DEFENSE OF DWI'S

LINDA S. KLEIN

I. IS THE STOP VALID?

A. There must be reasonable suspicion based on objective facts that individual is engaged in criminal activity, or violating a traffic law.

1. Random stop of car in absence of "specific particularly facts which justify the stop by indicating a reasonable suspicion that a violation of the law" occurred violates the Fourth Amendment.

   See: Delaware v. Prouse 440 U.S. 648, 59 L.Ed. 2d 660, 99 S.Ct. 1391 (1979).

2. Erratic driving, speeding, justifies stop.

   See: Michigan v. Long. 463 U.S. 1032, 77 L.Ed. 2d 1201 (1983).

3. Weaving into the other lane justifies stop.

   See: State v. Green. 103 NC. App. 38 (1991).

   Weaving inside the lane is not enough.

   See: State v. Watkins, 111 NC App 766, rev 377 NC 437 (1994).

4. Faded tag justifies stop.

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

5. Driving excessively slowly and weaving in own lane justifies stop.

   See: State v. Jones. 386 S.E. 2d 217, 96 N.C. App. 389 (1989).
   State v. Aubin. 397 S.E. 2d 653. 100 N.C. App. 628 (1990).

6. Reliable tips that car is carrying drugs justifies stop.

   See: State v. Poczontek. 90 N.C. App. 455

7. N.C.G.S. 20-16.3a Properly executed impaired driving checks allows stop. N.C.G.S. 20-16. 3a governs impaired driving checks. The statute allows roadblocks for DWI checks so long as the state does three things:

1. develops a systematic plan in advance, determining the number of vehicles to be stopped.

2. designates in advance the pattern for stopping cars, so that no individual officer has discretion as to which vehicle is stopped.

3. marks the area to advise the public an impaired driving check is being made.

In North Carolina, impaired driving checks are usually referred to as “Operation Eagle”. Impaired driving checks, which are known as “Operation Eagle” must comply with the requirements of N.C.G.S. 20-16. 3a. Just because an officer tells you, or the District Attorney or the Court, that a particular stop or roadblock was not Operation Eagle (or a DWI checkpoint):, that should not end the inquiry.

Routine roadblocks that are not directed at detecting impaired driving are allowed and do not have to meet the requirements of 20-16. 3a. Therefore, it may be tempting for a law enforcement officer to call what is really a DWI checkpoint a routine license check to circumvent the requirements of 20-16. 3a. Explore and develop the facts; for example, if the roadblock is set up at 2:00 a.m., down the Street from a bar or nightclub which closed at 2:00, it is probably really a DWI checkpoint. If the state cannot prove compliance with 20-16.3a, the stop is illegal and all subsequent evidence should be suppressed as poisonous fruit.

See also: Deleware v. Prouse. 99 S.Ct. 1391, 440 U.S. 648 (1979).

Remember, even if the state has proven compliance with 20-1 6.3a the state still must show the officer has probable case to arrest for DWI.

8. Lawful turn before routine police checkpoint does not constitute reasonable suspicion.

See: Murphy v. Commonwealth, 384 S.E. 2d 125 (Va. App. 1989).

In Murphy v. Commonwealth, the arresting officer observed defendant’s vehicle make a lawful right turn onto a dead end street 350 feet from the checkpoint. The officer pursued and stopped the vehicle. The state argued that the stop was lawful based on the defendant’s apparent attempt to avoid the roadblock. The Virginia Court of Appeals states:

> While Murphy’s turn onto the dead end street may have justified a “hunch” that the driver might be in violation of the traffic law or might be involved in criminal activity, a legal turn into an existing road prior to reaching a checkpoint, standing alone, does not warrant reasonable suspicion that the operator is involved in criminal activity.

See also: State v. Foreman, 133 NC App 292 (1999) modified and affirmed ______NC_______

See also: Pooler v. Motor Vehicle Division, 88 Or App. 475, 746 P.2d 716 (1987) