

DWI

Use of Alabama DUI Convictions in Sentencing Was Proper

State v. Armstrong, ___ N.C. App. ___, ___ S.E.2d ___ (20 April 2010).

The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled that for sentencing purposes, the defendant's Alabama convictions of driving under the influence of alcohol were substantially similar to an offense classified as a Class 1 misdemeanor in North Carolina. The court found that DWI was found, albeit in a different context, to be a Class 1 misdemeanor in *State v. Gregory*, 154 N.C. App. 718 (2002).

Trial Court Did Not Err in Allowing State to Amend Habitual Impaired Driving Indictment

State v. White, ___ N.C. App. ___, 689 S.E.2d 595 (16 February 2010).

The habitual impaired driving indictment alleged that the three prior impaired driving convictions had occurred within seven years of the habitual impaired driving offense. A recent statutory change applicable to this impaired driving offense permitted the state to prove that the convictions occurred within ten years, and at least one conviction alleged in the indictment had occurred more than seven years but less than ten years of the impaired driving offense. The court ruled, distinguishing *State v. Winslow*, 360 N.C. 161 (2005), *adopting dissenting opinion in* 169 N.C. App. 137 (2005) (error to allow habitual impaired driving indictment to be amended to change date of conviction so it fell within seven years of impaired driving offense), that the trial court did not err in allowing the state to amend the habitual impaired driving indictment to allege that all the convictions had occurred with ten years of the impaired driving offense.

Officer's Warrantless Compelling of DWI Defendant to Give Blood Sample at Hospital for Alcohol Testing After Defendant Had Refused to Take Breath Test Was Lawful Under G.S. 20-139.1(d1) and United States and North Carolina Constitutions

State v. Fletcher, ___ N.C. App. ___, 688 S.E.2d 94 (19 January 2010).

The defendant was arrested at a checkpoint for DWI, taken to a police station for Intoximeter breath testing, which the defendant refused. An officer then transported the defendant to a hospital to compel a blood test. The defendant's blood was drawn, and the blood test result was 0.10. The court ruled the officer reasonably believed under G.S. 20-139.1(d1) that the delay necessary to obtain a court order would result in the dissipation of alcohol in the defendant's blood. The officer testified that the entire process of driving to the magistrate's office, standing in line, completing the required forms, returning to the hospital, and having the defendant's blood drawn would have taken from two to three hours. The court also ruled that probable cause and exigent circumstances supported the warrantless compelling of the blood sample and did not violate the Fourth Amendment or various provisions of the Constitution of North Carolina.

Court Reverses Five Convictions of Felony Serious Injury by Vehicle When Jury at Same Trial Acquitted Defendant of DWI, Which Was Element That State Was Required to Prove for Jury to Convict Defendant of Felony Serious Injury by Vehicle

State v. Mumford, ___ N.C. App. ___, 688 S.E.2d 458 (5 January 2010).

The defendant was convicted of five counts of felony serious injury by vehicle in which five people were injured and the defendant was driving impaired. At the same trial, the jury found the defendant not guilty of DWI. The court, relying on *State v. Marsh*, 187 N.C. App. 235 (2007), and other cases and distinguishing cases in which inconsistent verdicts had been upheld, reversed the convictions of felony serious injury by vehicle because they were inconsistent with and legally contradictory to the verdict of not guilty of DWI, which was an element that the state was required to prove for the jury to convict the defendant of felony serious injury by vehicle.

Intoxilyzer Test Results From First and Third Breath Samples Were From “Consecutively Administered Tests” Under Former Version of G.S. 20-139.1(b3) When Defendant Failed to Provide Adequate Sample for Second Test

State v. Shockley, ___ N.C. App. ___, 689 S.E.2d 455 (8 December 2009).

The defendant was arrested for DWI and requested to take the Intoxilyzer test. The defendant provided a valid breath sample and the result was 0.16. The defendant failed to provide an adequate breath sample for the second test. The defendant provided a valid breath sample for the third test and the result was 0.15. The defendant failed to provide an adequate breath sample for the fourth test. The court ruled that the test results from the first and third breath samples were from “consecutively administered tests” under the former version of G.S. 20-139.1(b3). An insufficient sample does not produce a valid reading. [Author’s note: The current version of G.S. 20-139.1(b3) requires “at least duplicate sequential” breath samples. The court’s ruling in *Shockley* would likely apply to the current version as well.]

(1) Defendant May Not Be Sentenced for Both Involuntary Manslaughter and Felony Death by Vehicle Based on Same Death

(2) Defendant May Not Be Sentenced for Both Felony Death by Vehicle and DWI Based on Same Incident

(3) Trial Court Did Not Commit Error Concerning Defendant’s Right to Unanimous Verdict When Involuntary Manslaughter Jury Instruction on Culpable Negligence Allowed Jury to Consider One or More Traffic Violations to Establish Element

(4) Court Orders Remand for Resentencing

State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009).

The defendant was convicted of DWI, involuntary manslaughter, and felony death by vehicle arising from a crash in which the defendant was impaired and one person died as a result of the crash. The trial court imposed sentences for all three convictions. (1) Although the court, based on North Carolina Supreme Court cases, rejected the ruling in *State v. Williams*, 90 N.C. App. 614 (1988), that the offenses of felony death by vehicle and involuntary manslaughter have the same elements, it ruled that the legislature did not

intend that a defendant could be sentenced for convictions of both offenses. (2) The court ruled, relying on *State v. Richardson*, 96 N.C. App. 270 (1989), that the defendant could not be sentenced for both DWI and felony death by vehicle. (3) The court ruled, relying on *State v. Funchess*, 141 N.C. App. 302 (2000), that the trial court did not commit error concerning the defendant's right to a unanimous verdict when the involuntary manslaughter jury instruction on culpable negligence allowed the jury to consider one or more traffic violations to establish the element. (4) The court ordered that on remand for resentencing, if the trial court vacates the conviction of involuntary manslaughter and sentences the defendant for felony death by vehicle, then the court must arrest the DWI judgment. If the trial court vacates the felony death by vehicle conviction, the defendant may be sentenced for both involuntary manslaughter and DWI.

Sufficient Evidence of Malice to Support Defendant's Convictions of Second-Degree Murder Based on Vehicle Crash

State v. Davis, ___ N.C. App. ___, 678 S.E.2d 385 (7 July 2009).

The court ruled that, relying on *State v. Rich*, 351 N.C. 386 (2000), there was sufficient evidence of malice to support the defendant's second-degree murder convictions based on a vehicle crash. The state's evidence showed that the defendant had consumed nine to twelve beers in a two-hour period and had a 0.13 blood alcohol concentration. He drove his truck on a well-traveled highway and ran over a sign and continued driving. The court noted that the defendant should have known then that he was a danger to the safety of others. He continued weaving side to side. He eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into a pickup truck, knocking it into the air. Two people in the pickup truck died.

(1) State Did Not Have Right to Appeal to North Carolina Court of Appeals a Superior Court's Order Involving a District Court's Preliminary Finding Granting Defendant's Pretrial Motion to Dismiss DWI Under G.S. 20-38.6

(2) Court Rejects Defendant's Constitutional and Other Challenges to District Court DWI Procedures Set Out in G.S. 20-38.6(a), 20-38.6(f), and 20-38.7(a)

(3) Court Offers Interpretations of Statutory Issues

(4) Court Sets Parameters of Remand to Superior Court

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009).

The defendant was charged with DWI. He made a pretrial motion in district court under G.S. 20-38.6(a) alleging that the arresting officer lacked probable cause to arrest him. The district court entered a preliminary finding granting the pretrial motion under G.S. 20-38.6(f) and ordered dismissal of the DWI charge. The state gave notice of appeal to superior court under G.S. 20-38.7(a). The superior court entered an order finding that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. The superior court further concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded the matter to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. The defendant filed a motion to dismiss the state's appeal. (1) The court ruled that the state did not have a right to appeal the superior court's order to the North Carolina Court of Appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. The legislature did not provide the state with the right to appeal to North Carolina Court of Appeals under these circumstances. However, the court granted the state's petition for certiorari to review the issues in this case. (2) The court rejected the defendant's constitutional and other challenges to G.S. 20-38.6(a) (requires defendant to submit motion to suppress or dismiss pretrial), 20-38.6(f) (requires district court to enter written findings of fact and conclusions of law concerning defendant's pretrial motion and prohibits court from entering final judgment granting the defendant's pretrial motion until after state has opportunity to appeal to superior court), and 20-38.7(a) (allows state to appeal to superior court from district court's preliminary finding indicating it would grant defendant's pretrial motion). See the court's extensive analysis of these issues. (3) In the course of the court's rejection of the defendant's challenges, discussed in (2) above, the court offered its interpretation of other statutory issues. For example, the court recognized that the statutes cited above do not expressly preclude the state from appealing motions to suppress or dismiss made by the defendant during trial based on newly discovered facts. However, the court stated that the legislature's intent was to grant the state a right to appeal to superior court only from a district court's preliminary determination indicating that it would grant a defendant's pretrial motion to suppress evidence or dismiss DWI charges which (i) is made and decided before jeopardy has attached to the proceedings (author's note: before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning any element of the offense or to the defendant's guilt or innocence. The court opined that the legislature intended pretrial motions to

suppress evidence or dismiss charges under G.S. 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations on a defendant's access to witnesses, and challenges to chemical test results. On another issue, the court noted that G.S. 20-38.7(a) does not specify a time by which the state must appeal the district court's preliminary finding to grant a motion to suppress or to dismiss. The court indicated that an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. (4) The court noted that the district court entered a preliminary finding granting the defendant's pretrial motion to dismiss the DWI charge, based on its conclusion that the arresting officer did not possess probable cause to arrest and charge the defendant with DWI. The court stated that a court document showed, however, that a pretrial motion to suppress had been granted. The court inferred that the district court not only considered whether the officer had probable cause to arrest defendant but, further, preliminarily determined whether there was sufficient evidence for the state to proceed against the defendant for DWI (the court noted that a motion to dismiss for insufficiency of evidence cannot be made pretrial). Because there was no indication that the state had an opportunity to present its evidence, the superior court erred when it concluded that it appeared that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in the district court's order. Accordingly, the court remanded the case to superior court with instructions to remand the case to district court to enter a final order granting the defendant's motion to suppress evidence of his arrest for lack of probable cause. Only after the state has had an opportunity to establish a prima facie case may a motion to dismiss for insufficient evidence be made by the defendant and considered by the trial court, unless the state elects to dismiss the DWI charge. When the district court enters its final order on remand granting the defendant's pretrial motion to suppress, the state will have no further right to appeal from that order.

State's Notice of Appeal to Superior Court of District Court's Preliminary Notice of Intention to Grant Defendant's Motion to Suppress in DWI Case Was Properly Perfected

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009).

The court examined the facts and ruled that the state's notice of appeal to superior

court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited *State v. Fowler*, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009), in noting that the procedures in G.S. 15A-1432(b) are a guide but are not binding; instead, an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. See the court's discussion of the facts concerning the state's notice of appeal in this case.

Wildlife Enforcement Officer Had Subject Matter Jurisdiction to Stop Vehicle Driver for Impaired Driving and To Arrest Her For That Offense

Parker v. Hyatt, ___ N.C. App. ___, 675 S.E.2d 109 (21 April 2009).

The court ruled that a wildlife enforcement officer had subject matter jurisdiction under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Evidence Court Rejects Bright Line Rule That Admission Under Rule 404(b) of Traffic-Related Convictions That Occurred More Than Sixteen Years Before Date of Second-Degree Vehicular Murder Being Tried Is Plain Error Per Se—Ruling of Court of Appeals Is Reversed

State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), reversing, ___ N.C. App. ___, 654 S.E.2d 769 (15 January 2008).

The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. The issue before the court was whether the trial judge's admission under Rule 404(b) of prior traffic-related convictions of the defendant that were more than sixteen years old was plain error (the defendant had failed to object at trial to the admission of

his prior traffic record). The court rejected the implication that its per curiam ruling in *State v. Goodman*, 357 N.C. 43 (2003), reversing for reasons stated in dissenting opinion, 149 N.C. App. 57 (2002), had adopted a bright line rule that the admission under Rule 404(b) of traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder being tried is plain error per se. The relevance of a temporally remote traffic-related conviction to the malice issue does not depend solely on the length of time that has passed since the conviction occurred. Instead, the extent of its probative value depends largely on intervening circumstances. In this case, in which the defendant was convicted of DWI four times in the sixteen years before the events on trial, his older convictions did not only show that the defendant has the propensity to commit the offense being tried. Instead, those convictions constituted a part of a clear and consistent pattern of criminality that is highly probative of his mental state for the offense being tried. The probative value and thus admissibility of Rule 404(b) evidence must be determined on a case-by-case basis rather than through applying a fixed temporal maximum. The court ruled that the trial judge did not commit plain error in the admission of the defendant's entire driving record.

Court Rules That Provision in G.S. 20-138.1(a)(2) (“The Results of a Chemical Analysis Shall Be Deemed Sufficient Evidence to Prove a Person’s Alcohol Concentration”) Establishes Prima Facie Evidence Standard and Does Not Create Unconstitutional Presumption

State v. Narron, ___ N.C. App. ___, 666 S.E.2d 860 (7 October 2008).

The court ruled that the provision in G.S. 20-138.1(a)(2) (“The results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration”) establishes a prima facie evidence standard and does not create an unconstitutional presumption. The court concluded that the meaning of the phrase “shall be deemed sufficient evidence to prove” is that properly admitted results of a chemical analysis “must be treated as prima facie evidence of” a defendant’s alcohol concentration. The provision simply authorizes the jury to find that the report of the defendant’s alcohol concentration is what it purports to be—the results of a chemical analysis showing the defendant’s alcohol concentration. The jury may find it adequate proof of a fact in issue. No presumption is created

concerning some other element or factual issue. The court stated that because the statutory provision simply codifies the common law threshold for prima facie evidence of a defendant's alcohol concentration, there was no need in this case for the trial judge to call to the jury's attention that the chemical analysis was the basis of the judge's determination that the state had presented prima facie proof of the element (0.08 alcohol concentration). However, the court found no prejudice to the defendant by the court's statement to the jury that "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration."

(1) Defendant's Failure to Request Hearing to Contest Validity of 30-Day Civil DWI

Revocation Barred Appellate Review of Revocation's Validity in Criminal Appeal

(2) State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal

(3) State Properly Showed That Person Who Withdrew Blood Sample for DWI Chemical Testing Was Qualified Person Under G.S. 20-139.1(c)

(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under Crawford v. Washington, 541 U.S. 36 (2004)

(5) 30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge

State v. Hinchman, ___ N.C. App. ___, 666 S.E.2d 199 (16 September 2008).

The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the

defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (1) The court ruled that the defendant's failure to request a hearing to contest the validity of the revocation order barred appellate review of the revocation order's validity in the criminal appeal of the DWI conviction. (2) The court ruled that the state's motion to appeal to superior court the district court judge's order dismissing the DWI prosecution properly specified a legal basis of the appeal. The state's motion to appeal asserted there was no competent evidence to support the dismissal order, and the dismissal was contrary to law. (3) The court ruled that the state properly showed that the person who withdrew the blood sample for DWI chemical testing was a qualified person under G.S. 20-139.1(c). The trooper testified that he saw a person draw the blood sample at a hospital blood lab. The person was working at the lab and had a lab tech I uniform and name tag, and there was limited access to that area. (4) The court ruled, relying on *State v. Heinricy*, 183 N.C. App. 585 (2007), and *State v. Forte*, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). (5) The court ruled, relying on *State v. Evans*, 145 N.C. App. 324 (2001), that the 30-day DWI civil license revocation was not punishment under Double Jeopardy Clause to bar the later prosecution of the DWI charge. The court rejected the defendant's argument that the delay of 135 days between the defendant's arrest and the license revocation in effect was punishment under the Double Jeopardy Clause.

(1) Court Remands to Trial Court for Additional Findings and Conclusions of Law on Constitutionality of Checkpoint

(2) Assuming Without Deciding That Checkpoint Was Constitutional, Officer Had Reasonable Suspicion at Checkpoint to Detain Driver for Additional Investigation

State v. Veazey, ___ N.C. App. ___, 662 S.E.2d 683 (1 July 2008).

Two law enforcement officers established a checkpoint on a highway. The defendant was stopped and charged with DWI. The defendant made a motion to suppress, arguing that the checkpoint violated the Fourth Amendment. The trial judge ruled that the checkpoint was constitutional. The defendant pled no contest to DWI and preserved his right to appeal the trial judge's ruling on his suppression motion. (1) The court remanded to the trial court for additional findings and conclusions of law on the constitutionality of the checkpoint. First, the court concluded, given the conflicting evidence, the trial judge failed to make sufficient findings and conclusions of law concerning the officers' primary purpose in conducting the checkpoint. Second, relying on *Brown v. Texas*, 443 U.S. 47 (1979), and *State v. Rose*, 170 N.C. App. 284 (2005), the court concluded that the trial judge failed to properly apply the three-prong inquiry set out in *Brown* to determine whether the checkpoint itself was reasonable under the Fourth Amendment. (2) The court ruled, assuming without deciding that the checkpoint was constitutional, an officer had reasonable suspicion of criminal activity at the checkpoint to detain the driver for additional investigation. When the defendant presented his driver's license during the initial checkpoint detention, the officer detected a strong odor of alcohol in the vehicle and also saw that the defendant's eyes were red and glassy.

Denial of DWI Defendant's Right to Have Witness Observe Intoxilyzer Testing Procedures Required Suppression of Intoxilyzer Test Result

State v. Hatley, ___ N.C. App. ___, 661 S.E.2d 43 (20 May 2008).

The court ruled that the denial of the DWI defendant's right to have a witness observe the Intoxilyzer testing procedures required the suppression of the Intoxilyzer test result. The defendant was arrested for DWI and advised of her chemical testing rights at 3:01 a.m. The defendant indicated that she wanted to call a witness and was successful in reaching her daughter at approximately 3:04 a.m. She told the arresting officer that her daughter was on the way. During the remainder of the 30-minute period the defendant was allowed to call her daughter to ascertain her whereabouts, but the defendant was unable to reach her. The test was delayed 34 minutes before the defendant was asked to submit to the test, which she did, and with a test result of 0.11. The evidence showed that the daughter had arrived at the sheriff's office at approximately 3:20 a.m. and informed the front desk duty officer she was there for Deborah Hatley (the defendant's name) for a "DUI," but did not specifically state that she was there to witness an Intoxilyzer test. The court concluded that based on these facts—particularly the arresting officer's knowledge that a witness had been contacted and the officer's understanding that the witness was on her way to the sheriff's office to observe the test—the trial court erred in denying the defendant's motion to suppress the Intoxilyzer test result. The witness had arrived in a timely manner and had made reasonable efforts to gain access to the defendant.

State Did Not Have Right to Appeal to Superior Court a District Court Judge's Dismissal of DWI Charge When Dismissal Was Based on Finding of Insufficient Evidence to Support DWI Charge, Even Though Dismissal Was Erroneous

State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545 (15 April 2008).

The court ruled that the state did not have a right to appeal to superior court a district court judge's dismissal of a DWI charge when the dismissal was based on a finding of insufficient evidence to support the DWI charge, even though the dismissal was erroneous (see the court's opinion on the notary public issue that led to the dismissal). The state may not appeal a dismissal of a case to superior court if double jeopardy bars a retrial [G.S. 15A-1432(a)], and a finding of insufficient evidence bars a retrial under the Double Jeopardy Clause. The court noted that this case was tried before the enactment of G.S. 20-38.6, which requires (with limited exceptions) that motions to suppress evidence or dismiss DWI charges be made before trial.

(1) Sufficient Circumstantial Evidence to Prove Element of Driving to Support DWI Conviction

(2) Sufficient Evidence to Convict Passenger of Giving False Information (Orally Telling Officer That She Was the Driver) in Report of Reportable Accident Under G.S. 20-279.31(b)(1)

State v. Hernandez, 188 N.C. App. 193, 655 S.E.2d 426 (15 January 2008).

The male defendant and the female defendant were in a vehicle that was involved in an accident in which the vehicle hit a ditch and landed about thirty to forty feet in a bean field. Two officers arrived at the scene when no one was in the vehicle. Officer A saw that the steering wheel air bag had deployed and blood was on the air bag. He noticed that the male defendant had blood near his nose and on his shirt. Officer B saw that the female defendant had a fabric burn extending from her right shoulder to her collarbone. In addition, the driver's seat was pushed back too far for the female defendant to drive the vehicle. The female defendant later told the officer at the hospital that she was the driver of the vehicle. The male defendant took the Intoxilyzer and his BAC was 0.26. The male

defendant was convicted of DWI. The female defendant was convicted under G.S. 20-279.31(b)(1) of giving false information in a report of a reportable accident.

(1) The court ruled that there was sufficient circumstantial evidence to prove the element of driving to support the DWI conviction of the male defendant. The jury could reasonably infer from the physical evidence that the male defendant was the driver. (2) The court ruled that there was sufficient evidence to convict the female defendant of giving false information (orally telling officer that she was the driver) in a report of a reportable accident under G.S. 20-279.31(b)(1). The court rejected the female defendant's argument that the statute requires a written report and thus her oral statement to the officer did not constitute a report. The court also ruled that the identity of the driver is required to be included in a reportable accident report.

Trial Judge Did Not Err in Not Dismissing DWI Charge Under State v. Knoll Based on Magistrate's Substantial Violations of Defendant's Pretrial Release Statutory Rights, Because Defendant Failed to Show Violations Caused Irreparable Prejudice to Defendant's Preparation of Defense

State v. Labinski, 188 N.C. App. 120, 654 S.E.2d 740 (15 January 2008).

The defendant was convicted of DWI. The court ruled that the trial judge did not err in not dismissing the DWI charge under State v. Knoll, 322 N.C. 535 (1988), based on the magistrate's substantial violations of the defendant's pretrial release statutory rights because the defendant failed to show that the violations caused irreparable prejudice to the preparation of the defendant's defense. (See the court's discussion of the facts and its analysis of the legal issues.)

(1) Officer Had Reasonable Grounds to Believe Petitioner Had Committed Implied Consent Offense (DWI) to Support Revocation of License

(2) Officer Was Not Required to Wait Thirty Minutes Before Offering Intoxilyzer Test When Petitioner Did Not Clearly Indicate That She Wanted to Call Attorney

White v. Tippett, 187 N.C. App. 285, 652 S.E.2d 728 (20 November 2007).

Petitioner's driver's license was revoked because she willfully refused to take an Intoxilyzer test after being arrested for an implied consent offense (DWI). A superior court judge upheld her license revocation and she appealed to the court of appeals. (1) The court ruled that the arresting officer had reasonable grounds to believe that the petitioner had committed the DWI to support the license

revocation. The petitioner evaded a license checkpoint and the officer later detected an odor of alcohol about her (see other facts in the court's opinion). (2) The court ruled that the officer was not required to wait thirty minutes before offering the Intoxilyzer test when the petitioner did not clearly indicate that she wanted to call an attorney.

Evidence of Prior DWI Was Admissible to Show Malice Under Rule 404(b) in Second-Degree Vehicular Murder Trial

State v. Lloyd, 187 N.C. App. 174, 652 S.E.2d 299 (6 November 2007).

The defendant was convicted of two counts of second-degree murder, felony fleeing to elude officers, and other offenses, based on a high-speed chase by officers in which the defendant crashed his vehicle into another vehicle, killing its two passengers. The state was allowed to introduce evidence of a DWI committed by the defendant about five months earlier and his conviction of the DWI. The trial judge limited the evidence under Rule 404(b) to show the defendant's knowledge that his license was suspended when he committed the second-degree murders and to show malice. The court ruled that the evidence was properly admitted.

Officer Had Reasonable Suspicion for DWI Stop of Defendant Operating Two-Wheeled Motorized Vehicle

State v. Jones, 186 N.C. App. 405, 651 S.E.2d 589 (16 October 2007).

The court ruled that an officer had reasonable suspicion for a DWI stop of a defendant operating a two-wheeled motorized vehicle, based on the following facts (quoted language is officer's testimony as recounted by the court): The officer saw the defendant operating a motorized vehicle in a "wobbly" manner, and the defendant had to "put her foot down" on the road to negotiate a right hand turn and "almost dropped the moped." The officer equated her operation of the vehicle as she was turning to that of "a child learning to ride a bicycle" for the

first time. After the defendant made the turn, the officer saw the defendant for “two to three” minutes and followed her for “two to three blocks.” During this time, he watched the defendant wobble on the moped and described her operation of it as “jerky.”

Court Reverses Trial Judge’s Ruling That Checkpoint Violated Fourth Amendment

Because Judge Misapplied Ruling in *State v. Rose*, 170 N.C. App. 284 (2005), and Court Remands for Further Factual Findings

State v. Burroughs, ___ N.C. App. ___, 648 S.E.2d 561 (21 August 2007).

The trial judge ruled that a checkpoint (at which the defendant was arrested for DWI) violated the Fourth Amendment based on the ruling in *State v. Rose*, 170 N.C. App. 284 (2005). The state appealed. The court noted that the trial judge’s ruling was based on the absence of evidence to support the primary programmatic purpose of the checkpoint. The court stated that the ruling misconstrued the principles of *Rose* and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), on which *Rose* heavily relied. The court stated that the *Rose* ruling provided that when contradictory evidence exists about a checkpoint’s primary purpose, the trial judge must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask unconstitutional purposes. Neither *Rose* nor *Edmond* mandated that trial judges extensively inquire about the purpose of every checkpoint. The court in *Rose* required additional findings of the checkpoint’s purpose because substantial evidence indicated that the checkpoint’s purpose was to impermissibly check for illegal drugs. The court concluded that from the available evidence in the case before it, the actual purpose of the checkpoint clearly was the same as its stated purpose: to check for impaired drivers. Because such a purpose has been expressly ruled constitutional and the trial judge misconstrued the *Rose* ruling, the court reversed the trial judge’s ruling. However, the court ruled there still remained on remand for the trial court to determine whether the individual circumstances surrounding the stop of the defendant at this checkpoint were constitutional; the court cited and quoted from *State v. Mitchell*, 358 N.C. 63 (2004).

Trial Judge Did Not Err in DWI Trial in Allowing Testimony on Retrograde Extrapolation to Explain Why Non-Refrigerated Blood Sample Might Register Lower Blood Alcohol Concentration When Tested Than When Blood Was Drawn

State v. Corriher, 184 N.C. App. 168, 645 S.E.2d 413 (19 June 2007).

The defendant was convicted of DWI. A blood sample taken from the defendant was left unrefrigerated in an officer's vehicle for twelve days before it was tested. The court, relying on the standard for the admissibility of expert testimony set out in *Howerton v. Arai Helmut, Ltd.*, 358 N.C. 440 (2004), and *State v. Goode*, 341 N.C. 513 (1995), ruled that the trial judge did not err in allowing testimony on retrograde extrapolation to explain why a non-refrigerated blood sample might register a lower blood alcohol concentration when tested than when the blood was drawn.

(1) Habitual DWI Offense Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*

State v. Bradley, 181 N.C. App. 557, 640 S.E.2d 432 (6 February 2007).

The defendant was convicted of habitual DWI. (1) The court ruled that the habitual DWI offense is not unconstitutional under the Double Jeopardy Clause based on the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004).

Evidence--Breath alcohol level--Retrograde extrapolation model

State v. Teate, 180 NCA 601 (2006)

The trial court did not abuse its discretion in a driving while impaired case by

admitting the testimony of a research scientist and training specialist in forensic testing for the Alcohol Branch of the Department of Health and Human Services that using a retrograde extrapolation model indicated defendant's breath alcohol level was likely .10 at the time she was stopped by police, because: (1) the Court of Appeals has previously allowed the admission of retrograde extrapolation evidence in DWI cases even where the testimony concerned an average alcohol elimination rate rather than defendant's actual elimination rate; (2) the average alcohol elimination rate offered by the witness could aid a finder of fact in determining whether it was more or less likely defendant's breath alcohol level exceeded the statutory limit for DWI purposes; and (3) the evidence was sufficiently reliable and relevant, the expert was qualified, and defendant registered a .08 blood alcohol level when actually tested.

**Jurisdiction-Superior court-Habitual DWI a substantive offense-Misdemeanor DWI—
Driving with revoked license**

State v. Bowden, 177 NCA 718 (2006)

The superior court had jurisdiction to conduct a trial on defendant's misdemeanor DWI and driving with a revoked license charges without a trial first in district court, because: (1) habitual impaired driving is a substantive offense, and not a status offense as defendant would prefer; (2) the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense; and (3) defendant concedes that if the habitual DWI statute creates a substantive offense, then the superior court possessed jurisdiction to try him on the misdemeanor offenses set out in the same indictment with the habitual DWI charge.

Motor Vehicles-Driving While Impaired-Public vehicular area-No private road signs

State v. Cornett, 177 NCA 452 (2006)

A road was open to vehicular traffic within the meaning of N.C.G.S. § 20-4.01(32)(c) and was a public vehicular area where defendant and an officer testified that they drove the road and that there were no gates or signs indicating

that it was private. The trial court did not err by denying defendant's motion to dismiss a charge of driving while impaired.

Motor Vehicles-Driving While Impaired-Public vehicular area-Road within subdivision

State v. Cornett, 177 NCA 452 (2006)

A road on which a DWI defendant was stopped was within or leading to a subdivision (and so was a public vehicular area) where there were six homes on the street, with five or six different owners, each with a driveway leading off the road.

Criminal Law-Discovery-DWI case

State v. Cornett, 177 NCA 452 (2006)

The trial court did not err by denying a DWI defendant's pretrial motion to compel discovery from the State of written protocols regarding Intoxylizer operation, calibration, and measures. No statutory right to discovery exists for criminal cases originating in district court and there is no constitutional right to discovery other than for exculpatory evidence.

Sentencing Prior record level - Prior Driving While Impaired convictions

State v. Bauberger, 176 NC A 465 (2006)

The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by using defendant's prior driving while impaired convictions in determining his prior record level and sentencing him as a Level II offender, because: (1) although defendant contends his sentence as a Level II offender violates the prohibition against double jeopardy, he failed to cite any supporting case authority; (2) defendant's prior convictions were not

aggravating factors, but instead the trial court added points to defendant's prior record level under N.C.G.S. § 15A-1340.14; and (3) the parties do not cite any provisions of the Structured Sentencing Act, nor did the Court of Appeals find any, that prohibited a trial court from using the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing.****

Evidence--denial of motion to prevent expert witness from testifying--probable blood alcohol content prior to breathalyzer

State v. Fuller, 176 NCA 104 (2006)

The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion to prevent the State from calling its expert witness to testify regarding defendant's probable blood alcohol content at times prior to a breathalyzer test, because: (1) defendant was on notice that such evidence might be offered as extrapolation evidence has been accepted in this state since 1985; and (2) in light of defendant's clear understanding of the importance of this evidence to the State's case against her and its longstanding acceptance in the courts of this state, it cannot be concluded that the trial court's decision to deny defendant's motion was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

Motor Vehicles--driving while impaired--motion for mistrial--mentioning Alco- Sensor test

State v. Fuller, 176 NCA 104 (2006)

The trial court did not abuse its discretion in a driving while impaired case by denying defendant's motion for a mistrial after an officer referred to an Alco-Sensor test during his testimony, because: (1) the officer did not testify regarding the results of the Alco-Sensor test, but only that one was administered; (2) the results of an alcohol screening test may be used by an officer to determine if there are reasonable grounds to believe that a driver has committed an implied consent offense under N.C.G.S. § 20-16.2; and (3) immediately after the officer's testimony regarding his reliance on the Alco-Sensor results, the trial court

instructed the jury to dismiss that statement from their minds and not consider it in deliberations, and all jurors raised their hands at the trial court's request to indicate that they could follow the trial court's instruction.

Evidence--expert opinion--blood alcohol concentration at relevant time

State v. Fuller, 176 NCA 104 (2006)

The trial court did not err in a driving while impaired case by allowing over defendant's objection the State's expert to offer his opinion as to defendant's blood alcohol concentration at the time she was first contacted by the officers, because: (1) for purposes of N.C.G.S. § 20- 4.01(33a), the term relevant time after the driving refers to any time after the driving in which the driver still has in his body alcohol consumed before or during the driving; and (2) there was no evidence that defendant consumed any alcoholic beverages between the time of the accident and the arrival of the officers, and consequently, the officers' arrival time meets the statutory definition of a relevant time after the driving.

Evidence--publication of expert calculation document--relevant time

State v. Fuller, 176 NCA 104 (2006)

The trial court did not err in a driving while impaired case by allowing the State to publish its expert's calculation document to the jury regarding defendant's blood alcohol concentration at the time she was first contacted by the officers, over defendant's objection, based on the same reasoning the Court of Appeals has already used in this case regarding the definition of relevant time.

Motor Vehicles--driving while impaired--motion to dismiss--sufficiency of evidence

State v. Fuller, 176 NCA 104 (2006)

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired at the close of all evidence, because the opinion of the State's expert that defendant's blood alcohol concentration at the time the officers first made contact with her was .08 is, alone, sufficient to withstand dismissal.

Sentencing--prior record level--driving while impaired convictions

State v. Hyden, 175 NCA 576 (2006)

The trial court did not err by counting all five of defendant's prior driving while impaired convictions when determining his prior record level under N.C.G.S. § 15A-1340.14 for purposes of sentencing even though defendant contends that three of the driving while impaired convictions were also elements of the two habitual impaired driving convictions, because: (1) although prior convictions of driving while impaired are elements of the offense of habitual impaired driving, the statute does not impose punishment for these previous crimes but instead imposes an enhanced punishment for the latest offense; (2) on each occasion that defendant was sentenced as a felon, it was based on the new instance of DWI being considered a more serious violation in light of defendant's recidivist record; (3) defendant was convicted of five separate instances of DWI, some deemed by the General Assembly to be misdemeanors and some deemed to be felonies; and (4) to hold otherwise renders habitual driving while impaired a status rather than an offense which is contrary to N.C.G.S. § 20-138.5 and prior decisions of the Court of Appeals.

Evidence--prior crimes or bad acts--driving while impaired--malice--remoteness

State v. Westbrook, 175 NCA 128 (2005)

The trial court did not err in a prosecution for second-degree murder, driving while impaired and other offenses by admitting evidence of defendant's prior conviction for driving while impaired on 24 April 1995, because: (1) our case law reveals that prior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of N.C.G.S. § 8C-1, Rule 404(b); and (2) although

defendant contends the nine-year-old conviction was too remote to be relevant, the Court of Appeals has found older convictions to be admissible.

Evidence--medical records--proper administration of justice

State v. Westbrook, 175 NCA 128 (2005)

The trial court did not err in a prosecution for second-degree murder, driving while impaired and other offenses by admitting defendant's medical records, because: (1) it was within the trial court's discretion to determine what is necessary for the proper administration of justice; and (2) the trial court did not abuse its discretion. N.C.G.S. § 8-53.

Homicide--second-degree murder--motion to dismiss--sufficiency of evidence-- malice

State v. Westbrook, 175 NCA 128 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder even though defendant contends there was insufficient evidence of malice, because: (1) it is only necessary for the State to prove that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind; and (2) there was substantial evidence from which the jury could infer malice, including that defendant drove with an alcohol concentration of 0.156, sped seventy-five to eighty miles per hour in a forty-five miles per hour zone, traveled in the opposite direction lane, ran a red light without attempting to brake or stop, and had notice as to the serious consequences of driving while impaired as a result of his nine-year-old driving while impaired conviction.

Motor Vehicles--driving while impaired--sufficiency of evidence--motorized scooter

State v. Crow, 175 NCA 119 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired even though defendant contends there was insufficient evidence to show a violation of N.C.G.S. § 20-138.1 when the motorized scooter with two wheels arranged in tandem that defendant was riding could not be considered a vehicle within the meaning of the statute, because: (1) by its express terms, the statute does not apply to horses, bicycles, or lawnmowers, but encompasses all other vehicles defined by N.C.G.S. § 20-4.01(49), and defendant does not fall under any of the exceptions; (2) there is no evidence that defendant was using the scooter for anything other than strictly recreational purposes, and adding the term “mobility enhancement” in the statute was a technical change that did not substantively expand the existing mobility impairment exception to the term “vehicle”; (3) defendant's scooter was not self-balancing, and the wheels on the scooter were arranged one behind the other, or in tandem, thus foreclosing the possibility that it may be considered an electric personal assistive mobility device; and (4) the evidence at trial showed that defendant's breath alcohol concentration following arrest was 0.13 which was well over the 0.08 limit found in N.C.G.S. § 20-138.1(a)(2).

Motor Vehicles--driving while impaired--sufficiency of evidence--fair notice of prohibited acts

State v. Crow, 175 NCA 119 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired based on the grounds that N.C.G.S. § 20-138.1 and its associated statutory scheme fail to give fair notice of acts to be prohibited, because: (1) based on the language and purpose of N.C.G.S. § 20-138.1 to protect the lives of motorists and pedestrians, an average person exercising common sense should have known that operating a motorized scooter while impaired would subject him to the penalties of the statute; (2) both N.C.G.S. §§ 20-138.1 and 20- 4.01(49) are broadly applicable to “any vehicle” with only narrow explicit exceptions; (3) the statutory scheme makes clear that a person riding something other than one of the enumerated exceptions to the term vehicle is engaged in conduct prohibited by N.C.G.S. § 20-138.1, and the conclusion also follows from the purpose of the statute to protect human life on the roadways of this state; (4) defendant's behavior subjected a hundred pedestrians in the immediate area, along with automobile traffic, to a high degree of danger; and (5) the absence of a motorized scooter from the list of exceptions is indicative of the General

Assembly's intent to include such devices in the statutory definition of vehicle.

Motor Vehicles--driving while impaired--instructions--redacted version--vehicle

State v. Crow, 175 NCA 119 (2005)

The trial court did not err in a driving while impaired case by submitting a redacted version of the statutory definition under N.C.G.S. § 20-4.01(49) of the term “vehicle” as part of the court's instructions to the jury which excluded the exceptions for mobility impairment and electric personal assistive mobility devices, because: (1) the omission was not likely to mislead the jury when the redacted portions were not relevant to defendant's case; (2) there was no evidence presented at trial that defendant suffered from a mobility impairment or was using the scooter for mobility enhancement; and (3) defendant's scooter does not fall within the definition of “electric personal assistive mobility device” found in N.C.G.S. § 20-4.01(7a).

Motor Vehicles--driving while impaired--motion to dismiss--corpus delicti rule--confession--corroborating evidence

State v. Cruz, 173 NCA 689 (2005)

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired, because evaluating the evidence under either the traditional or trustworthiness approach to the corpus delicti rule reveals that: (1) the State offered corroborating evidence of the essential facts of defendant's confession through the testimony of various witnesses; and (2) several officers and witnesses testified to defendant's drinking and impairment.

Evidence--motion in limine_ -defendant's statement he took pain medication--corroboration_corpus delicti rule

State v. Highsmith, 173 NCA 600 (2005)

The Court of Appeals exercised its discretion pursuant to N.C. R. App. P. 2 and determined that the trial court did not err in a habitual driving while impaired case by denying defendant's motion in limine to exclude the statement defendant made to a trooper that he had taken the pain medication called Floricet, because testimony from a pharmaceuticals expert about the effects of Floricet and the testimony from the trooper about defendant's behavior corroborate defendant's statement about consuming Floricet, and admission of the statement did not violate the corpus delicti rule.

Motor Vehicles--habitual driving while impaired--motion to dismiss--sufficiency of evidence--knowing consumption of impairing substance

State v. Highsmith, 173 NCA 600 (2005)

The trial court did not err in a habitual driving while impaired case by denying defendant's motion to dismiss based on alleged insufficient evidence that defendant knowingly consumed an impairing substance, because: (1) an expert in pharmaceuticals testified that the pain medication Floricet was an impairing substance and that a healthcare professional should have warned defendant of its effects; and (2) defendant knew or should have known that a prescription medication such as Floricet could impair him, and he was on notice that he risked crossing over the line into the territory of proscribed conduct by driving after taking Floricet.

Motor Vehicles- habitual driving while impaired--involuntary intoxication--no inference based on failure to administer Intoxilyzer or blood test

State v. Highsmith, 173 NCA 600 (2005)

The trial court did not err in a habitual driving while impaired case by failing to instruct the jury on involuntary intoxication and on the permitted inferences arising from a trooper's failure to administer an Intoxilyzer or blood test to defendant, because: (1) defendant presented no evidence that he was forced to

consume the medication he took, but instead that he took the substance voluntarily without knowing it was intoxicating; and (2) there is no legal authority for defendant's assertion that an inference should arise that he was not intoxicated based on the State's failure to administer the Intoxilyzer or to administer a blood test.

**Motor Vehicles--habitual DWI--date of prior conviction--amendment of indictment—
substantial alteration**

State v. Winslow, 360 NC 161 (2005) Rev'd Ct of Appeals

The decision of the Court of Appeals affirming a sentence for habitual DWI is reversed for the reason stated in the dissenting opinion that the trial court erred in permitting the State to amend the habitual DWI indictment after the close of the State's evidence to reflect the correct date of conviction of one of defendant's prior DWI offenses rather than the date of the offense, which was eight days outside the seven-year time period for habitual DWI, because amendment of the indictment to allege a date within the seven-year period was a substantial alteration prohibited by N.C.G.S. § 15A-923(e).

**Motor Vehicles--driving while impaired--motion to dismiss--sufficiency of evidence—
double jeopardy**

State v. Streckfuss, 171 NCA 81 (2005)

The trial court did not violate defendant's right against double jeopardy by denying his motion to dismiss the charge of driving while impaired even though the State confiscated and retained his South Dakota driver's license when defendant refused to take an Intoxilyzer test and imposed a \$50 fee, because: (1) contrary to defendant's argument, nothing in N.C.G.S. § 20-16.5 indicates that the purpose underlying the statute is different for out-of-state drivers than it is for North Carolina drivers when the threat posed to the citizens of North Carolina by an impaired driver driving on North Carolina highways is the same regardless of what state's license the driver has; (2) it is clear from the plain language of N.C.G.S. § 20-16.5 that it applies equally to a driver who has a North Carolina

driver's license and to a driver who has a license from another state; (3) defendant does not argue, and nothing in the record indicates, that defendant was actually deprived of the ability to drive in the State of South Dakota for thirty days, and nothing in the record suggests that defendant could not have applied for or obtained a duplicate license or otherwise sought relief in South Dakota; (4) the State provides statutory remedies for a driver to secure his revoked license, which mitigate any possible punitive effects of the State's confiscation of a nonresident's license; and (5) the \$50 fee is not a fine, but rather a minimal administrative fee that covers the costs for the action.

Evidence--prior crimes or bad acts--driving convictions--malice

State v. Edwards, 170 NCA 381 (2005)

The trial court did not err in a second-degree murder case by admitting into evidence defendant's prior driving convictions for driving while impaired (DWI) and driving while license revoked (DWLR) as evidence of malice to support the second-degree murder charge, because: (1) prior driving convictions of a defendant are admissible to show malice and the showing of malice in a second-degree murder case is a proper purpose within the meaning of N.C.G.S. § 8C-1, Rule 404(b); (2) although our Supreme Court agreed in *State v. Wilkerson, 356 N.C. 418 (2002)*, that evidence of prior convictions could only be considered as probative of knowledge and intent, our appellate courts have consistently treated driving convictions offered to prove the requisite state of mind for a second-degree murder conviction separately when interpreting Rule 404(b); and (3) although defendant contends the DWLR convictions were insufficiently similar to be relevant under Rule 404(b), prior convictions for traffic offenses other than DWI are admissible to establish malice in a prosecution of a defendant for DWI resulting in the death of another person.

Motor Vehicles--habitual DWI--indictment--date of prior conviction--amendment--Rule of Lenity

State v. Winslow, 169 NCA 137 (2005) Rev'd Ct of Appeals State v. Winslow, 360 NC 161 (2005)

The indictment used to charge defendant with habitual DWI was not fatally defective even though it originally alleged that one of defendant's prior DWI convictions occurred on 1 April 1993, which was actually the date of the offense and eight days outside the seven-year limitation of the habitual DWI statute, N.C.G.S. § 20-138.5(a), where the trial court allowed the prosecutor's motion to amend the indictment to reflect the date of conviction on 11 August 1993. The Rule of Lenity did not require that the date of the offense rather than the date of conviction be used in the interpretation of the DWI statute because the statute clearly refers to prior convictions, and there is no ambiguity in the statute.

Indictment and Information--amendment--habitual driving while impaired--no substantial alteration

State v. Winslow, 169 NCA 137 (2005) Rev'd Ct of Appeals State v. Winslow, 360 NC 161 (2005)

The trial court did not err in a habitual driving while impaired case by allowing the State to amend the indictment after the State rested, because: (1) permitting the State to amend the indictment in the instant case to reflect the date of conviction rather than the date of the offense did not impair defendant's ability to defend the charge of habitual DWI; (2) time was not of the essence as the indictment specified defendant was being charged with habitual DWI; (3) defendant never denied having been convicted of the 1993 DWI, he had notice of the 1993 DWI, and he had ample time to prepare for trial; and (4) the amendment to the indictment did not substantially alter the charge set forth in the indictment.

Sentencing--aggravating factors--two prior DWI convictions

State v. Tedder, 169 NCA 446 (2005)

The trial court did not err by sentencing defendant for driving while impaired based upon its finding of two grossly aggravating factors which were not submitted to the jury because: (1) the case of *Blakely v. Washington*, ___ U.S. ___ (2004) specifically exempts aggravated sentences based upon prior convictions from its requirements; (2) the court found as grossly aggravating factors that

defendant had two previous convictions for DWI committed within the preceding seven years of the date of the current offense and that at the time of the current offense she drove with a child under the age of sixteen years in the vehicle; (3) N.C.G.S. § 20-179(c) mandates that the trial court must impose the Level One punishment under subsection (g) if the judge determines that two or more grossly aggravating factors apply or if defendant has two prior impaired driving convictions within the 7 years preceding the offense; and (4) the finding of two prior convictions triggered the mandatory Level One sentence and the finding of another grossly aggravating factor had no impact on defendant's sentence.

Courts–jurisdiction–district court–driver's license reinstatement

State v. Benbow, 169 NCA 613 (2005)

The district court did not have jurisdiction to exempt defendant from the ignition interlock requirement where defendant was seeking reinstatement of her driver's license after having it revoked for driving with an alcohol concentration of 0.16. Although defendant had obtained an exemption for her limited driving privilege because medical conditions prevented her use of the device, N.C.G.S. § 20-17.8 does not provide any exceptions to the requirement for license reinstatement

Criminal Law–defenses–necessity–driving while impaired

State v. Hudgins, 167 NCA 705 (2005)

An instruction on the defense of necessity should have been given in a DWI trial. The defense remains available even though DWI is a strict liability offense, and a trial judge is not relieved of the duty to give a correct instruction, there being evidence to support it, merely because the request was not altogether correct. There was substantial evidence of the defense in that defendant said he jumped behind the wheel of the moving truck and steered it to prevent collisions with another vehicle and a house and injuries to others. Credibility is for the jury.

Evidence–prior crimes or bad acts–driving while impaired–not admissible

State v. Scott, 167 NCA 783 (2005)

The trial court erred in a prosecution for driving with a revoked license by admitting multiple letters of suspension with no redaction of the specific offenses, including multiple counts of driving while impaired.

Indigent Defendants—funds for expert witnesses—insufficient particularized showing

State v. Speight, 166 NCA 106 (2004)

The denial of funds for medical and accident reconstruction experts for a DWI and second-degree murder defendant was not error where defendant's unsupported assertions showed only a mere hope or suspicion of favorable evidence. Moreover, any alleged error in denying funds for the accident reconstruction expert was not prejudicial because defendant wanted the expert to undermine malice and the jury ultimately acquitted defendant of second-degree murder.

Evidence—consumption of alcohol by driver—observations of officer

State v. Speight, 166 NCA 106 (2004)

An officer's testimony that a DWI and second-degree murder defendant had consumed sufficient alcohol to be impaired was admissible because the officer detected the odor of alcohol in the car and on defendant's breath, observed the scene of the collision and its severity, interviewed four or five witnesses, and had been on a traffic enforcement unit for five years.

Evidence—motion to suppress—timely and sufficient—other evidence admitted

State v. Speight, 166 NCA 106 (2004)

The denial of a DWI and second-degree murder defendant's motion to suppress the results of an SBI analysis of his blood samples was erroneous but not prejudicial. The State was placed on notice that defendant would seek to suppress this evidence by the inclusion of "any and all blood or breath alcohol level tests" in defendant's amended motion to suppress. Moreover, defendant was not required to file a motion to suppress prior to trial because the blood was seized as the result of a warrantless consent search and the State gave notice of its intent to use the evidence only five days prior to trial rather than the 20 days required by N.C.G.S. § 15A-975(b). However, there was no prejudice because the State introduced evidence of a separate blood analysis performed by the hospital.

Motor Vehicles—impaired driving—entrapment

State v. Redmon, 164 NCA 658 (2004)

The failure to give a requested instruction on entrapment resulted in the reversal of a driving while impaired conviction where a defendant was found sleeping in a truck, there was evidence that he had been drinking but not driving and did not intend to drive, defendant had a conversation with an officer in which he may have been told to move along, and the officer arrested defendant as he drove away.

Motor Vehicles--driving while impaired--sufficiency of evidence

State v. Allen, 164 NCA 665 (2004)

There was sufficient evidence of driving while impaired based on a Trooper's observations and defendant's refusal of the intoxilyzer test, which is admissible as substantive evidence of guilt.

Motor Vehicles—habitual driving while impaired—predicate convictions

State v. Allen, 164 NCA 665 (2004)

There were three predicate convictions supporting defendant's habitual DWI conviction. Despite defendant's contention that the first conviction was not reduced to writing and signed, the uniform citation form was signed by the presiding judge. Moreover, defendant had two other convictions, even though they were consolidated for judgment. The determinations of what qualifies as a predicate conviction are done differently under the Habitual Impaired Driving statute and the Habitual Felon Act.

Matos v. State, 899 So.2d 403 (Fla. Dist. App. 2005)

A recent Florida appellate case may be useful to you in a prosecution of vehicular homicide and related offenses. It upheld the admissibility of the event data recorder ("black box") in the defendant's General Motors vehicle that showed the vehicle was traveling at a high rate of speed before the crash.

Search and Seizure—DWI stop—trooper's reason not credible

State v. Villeda, 165 NCA 431 (2004)

The trial court's finding that the DWI stop of a Hispanic male was unjustified and constituted an unreasonable search and seizure was supported by findings and evidence from an Internal Affairs investigation that the trooper's stated reason for the stop was not credible.

Searches and Seizures—traffic stop—speed of vehicle—personal observation of officer—probable cause**

State v. Barnhill, 166 NCA 228 (2004)

The trial court erred by suppressing DWI evidence seized as a result of a speeding stop on the grounds that the officer had no speed detection device nor training in estimating speed and could not articulate objective criteria on which to base his

opinion of the vehicles' speed. The officer had an unobstructed view of the vehicle and ample opportunity to observe its progress, and his observation of its speed, the sound of its racing engine, and the car bouncing as it passed through an intersection furnished a sufficient blend of circumstances to establish a fair probability that defendant was speeding.

Criminal Law--driving while impaired--right to communicate with counsel, family, and friends

State v. Rasmussen, 158 NCA 544 (2003)

A defendant charged with driving while impaired was not denied his statutory or constitutional rights to communicate with counsel, family, and friends, because: (1) defendant was advised at least three times of his right to an attorney but did not assert that right, and law enforcement officers were not required to assume that defendant wanted to speak to his friend as an attorney simply based on the fact that she was an attorney even though officers knew that fact; and (2) defendant's friend was provided with enough contact with defendant to allow her to form an opinion as to his impairment or lack thereof, and even if defendant's friend should have been allowed to witness the field sobriety tests, there was no prejudicial error since the trial court on its own motion suppressed the introduction of the test results at trial. N.C.G.S. §§ 15A-501, 20-16.2(a)(6); N.C. Const. art. I, § 23.

Motor Vehicles--driving while impaired--driver's license checkpoint

State v. Mitchell, 358 NC 63 (2004)

The Court of Appeals did not err in a driving while impaired case by concluding that a driver's license checkpoint was legal, because: (1) officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines, the officer received sufficient supervisory authority to conduct the checkpoint, and the officers stopped all oncoming traffic at the checkpoint; (2) the pertinent officer had reasonable articulable suspicion to stop defendant when defendant ignored the officer's order to stop and forced the officer to jump out of

the road to avoid being struck by defendant's vehicle; and (3) the officer had reasonable articulable suspicion that defendant committed several crimes including assaulting a police officer, attempting to elude an officer who was in the lawful performance of his duties, and driving a vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others. See Farb p. 6

Evidence - outstanding charges and warrants – relevance

State v. Smith, 157 N.C. App. 493 (2003)

A defendant's outstanding criminal charges and unserved warrants were relevant in a second-degree murder and DWI prosecution which resulted from a high speed chase where questions were raised about the reason for the pursuit.

Motor Vehicles—habitual driving while impaired—motion to dismiss--standard of review--substantial evidence

State v. Scott, 356 NC 591 (2002) Revd Ct App 146 NCA 283

The Court of Appeals erred by applying the proof beyond a reasonable doubt standard of review in determining whether the trial court properly dismissed the habitual DWI charge under N.C.G.S. § 15A-1227(a)(3) after the return of a verdict of guilty but before entry of judgment because the appropriate standard of review is whether there is substantial evidence of each essential element of the offense charged or of a lesser offense included therein, and of defendant's being the perpetrator of such offense.

Motor Vehicles—habitual driving while impaired—motion to dismiss--sufficiency of evidence

State v. Scott, 356 NC 591 (2002) Revd Ct App 146 NCA 283

The Court of Appeals erred by affirming the trial court's dismissal of defendant's conviction of habitual driving while impaired under N.C.G.S. § 20-138.5, because substantial evidence existed for each essential element of DWI and viewing the evidence in a light most favorable to the State reveals a reasonable inference of defendant's guilt based on direct and circumstantial evidence presented by the State.

Motor Vehicles; Search and Seizure--driving while impaired--reasonable suspicion for investigatory stop ***GREAT CASE *******

State v. Thompson, 154 NCA 194 (2002)

The trial court did not err in a DWI action by denying defendant's motion to suppress evidence of the stop of his vehicle because there were sufficient articulable acts for a reasonable suspicion that defendant was committing a motor vehicle violation where officers observed defendant weave within his lane and the tires of his car touch the dividing line of the highway, and the officers observed defendant exceeding the speed limit.

Motor Vehicles--Intoxilyzer--informing defendant of rights

State v. Thompson, 154 NCA 194 (2002)

The trial court did not err in a DWI action by denying defendant's motion to suppress the Intoxilyzer test results where the officer put a copy of defendant's rights in front of defendant as the officer read the rights, defendant's signature was obtained, and defendant was provided with a copy of the rights form after the test. Nothing in the statutes or the case law mandated that the officer physically hand defendant a copy of his rights.

Motor Vehicles; Search and Seizure--stop and arrest--random drivers license checkpoint

State v. Mitchell, 154 NCA 186 (2002)

The trial court erred in an impaired driving case by granting defendant's motion to suppress evidence of his stop and arrest based on defendant's driving through a random drivers license checkpoint because even though there was no evidence of a written plan adopted by the pertinent police department relative to license checkpoints and the pertinent officer had standing permission to establish the checkpoint, the State met its burden of showing the random license check was not an unreasonable detention when uncontroverted evidence demonstrated that all westbound traffic on U.S. 29/74 was stopped and checked for licenses and registrations.

Motor Vehicles–DWI–sufficiency of evidence–no intoxilyzer–no field sobriety test

State v. Gregory, 154 NCA 718 (2002)

The failure of the State to present the results of intoxilyzer or field sobriety tests did not render the evidence insufficient for a DWI conviction where a deputy saw defendant make an abrupt lane change without signaling, speed, and jam on his brakes before stopping in the middle of traffic; the deputy noticed a strong odor of alcohol coming from the car and defendant had red, glassy eyes and slurred speech; defendant staggered when he walked to the patrol car and had to steady himself against his vehicle; defendant refused to submit to the intoxilyzer test; and both the deputy and the officer who attempted to give defendant an intoxilyzer test formed the opinion that defendant's faculties were appreciably impaired.

Evidence–impeachment–prior DWI offenses

State v. Gregory, 154 NCA 718 (2002)

The trial court properly denied a motion in limine to suppress prior DWI convictions. A careful reading of the applicable statutes indicates that a DWI conviction is a Class 1 misdemeanor and is admissible for impeachment purposes under N.C.G.S. § 8C-1, Rule 609(a).

Evidence; Motor Vehicles--driving while impaired--blood test--motion in limine--motion to suppress

State v. McDonald, 151 NCA 236 (2002)

The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant's motion in limine and motion to suppress the results of a blood test even though defendant's blood sample was left in a box in an officer's patrol car for three days before being tested, because: (1) the accuracy of the analysis is what is at issue as opposed to the status of the blood sample itself; (2) the evidence presented at trial showed the State followed the guidelines set forth in N.C.G.S. § 20-139.1; (3) there was no question of a mistake or an incorrect administration of the blood testing of the sample of defendant's blood; (4) there was evidence that the effect of the blood being left in the car for three days, if any, was that the alcohol content would evaporate and actually lower the alcohol concentration, which would be to defendant's benefit; and (5) the uncertainty regarding the effect of leaving the samples in the patrol car for three days goes to the weight of the evidence.

Evidence--prior crimes or acts--driving record--driving convictions

State v. Goodman, 149 NCA 57 (2002)

Although the trial court erred in a second-degree murder case arising out of defendant's driving while intoxicated by admitting defendant's entire driving record which detailed his prior driving convictions under N.C.G.S. § 8C-1, Rule 404(b) when some of his convictions were too remote in time to be probative, the trial court did not commit plain error because: (1) prior driving convictions are a proper means of establishing the malice element of second-degree murder; (2) defendant had numerous convictions, including four convictions for driving while intoxicated or impaired which occurred within the appropriate time frame of within sixteen years of the date of the offense at issue; (3) the remoteness of defendant's three convictions for driving while intoxicated, occurring only one and two years outside the permissible period of sixteen years, goes to the weight of the evidence rather than its admissibility; (4) defendant's non-alcohol related convictions including failing to yield the right of way, illegal passing, reckless

driving, and speeding are not too dissimilar to be probative of a pattern of recklessness and inherently dangerous conduct which substantiate defendant's malice in the present case; and (5) defendant cannot establish that a different result would have occurred absent any error.

Evidence—expert testimony—Highway Patrol trooper—accident investigation

State v. Holland, 150 NCA 457 (2002)

The trial court did not abuse its discretion in an involuntary manslaughter prosecution by allowing a Highway Patrol trooper to testify as an expert in accident reconstruction where the witness had been a trooper for 16 years and had both formal training and experience in accident investigation and reconstruction. N.C.G.S. § 8C-1, Rule 702.

Evidence—expert testimony—accident reconstruction—sufficiently reliable

State v. Holland, 150 NCA 457 (2002)

A Highway Patrol trooper's testimony in reconstructing an accident in an involuntary manslaughter prosecution established a sufficient level of reliability to support the trial court's discretionary admission of his expert testimony.

Motor Vehicles—DWI—suspension of commercial license—double jeopardy--noncommercial DWI offense

State v. Reid, 148 NCA 548 (2002)

Defendant's conviction for DWI did not constitute double jeopardy where his commercial drivers license had been suspended for thirty days and he was refused a limited commercial driving privilege. Double jeopardy will attach only when a defendant is forced to defend multiple criminal punishments for one offense;

driver's license revocations are civil rather than criminal. Although defendant argued that he was denied his right to earn a livelihood, the state has a greater public safety interest in commercial drivers because of the greater risk of harm. U.S. Const. Amend. V; N.C. Const. Art. I, § 19.

Motor Vehicles--driving while impaired--Intoxilyzer test results--appreciably impaired prong

State v. Roach, 145 NCA 159 (2001)

The trial court erred in a driving while impaired case by admitting the Intoxilyzer test results, because: (1) a proper foundation was not laid before admitting evidence as to the outcome of the chemical analysis test when the arresting officer did not testify at trial that he possessed a permit issued by the Department of Health and Human Services as required by N.C.G.S. § 20-139.1; and (2) even though there was sufficient evidence to convict defendant under the appreciably impaired prong of the driving while impaired statute under N.C.G.S. § 20-138.1(a)(1), it is not possible to tell whether the jury found defendant guilty based on his blood alcohol concentration level or due to the appreciable impairment of his faculties.

Motor Vehicles--impaired driving checkpoint--validity of plan--screening procedure

State v. Colbert, 146 NCA 506 (2001)

The trial court erred by dismissing evidence gained from an impaired driving checkpoint on the grounds that it did not meet the requirement of N.C.G.S. § 20-16.3A in that it did not designate in advance the pattern for requesting that drivers be stopped to submit to screening tests. The plan required that every vehicle be stopped, that every driver be administered a series of alcohol screening procedures such as engaging the driver in conversation, and that a driver would be taken to a second location for the alco-sensor test only if there was a reasonable and articulable suspicion of impairment. The fact that an officer must make a judgment as to whether there is reasonable and articulable suspicion does not vitiate the validity of the plan nor offend the requirement that officers not be

permitted unbridled discretion.

Constitutional Law--double jeopardy--driving while impaired--revocation of driver's license—civil penalty

State v. Evans, 145 NC App 324 (2001)

The trial court erred in a driving while impaired case by concluding that the 30-day civil revocation of defendant's driver's license under N.C.G.S. § 20-16.5 constitutes a criminal penalty in violation of double jeopardy, because: (1) any deterrent effect a driver's license revocation may have upon the impaired driver is merely incidental to the overriding purpose of protecting the public's safety; (2) the sanctions imposed by the statute are not excessive in relation to the remedial purpose of removing impaired drivers from the highway while they are a risk to themselves and others; and (3) N.C.G.S. § 20-16.5 is neither punitive in purpose or effect.

Evidence--prior crime or act--DWI convictions

State v. Woodard, 146 N.C. App. 75 (2001)

The trial court did not err in a first-degree murder case, arising out of a fatal vehicle collision occurring after defendant drove his vehicle at an excessive rate of speed through an intersection in an effort to elude pursuing law enforcement officers, by admitting evidence of and instructing the jury on defendant's prior DWI charges and convictions because: (1) evidence of other crimes or wrongful acts by a defendant may be used under N.C.G.S. § 8C-1, Rule 404(b) to demonstrate malice; and (2) defendant's prior DWI convictions tended to demonstrate that defendant was aware that his conduct leading up to the collision in this case was reckless and inherently dangerous to human life.

Motor Vehicles--impaired driving--sufficiency of evidence ***BAD Law*******

*State v. Scott, 146 N.C. App. 283 (2001) Rev'd by 356 NC 591 (2002)******

The trial court did not err by dismissing a charge of driving while impaired for insufficient evidence where the only evidence presented by the State was that defendant stopped his vehicle in an intersection after being signaled by an officer; defendant jumped out of the vehicle, approached the officer, and returned to his car when ordered by the officer; the officer smelled alcohol within the vehicle and on defendant; the officer noticed a half-full open bottle of beer on the seat beside defendant; and defendant had slurred speech. The State did not offer any evidence that defendant had difficulty controlling the vehicle, that he appeared appreciably impaired or that defendant's car had been weaving; there were limited places in which to pull the vehicle over; defendant did not appear to stumble or have difficulty walking when he left the vehicle; defendant was compliant, courteous, and non-combative at all times; defendant was not asked to submit to field sobriety tests; and defendant refused the Intoxilyzer test.

Motor Vehicles--impaired driving--indictment--misdemeanor and habitual

State v. Rich, 351 N.C. 386

State v. Lobohe, 143 N.C. App. 555 (2001)

The trial court properly denied defendant's motion to dismiss an indictment for impaired driving and habitual impaired driving where Count I contained all of the elements of driving while impaired but did not allege defendant's three previous convictions, while Count II contained the allegation of three previous convictions and the dates of those convictions. The indictment follows precisely the required format of N.C.G.S. § 15A-928 and complies with N.C.G.S. § 15A- 924(a)(5).

Motor Vehicles--impaired driving--misdemeanor and felony counts--superior court jurisdiction

State v. Rich, 351 N.C. 386

State v. Lobohe, 143 N.C. App. 555 (2001)

The trial court properly denied an impaired driving defendant's motion to dismiss a misdemeanor offense for lack of superior court jurisdiction where the second count of the indictment alleged felony habitual impaired driving, an element of

which was the misdemeanor impaired driving.

**Motor Vehicles--driving while impaired--testing of blood and urine--implied consent—
search warrant after defendant's refusal *******

State v. Davis, 142 N.C. App. 81 (2001)

The trial court did not err in a driving while impaired case by concluding that defendant's due process rights were not violated under the implied consent statute of N.C.G.S. § 20-16.2 by the testing of his blood and urine pursuant to a search warrant after defendant's refusal to be tested, because: (1) blood and urine tests are not testimonial or communicative evidence within the privilege against selfincrimination; (2) testing pursuant to a search warrant is a type of "other competent evidence" referred to in N.C.G.S. § 20-139.1; and (3) defendant's belief that his right to refuse to take the test was absolute is not relevant.

**Motor Vehicles--blood alcohol concentration--extrapolation--Daubert--scientific foundation

State v. Davis, 142 N.C. App. 81 (2001)

The trial court did not abuse its discretion in a driving while impaired case by finding that the foundation for an expert's extrapolation testimony regarding defendant's blood alcohol concentration at the time of an accident was sufficient to meet the Daubert standard, because: (1) North Carolina courts have accepted extrapolation evidence since 1985; (2) other states have recognized the reliability of extrapolation evidence; (3) the expert stated his basis of understanding came from a large number of studies; and (4) defendant did not object to the expert's qualifications.

Evidence--prior convictions--driving while impaired--reckless driving--malice

State v. Miller, 142 N.C. App. 435 (2001)

The trial court did not err in a prosecution for second-degree murder arising from defendant's impaired driving by admitting defendant's prior convictions for driving while impaired and careless and reckless driving to establish that defendant acted with malice.

Motor Vehicles--driving while impaired--breathalyzer test results--customary and required procedures

State v. Tappe, 139 N.C. App. 33 (2000)

The trial court did not err in a driving while impaired case by admitting the results of defendant's breathalyzer test, even though pertinent documents were destroyed in accordance with standard procedures during the ten-year period between defendant's arrest and the hearing date, because: (1) the qualified individual who administered the test related the customary and required procedures he and other chemical analysts followed in administering breathalyzer tests, including performance of a simulator test prior to obtaining an actual breath sample, to show the test was administered in conformity with the habit or routine practice, N.C.G.S. § 8C-1, Rule 406; (2) the individual who administered the test related his personal experience in operating the Breathalyzer 900; and (3) the individual's testimony comprised a proper and acceptable manner of establishing compliance with the requirements of N.C.G.S. § 20-139.1(b) for a valid chemical analysis.

Motor Vehicles--driving while impaired--blood test--right to assistance

State v. Tappe, 139 N.C. App. 33 (2000)

Defendant's statutory right under N.C.G.S. § 20-16.2(a)(5) and N.C.G.S. § 20-139.1(d) to assistance in obtaining a blood test after his submission to a chemical analysis was not violated in a driving while impaired case, because: (1) an officer's duty goes no further than allowing a defendant access to a telephone and allowing medical personnel access to a driver held in custody; and (2) defendant acknowledged that he was afforded an opportunity to telephone both his girlfriend

and his attorney in Virginia, which reveals that defendant could have telephoned a medical expert or hospital for the purposes of conducting a blood test.

Search and Seizure--driving while impaired--investigatory stop--reasonable suspicion

State v. Bonds, 139 N.C. App. 627 (2000)

The trial court did not err in a driving while impaired case by concluding that a police officer had reasonable suspicion to justify the investigatory stop of defendant's vehicle because: (1) the officer testified that he observed specific indicators of intoxication he was specifically trained to look for, including that defendant had a blank look on his face and stared straight ahead without making eye contact with the officer, defendant was driving at least ten miles per hour below the speed limit, and defendant's driver-side window was completely down in twenty-eight degree weather; and (2) just because most investigatory stops in the context of driving while impaired have involved weaving within a lane or weaving between lanes, it does not mean that only those cases will meet the reasonable suspicion standard.

Motor Vehicles--driving a commercial vehicle while impaired--sufficiency of evidence

State v. Jones, 140 N.C. App. 691 (2000)

The trial court did not err by failing to grant defendant's motion to dismiss the charge of driving a commercial vehicle while impaired in violation of N.C.G.S. § 20-138.2 even though defendant contends he was not driving a commercial motor vehicle as specified by N.C.G.S. § 20-4.01(3d)(a) at the time of his arrest based on the facts that he was driving the tractor for his own private use and that he had detached the trailer portion of the tractor-trailer, because: (1) defendant used the vehicle in question to haul a load of strawberries from California to North Carolina, establishing that the vehicle was designed or used to transport property, N.C.G.S. § 20-4.01(3d); (2) the weight specified by defendant for the tractor-trailer more than satisfied the statutory requirement that a vehicle have a combined gross vehicle weight rating (GVWR) of 26,001 pounds or more to be considered a commercial motor vehicle; (3) the trailer's weight exceeded the

statutory requirement that the GVWR of a Class A commercial motor vehicle's towed unit weigh at least 10,001 pounds; (4) neither the statute defining commercial motor vehicle nor the statute detailing the crime for which defendant was convicted specify that if the vehicle is being used in a private application at the time of the crime, it is no longer a commercial motor vehicle; and (5) the tractor and trailer were properly considered as one unit for the purpose of determining whether the vehicle was a commercial motor vehicle based on the facts that defendant did not change the nature of the vehicle or what it was designed or used to transport by simply detaching the trailer, nor did detaching the trailer change the vehicle's GVWR.

Evidence--prior convictions--traffic violations

State v. Fuller, 138 NC App 481 (2000)

The trial court did not commit plain error in a second- degree murder case by admitting defendant's prior traffic convictions for the previous eight years because: (1) evidence of prior convictions is admissible under N.C.G.S. § 8C-1, Rule 404(b) to establish the malice necessary to support a second degree murder conviction; (2) defendant's driving violations are sufficiently proximate in time to the offenses charged in this case; and (3) defendant's driving record need not establish solely alcohol-related driving offenses to be admissible in this context under Rule 404(b).

Evidence--prior bad acts--driving while impaired--prior conviction--pending charge--malice

State v. Mcallister, 138 N.C. App. 252 (2000)

The trial court did not err in a prosecution for second-degree murder and driving while impaired by admitting evidence of defendant's prior conviction and pending charge for impaired driving because: (1) the 1991 conviction was probative of defendant's state of mind and to show malice; and (2) the pending 1997 driving while impaired case is admissible as evidence of malice to support a second-degree murder charge, and the trial court properly instructed that the 1997

incident pertained to a pending trial rather than a conviction. N.C.G.S. § 8C-1, Rule 404(b).

Evidence - Photographs - crash victims' automobile

State v. Gray, 137 N.C. App. 345 (2000)

The trial court did not err in an impaired driving second-degree murder prosecution by admitting photographs of the victims' vehicle.

Evidence - lay opinion - investigating officer - driving while impaired

State v. Rich, 351 N.C. 386 (2000)

An investigating officer was properly permitted to state his opinion in a prosecution for two second degree murders that defendant was driving while impaired when he collided with the victims' vehicle for the purpose of showing malice where the officer based his opinion not only on the odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers.

Evidence - other crimes - prior speeding convictions - malice

State v. Rich, 351 N.C. 386 (2000)

Evidence of defendant's prior convictions for speeding was admissible under Rule 404(b) to show malice in this prosecution for second-degree murders arising from an automobile accident in which the State's evidence tended to show that defendant drove his vehicle on the wrong side of the road at a high rate of speed while impaired. This evidence was not offered to show that defendant was speeding at the time of the collision but to show that defendant knew and acted with a total disregard of the consequences, which is relevant to show malice.

Motor Vehicles - driving while impaired - refusal to submit to Intoxilyzer - civil and criminal cases - collateral estoppel

State v. Summers, 351 N.C. 620 (2000)

The Court of Appeals did not err in defendant's criminal prosecution for DWI by applying the doctrine of collateral estoppel to prevent relitigation of whether defendant willfully refused to submit to an Intoxilyzer test because: (1) that exact issue had been conclusively decided on appeal to civil superior court from defendant's driver's license revocation from the Division of Motor Vehicles (DMV) with the Attorney General representing DMV in superior court; (2) there is privity between the district attorney, representing the State in defendant's criminal prosecution for DWI, and the Attorney General, representing the State in defendant's appeal to civil superior court from his license revocation, since they both represent the interest of protecting the citizens of North Carolina from drunk drivers in judicial actions involving the determination of whether there was a willful refusal to submit to an Intoxilyzer test; and (3) N.C.G.S. § 20-16.2 and § 20-139.1, the primary sections prescribing the procedures for conducting chemical analysis and the civil and criminal consequences of the analysis, indicate a commonality of purpose and reflects direct cross-reference and reliance between the two.

Search and Seizure - driving while impaired - checkpoint avoidance - criminal activity – reasonable and articulable suspicion

State v. Foreman, 351 N.C. 627 (2000)

The Court of Appeals did not err in upholding defendant's DWI conviction based on the conclusion that under the totality of the circumstances, the arresting officer had a reasonable, articulable suspicion that defendant was engaged in criminal activity prior to any seizure because: (1) the officer observed a quick left turn away from the DWI checkpoint at the precise point where the driver of the vehicle would have first become aware of its presence; (2) the officer did not stop defendant's vehicle once it turned away from the checkpoint, or at any point; and (3) after making a quick turn away from the checkpoint, defendant voluntarily

parked in a residential driveway and remained hidden in the car until the officer approached the vehicle.

Search and Seizure - driving while impaired - checkpoint avoidance - investigatory stop – minimal intrusion

State v. Foreman, 351 N.C. 627 (2000)

Even though the Court of Appeals incorrectly concluded that a legal turn away from a DWI checkpoint upon entering the checkpoint's perimeters cannot justify an investigatory stop, the Court of Appeals did not err in upholding defendant's DWI conviction based on the evidence derived from the police officer's observations because: (1) it is reasonable and permissible for an officer to monitor a checkpoint's entrance for vehicles whose drivers may be attempting to avoid the checkpoint; (2) it necessarily follows that an officer, in light of and pursuant to the totality of circumstances or the checkpoint plan, may pursue and stop a vehicle which has turned away from a checkpoint within its perimeters for reasonable inquiry to determine why the vehicle turned away; and (3) our state's interest in combating intoxicated drivers outweighs the minimal intrusion that an investigatory stop may impose upon a motorist under these circumstances. N.C.G.S. § 20-16.3A.

Automobiles and Other Vehicles 790 (NCI4th) - murder - driving while impaired - evidence of malice - sufficient

State v. McBride, 109 N.C. App. 64 (1993) 425 S.E.2d 731

There was sufficient evidence of malice in a second degree murder prosecution arising from an automobile accident where defendant drove his car knowing that his license was permanently revoked, indicating that he acted with a mind without regard for social duty and with recklessness of consequences; the fact that defendant used false license tags and lied to inspection personnel to obtain an inspection sticker indicates a mind deliberately bent on mischief; and defendant's driving while substantially impaired after prior convictions for driving while impaired and while his license was revoked manifests a mind utterly without

regard for human life and social duty.

Searches and Seizures 12 (NCI3d) - DWI - investigatory stop - communication from another officer

State v. Battle, 109 N.C. App. 367 (1993) 427 S.E.2d 156

An investigatory stop of a vehicle was constitutional and the trial court erred by suppressing evidence obtained therefrom in a DWI prosecution where the first officer, Officer Harmon, observed defendant sitting in the driver's seat of a red four door Pontiac in the parking lot of a washerette; Officer Harmon believed defendant was impaired by alcohol based on tests given defendant and the odor of alcohol on his person; Officer Harmon told defendant not to drive and drove his vehicle from the parking lot, leaving defendant and other men standing near defendant's vehicle; Officer Harmon radioed Officer Beekin to be on the lookout for a red four door Pontiac with the license plate number of defendant's automobile; Officer Beekin saw an automobile fitting that description leave the parking lot and drive onto a public street; Officer Beekin followed the vehicle for approximately four blocks and did not observe anything unusual about the operation of the automobile; and Officer Beekin stopped the automobile and arrested defendant for driving while impaired. Although Officer Beekin did not have the reasonable suspicion necessary to make the stop of defendant's vehicle based either on his own observations or on any particular information communicated to him by Officer Harmon, the instructions to "be on the lookout" for the vehicle were tantamount to a request "to stop" the vehicle and the stop was therefore constitutional.

Evidence and Witnesses 1921 (NCI4th) - blood test for alcohol - unconscious defendant - admissible

State v. Garcia-Lorenzo, 110 N.C. App. 319 (1993) 430 S.E.2d 290

Automobiles and Other Vehicles 818.1 (NCI4th); Criminal Law 135 (NCI4th) - habitual

impaired driving - admissibility of prior convictions - collateral attack on prior convictions impermissible

State v. Stafford, 114 N.C. App. 101 (1994) ___ S.E.2d ___

The trial court properly denied defendant's motion to suppress the evidence of his prior DWI convictions in a prosecution for habitual impaired driving, though defendant alleged that court records failed to show that defendant was represented by counsel when he entered guilty pleas in those prior cases and they therefore did not comply with *Boykin v. Alabama*, 395 U.S. 238, since defendant could not collaterally attack the validity of his DWI convictions.

Evidence and Witnesses 1811 (NCI4th) - driving while impaired - refusal to submit to chemical analysis -admissible

State v. O'rourke, 114 N.C. App. 435 (1994) ___ S.E.2d ___

The trial court did not err in a prosecution for driving while impaired by not granting defendant's motion in limine to exclude evidence of defendant's refusal to submit to a chemical analysis where DMV had rescinded defendant's license revocation after a hearing. Rescission of a revocation is provided on any one of five grounds, including that petitioner did not willfully refuse to submit to a chemical analysis, and the record does not reveal which of the five grounds DMV relied upon. Even assuming that DMV found that defendant did not willfully refuse, the decision by DMV to rescind the revocation was independent of and inconsequential to defendant's criminal trial for DWI.

Criminal Law 1493 (NCI4th) - driving while impaired - condition of probation –Alcoholics Anonymous - reasonably related to rehabilitation

State v. McGill, 114 N.C. App. 479 (1994) ___ S.E.2d ___

Automobiles and Other Vehicles 849 (NCI4th) - streets in mobile home park as public streets – driving while impaired conviction proper

State v. Turner, ___ N.C. App. ___ (12-20-1994) ___ S.E.2d ___

Criminal Law 1149 (NCI4th) - knowingly creating risk to more than one person with device normally hazardous to more than one person - drunk driver - fatal accident - finding of aggravating factor proper

State v. McBride, 118 N.C. App. 316 (1995)

The trial court did not err in finding as an aggravating factor for second-degree murder and impaired driving that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person, since an automobile driven by an intoxicated driver is a device which in its normal use is hazardous to the lives of more than one person, and defendant's prior convictions for driving while impaired and his reckless operation of his automobile on the night in question, together with his factual misrepresentations, supported the conclusion that defendant knowingly created this risk.

Automobiles and Other Vehicles 813 (NCI4th) - request to have wife witness breathalyzer test - refusal- - results inadmissible at trial

State v. Myers, 118 N.C. App. 452 (1995)

Indictment, Information, and Criminal Pleadings 38 (NCI4th) - impaired driving - amendment to allege public vehicular area

State v. Snyder, 118 N.C. App. 540 (1995)

The trial court erred by permitting the State to amend an indictment for driving while impaired which alleged that defendant drove on a "street or highway" to allege that defendant drove on a "highway or public vehicular area" because the amendment altered an essential element of the offense and thus substantially altered the charge against defendant

Automobiles and Other Vehicles 93 (NCI4th) willful refusal to take breathalyzer test - sufficiency of evidence - possibility of losing limited driving privilege- instruction not required

Nowell v. Killens, 119 N.C. App. 567 (1995) ___ S.E.2d ___

Evidence was sufficient to support a finding that petitioner was informed of his statutory rights with regard to a breathalyzer test, and the trial court did not err in concluding that petitioner had willfully refused to submit to the chemical analysis of his breath. The court declines to impose the additional requirement that persons being requested to submit to chemical analysis should be informed that a refusal can result in the denial of their right to seek a limited driving privilege.

Evidence and Witnesses 1832 (NCI4th) chemical analysis of blood- written notice of rights given

State v. Lovett, 119 N.C. App. 689 (1995) ___ S.E.2d ___

There was no merit to defendant's contention that the trial court erred by denying his motion to suppress blood test results because the chemical analyst did not give him notice in writing of his rights, since the chemical analyst placed the written rights form with defendant's emergency room chart; defendant was not capable of signing the form because his hands were strapped down and IVs were in both arms; there was effectively no other means by which the notice could have been given to him; and defendant was clearly informed of his rights and waived them. N.C.G.S. 20-16.2.

Automobiles and Other Vehicles 789 (NCI4th) felony death by vehicle - no lesser included

offense of involuntary manslaughter

State v. Lovett, 119 N.C. App. 689 (1995) ___ S.E.2d ___

The trial court did not err in failing to instruct the jury on felony death by vehicle, since that is not a lesser included offense of involuntary manslaughter.

Evidence and Witnesses 2311 (NCI4th) impaired driving charged evidence of blood-breath ratio properly excluded

State v. Cothran, 120 N.C. App. 633 (1995) ___ S.E.2d ___

In a prosecution of defendant for impaired driving in a commercial motor vehicle, the trial court did not err in excluding expert testimony that defendant's Intoxilyzer reading did not accurately reflect his blood alcohol level because his normal blood-breath ratio was different than the calibration of the Intoxilyzer, since the legislature has adopted a breath alcohol per se offense as an alternative method of committing a driving while impaired offense, and it is immaterial whether defendant is in fact impaired or whether his blood alcohol content is in excess of that permitted in the statutes. N.C.G.S. 20-138.2.

Indictment, Information, and Criminal Pleadings § 36 (NCI4th) driving while impaired "street or highway" amendment to "public vehicular area"

State v. Snyder, 343 N.C. 61 (1996) 468 S.E.2d 221

The trial court did not err in a prosecution for driving while impaired and being an habitual felon by granting the State's motion to amend the DWI indictment that defendant operated a motor vehicle on "a street or highway" to read "on a highway or public vehicular area" where defendant was stopped in a parking lot. This change was merely a refinement in the description of the type of situs on which defendant was driving while impaired rather than a change in an essential element of the offense.

Automobiles and Other Vehicles § 852 (NCI4th) driving while impaired peremptory instruction parking lot as public vehicular area

State v. Snyder, 343 N.C. 61 (1996) 468 S.E.2d 221

Automobiles and Other Vehicles § 115 (NCI4th); Constitutional Law § 172 (NCI4th) DWI arrest administrative revocation of driver's license subsequent criminal prosecution no double jeopardy

State v. Oliver, 343 N.C. 202 (1996) 470 S.E.2d 16

The ten-day administrative revocation of defendant's driver's license under N.C.G.S. § 20-16.5 after his arrest for DWI and the \$50 restoration fee constitute a remedial highway safety measure and not punishment for purposes of double jeopardy analysis.

Evidence and Witnesses §§ 1831, 2311 (NCI4th) chemical analysis of breath notice of rights by arresting officer admissibility of results

State v. Oliver, 343 N.C. 202 (1996) 470 S.E.2d 16

In enacting N.C.G.S. § 20-16.2(a), the legislature did not intend to require an officer, other than the arresting officer, to notify a person charged with DWI of his rights regarding chemical analysis of the breath in order for the test results to be admissible in the criminal prosecution for DWI.

Automobiles and Other Vehicles § 852 (NCI4th); Criminal Law § 904 (NCI4th) impaired driving disjunctive instruction unanimity of verdict

State v. Oliver, 343 N.C. 202 (1996) 470 S.E.2d 16

The trial court did not allow a nonunanimous verdict in violation of Art. I, § 24 of the N.C. Constitution and N.C.G.S. § 15A-1237(b) by its instruction allowing the jury to find defendant guilty of impaired driving if it found beyond a reasonable doubt that defendant drove a vehicle on a highway in this state while he was under the influence of an impairing substance or had an alcohol concentration of 0.08 or more at a relevant time after driving,

Searches and Seizures § 77 (NCI4th) impaired driving checking station compliance with guidelines motion to suppress improperly granted

State v. Barnes, 123 N.C. App. 144 (1996) 472 S.E.2d 784

Automobiles and Other Vehicles § 833 (NCI4th) driving while impaired reasonable and articulable suspicion for stop

State v. Watson, 122 N.C. App. 596 (1996) 472 S.E.2d 28

A highway patrolman had a reasonable and articulable suspicion for stopping defendant's vehicle where he observed defendant driving on the center line and weaving back and forth within his lane for 15 seconds at 2:00 a.m. on a road near a nightclub. Looking at the totality of the circumstances, the evidence is sufficient to form a suspicion of impaired driving in the mind of a reasonable and cautious officer.

Evidence and Witnesses § 1812 (NCI4th) driving while impaired printed results of test record produced by machine

State v. Watson, 122 N.C. App. 596 (1996) 472 S.E.2d 28

The trial court did not err in a prosecution for driving while impaired by denying

defendant's motion to suppress the results of his chemical analysis where defendant argued that the trooper did not record the printed results of the test or provide defendant with a copy prior to trial as mandated by N.C.G.S. § 20-139.1(e) but the required information was supplied on the test card printed by the machine after the test was performed, which the trooper gave to defendant. The reliability and accuracy of current blood alcohol testing methods was recognized by *State v. Smith*, 312 N.C. 361, and the record produced by the machine is sufficient to meet the statutory requirements.

Automobiles and Other Vehicles § 141 (NCI4th) driving while license revoked cutting up license and mailing it to DMV

State v. Ellison, 122 N.C. App. 638 (1996) 471 S.E.2d 130

Defendant's argument in a prosecution for driving with a revoked license that he had rescinded his contract with the State by cutting up his license and returning it to the Division of Motor Vehicles and that he should be able to travel freely without having to meet the statutory requirements was without merit. N.C.G.S. § 20-28 provides that any person driving a motor vehicle upon the highways with a revoked license is guilty of a misdemeanor and it has been held that the right to operate a motor vehicle upon the State's highways is not unrestricted but a privilege which can be exercised only in accordance with legislative restrictions. Defendant's intent to liberate himself from statutory requirements had no bearing on the fact that he committed an offense expressly forbidden by statute.

Automobiles and Other Vehicles § 141 (NCI4th) driving while license revoked 1983 Plymouth not a road machine defendant not exempted

State v. Ellison, 122 N.C. App. 638 (1996) 471 S.E.2d 130

There was no merit in a defense argument in a prosecution for driving with a revoked license that defendant was operating a "road machine" and not a motor vehicle and was exempted from having a license under N.C.G.S. § 20-8. Although not defined in the statute, when read in para materia with the other terms used in the statute, a road machine differs from an automobile in that it involves only

temporary operation for purposes other than travel. In this case, defendant was driving a 1983 Plymouth automobile.

Evidence and Witnesses § 1831 (NCI4th) DWI defendant informed of rights by charging officer results admissible

State v. Abdereazeq, 122 N.C. App. 727 (1996) 471 S.E.2d 445

N.C.G.S. § 20-16.2(a) does not require an officer other than the charging officer to advise defendants of their statutory rights in order for the State to admit into evidence at the criminal prosecution for DWI the results of a refusal to submit to chemical analysis.

Automobiles and Other Vehicles 849 (NCI4th) DWI car wash parking lot public vehicular area effect of local ordinance

State v. Robinette, 124 N.C. App. 212 (1996) 476 S.E.2d 387

A town's adoption of an ordinance making it a misdemeanor for persons to park on the premises of a specific car wash unless using the car wash facilities did not convert the car wash parking lot from a "public vehicular area" to "private property" within the meaning of the driving while impaired statute, N.C.G.S. § 20-138.1 (a). N.C.G.S. § 20-4.01 (32)(b).

Searches and Seizures § 77 (NCI4th) detaining defendant for Alco-sensor test reasonable, articulable suspicion of crime

State v. Rogers, 124 N.C. App. 364 (1996) 477 S.E.2d 221

An officer had a reasonable, articulable suspicion that defendant was committing the crime of driving while impaired in his presence and thus properly detained defendant for an Alco-sensor test where defendant stopped his vehicle in an

intersection after being directed to turn by the officer; the officer approached defendant's vehicle and engaged in a short conversation with defendant; and the officer detected a strong odor of alcohol on defendant's breath.

Automobiles and Other Vehicles § 834 (NCI4th) driving while impaired probable cause for arrest

State v. Rogers, 124 N.C. App. 364 (1996) 477 S.E.2d 221

An officer had probable cause to arrest defendant for driving while impaired where defendant stopped his vehicle in an intersection after being directed to turn by the officer; the officer approached defendant's vehicle, engaged in a short conversation with defendant, and detected a strong odor of alcohol on defendant's breath; the officer administered an Alco-sensor test to defendant which revealed an alcohol concentration of .13; the officer arrested defendant; and a subsequent Intoxilyzer test indicated that defendant's alcohol concentration was .11.

Automobiles and Other Vehicles § 813 (NCI4th) Alco-sensor test results inadmissible basis for probable cause

State v. Rogers, 124 N.C. App. 364 (1996) 477 S.E.2d 221

Though the arresting officer's failure to administer a second Alco-sensor test, in violation of N.C.G.S. § 20-16.3 (b), may have rendered the evidence inadmissible at trial, there was no prohibition against the results of this test being used by the officer to form probable cause. Page 365

Automobiles and Other Vehicles § 115 (NCI4th); Constitutional Law § 172 (NCI4th) driver's license revoked DWI conviction no double jeopardy

State v. Rogers, 124 N.C. App. 364 (1996) 477 S.E.2d 221

Revocation of defendant's driver's license under N.C.G.S. § 20-16.5 and subsequent conviction of DWI under N.C.G.S. § 20-138.1 did not violate the prohibition against double jeopardy.

Evidence and Witnesses § 1811 (NCI4th) - breathalyser - impairing substance - willful refusal - admissible

State v. Pyatt, 125 N.C. App. 147 (1997)

It was not error, much less plain error, for the trial court to instruct the jury in a prosecution for impaired driving that it could consider evidence of defendant's refusal to take an intoxilyzer test without finding that the refusal was wilful. N.C.G.S. § 20-139.1(f) does not require a willful refusal before evidence of a refusal is admissible.

Automobiles and Other Vehicles § 834 (NCI4th) - DWI out of officer's presence - authority to arrest without warrant

State v. Crawford, 125 N.C. App. 279 (1997)

A deputy sheriff had probable cause to believe (1) that defendant had committed the misdemeanor offense of driving while impaired outside his presence and (2) that defendant might cause injury to himself or others if not immediately arrested, and the deputy thus had authority to arrest defendant without a warrant pursuant to N.C.G.S. § 15A-401(b)(2), where the deputy found defendant alone in a car parked on the shoulder of a rural side road around 3:30 a.m.; defendant was in the driver's seat, his pants were undone, and he had been drooling; defendant had a strong odor of alcohol about him, had difficulty speaking, and admitted he had been drinking; the hood of the car was warm although the outside temperature was 26 degrees; a box of tapes and a car cover occupied the passenger seats; defendant had possession of the ignition key; the officer was alone at the scene; there was no evidence that defendant's car was inoperable; and defendant attempted to put the key in the ignition in order to drive away from the scene. Therefore, the trial court erred in suppressing evidence seized after defendant's arrest.

Evidence and Witnesses § 2176 (NCI4th) - HGN test - scientific test - qualified expert

State v. Helms, 127 N.C. App. 375 (1997) See 348 NC 578

A horizontal gaze nystagmus (HGN) test represents specialized knowledge that must be presented to the jury by a qualified expert.

Automobiles and Other Vehicles § 845 (NCI4th) - driving while impaired - appreciable impairment - sufficient evidence

State v. Phillips, 127 N.C. App. 391 (1997)

The State presented sufficient evidence that defendant was appreciably impaired to support his conviction of DWI under N.C.G.S. § 20-138.1 (a)(1) where the arresting officer testified that he observed defendant driving erratically, that defendant had an odor of alcohol about him, and that defendant admitted he had been drinking significantly earlier in the evening.

Automobiles and Other Vehicles § 834 (NCI4th) - DWI - probable cause

State v. Thomas, 127 N.C. App. 431 (1997)

In a prosecution for habitual impaired driving and driving while license revoked, the trial court did not err in concluding that there was probable cause to arrest defendant where the arresting officer was notified of defendant's intoxication by an off-duty policeman and the arresting officer observed defendant's disorderly appearance, red glassy eyes, strong odor of alcohol, backing up when he saw the arresting officer, and inability to produce a driver's license.

Evidence - alco-sensor test - admissibility

State v. Bartlett, 130 N.C. App. 79 (1998)

The trial court erred in a prosecution for driving with a revoked license by admitting the results of an alco-sensor test where the test results were admitted as substantive evidence and the State violated discovery rules.

Evidence and Witnesses § 2176 (NCI4th) - HGN test - necessity for qualified expert

State v. Helms, 348 N.C. 578 (1998)

A horizontal gaze nystagmus (HGN) test does not measure behavior a lay person would commonly associate with intoxication, but rather represents specialized knowledge that must be presented to the jury by a qualified expert. Once the expert testifies as to the relationship between HGN test results and intoxication, he or she is then subject to cross-examination to test the validity and reliability of the HGN test.

Evidence and Witnesses § 2176 (NCI4th) - impaired driving - HGN test - insufficient foundation - admission of results as prejudicial error

State v. Helms, 348 N.C. 578 (1998)

The State failed to present a sufficient foundation for the admission in a DWI prosecution of testimony by the arresting officer as to the results of an HGN test administered to defendant where nothing in the record indicates that the trial court took judicial notice of the reliability of the HGN test, and the State presented no evidence and the court conducted no inquiry regarding the reliability of the HGN test. Until there is sufficient scientifically reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results. Further, in light of the heightened credence juries tend to give to scientific evidence, there is a reasonable possibility that had evidence of the HGN test results not been erroneously admitted a different outcome would have been reached at trial so that the admission of this evidence was prejudicial error.

Criminal Law - prior convictions - admitted to show malice - limiting instructions

State v. Grice, 131 N.C. App. 48 (1998)

The trial court did not err in a second-degree murder prosecution arising from a fatal automobile accident which resulted from defendant's impaired driving by admitting DUI convictions from 1980. Prior driving while impaired convictions may be offered to show malice and the trial court correctly gave a limiting instruction.

Evidence-Intoxilyzer results - officer out of jurisdiction - not a substantial violation of defendant's rights

State v. Pearson, 131 N.C. App. 315 (1998)

The trial court erred in a prosecution for driving while impaired by allowing defendant's motion to suppress Intoxilyzer results where the Intoxilyzer in the county where defendant was arrested displayed an incorrect date and time, defendant was taken to another county for an Intoxilyzer test and taken before the magistrate there, and defendant moved to suppress the Intoxilyzer results based on the administering officer being out of his jurisdiction. Even if the motion to suppress was procedurally valid, the officer's technical violation would not be so serious as to constitute a substantial violation of defendant's rights.

Evidence - prior crime or act - malice - prior traffic offenses

State v. Rich, 132 N.C. App. 440 (1999)

The trial court did not err in a second-degree murder prosecution arising from speeding and drinking by admitting defendant's prior traffic violations to substantiate malice. Evidence of defendant's prior violations was relevant to establish defendant's "depraved heart" on the night he struck the victims' vehicle while rounding a sharp curve at a speed at least forty miles per hour over the posted limit.

Motor Vehicles - driving while impaired - instructions - two instances - single offense – unanimous verdict

State v. Mccaslin, 132 N.C. App. 352 (1999)

The trial court did not err in a prosecution for driving while impaired by refusing to instruct jurors that they could consider only the first incident of defendant's driving, even though defendant argued that a less than unanimous verdict resulted, where defendant left the scene of an accident, returned in a car driven by another person while a highway patrol trooper was completing the accident report, left the scene when the trooper told defendant that he needed to see the truck, and returned a few minutes later driving his truck.

Motor Vehicles - driving while impaired - willful refusal of breath analysis - litigated at license revocation

State v. Summers, 132 N.C. App. 636 (1999)

The trial court erred in a DWI prosecution by denying defendant's motion in limine and overruling his objection at trial to evidence of his single breath analysis. A single analysis is admissible only if the subsequent breath sample is a willful refusal; here, the issue of willful refusal had been litigated in defendant's favor at a prior DMV license revocation proceeding and appeal to superior court. The District Attorney was fully represented and protected by the appearance of the Attorney General in the license revocation appeal and both prongs of the collateral estoppel test are satisfied.

Motor Vehicles - driving while impaired - Intoxilyzer - third test - necessary steps

State v. Moore, 132 N.C. App. 802 (1999)

The trial court erred by suppressing the results of an Intoxilyzer test where the

first two samples differed by more than .02 and the required third sample was taken without additional procedures being performed between the second and third samples. The key phrase in the regulations governing repeating steps for a third or subsequent test is "as applicable"; the trooper properly interpreted the regulations such that the only applicable step to repeat was step (6), "PLEASE BLOW."

Search and Seizure - avoidance of DWI checkpoint - automobile followed - hiding in driveway - reasonable and articulable suspicion of criminal activity

State v. Foreman, 133 N.C. App. 292 (1999)

There was a reasonable and articulable suspicion of criminal activity prior to defendant's seizure for driving while impaired where defendant made a quick left turn at the intersection immediately preceding a DWI checkpoint, an officer followed without engaging his siren or blue lights, the vehicle made a second abrupt left turn and parked in a residential driveway, the officer used his lights to see into the vehicle, defendant did not attempt to restart or exit the vehicle, all of its occupants remained "scrunched down" in the vehicle even though it was parked with its engine and lights off, the officer continuously watched the vehicle until backup arrived, and the occupants did not change positions. Although a legal left turn at an intersection immediately preceding a posted DWI checkpoint does not justify an investigatory stop without more, it is constitutionally permissible for officers to follow vehicles that legally avoid DWI check points and the defendant here was seized, at the earliest, when backup arrived. The objective facts the officer observed prior to the arrival of backup were sufficient to raise a reasonable and articulable suspicion of criminal activity.

Evidence - driving while impaired - blood plasma alcohol testing - results admissible

State v. Cardwell, 133 N.C. App. 496 (1999)

The trial court did not abuse its discretion in a driving while impaired prosecution by admitting into evidence the results from a blood plasma alcohol test performed using an ACA Star Analyzer. The court's findings reveal its consideration of the

Analyzer's general acceptance in both the medical and forensic fields, the fact that the Analyzer is an established technique for measuring alcohol concentration, the professional backgrounds of the individuals who operate and/or rely on the Analyzer, and defendant's particular circumstances.

Motor Vehicles - driving while impaired - blood plasma alcohol level - conversion ratio - reliable

State v. Cardwell, 133 N.C. App. 496 (1999)

The trial court did not abuse its discretion in a driving while impaired prosecution by finding that a ratio of 1 to 1.18 was reliable to convert plasma-alcohol concentration to its blood-alcohol equivalent. The court received evidence that 1 to 1.18 is the generally accepted conversion ratio, that numerous studies have found that ratios between 1 to 1.15 and 1 to 1.21 to be accurate, and the court's findings reveal consideration of the professional background of the expert employing the 1 to 1.18 ratio. Furthermore, defendant's blood-alcohol level was above the legal limit even using the highest conversion ratio.

Evidence - motion in limine - habitual impaired driving - driving while license revoked - operation of vehicle

State v. Clapp, 135 N.C. App. 52 (1999)

The trial court did not err by allowing the State's motion in limine to prohibit the introduction of evidence by defendant that the vehicle he was alleged to have been operating was not operable in a case involving habitual impaired driving and driving while license revoked because the State's evidence was sufficient to show defendant operated the vehicle in the presence of a police officer.

Motor Vehicles - driving while impaired - prior out-of-state conviction - aggravating factor - substantially equivalent offense

State v. Parisi, 135 N.C. App. 222 (1999)

In a case involving driving while under the influence of an impairing substance under N.C.G.S. § 20-139.1, the trial court did not err in determining that defendant's conviction in New York for the offense of driving while ability impaired was a prior conviction constituting an aggravating factor for purposes of sentencing because both offenses are "substantially equivalent."

Motor Vehicles - DWI vehicle seizure - Fourth Amendment

State v. Chisholm, 135 N.C. App. 578 (1999)

The trial court had no basis for finding that the seizure of an automobile under DWI statutes violated the Fourth Amendment where defendant was arrested for driving while intoxicated and with a revoked license, and a magistrate found probable cause for the arrest and probable cause for the seizure of the vehicle. The warrantless seizure of a motor vehicle does not violate the Fourth Amendment if the officer has probable cause to believe that the vehicle is subject to forfeiture. N.C.G.S. § 20-28.3.

Motor Vehicles - DWI vehicle seizure - due process

State v. Chisholm, 135 N.C. App. 578 (1999)

Due process was not violated when defendant's car was seized under DWI statutes; a long line of cases holds that due process is met when a motor vehicle is seized without prior notice or a proper hearing.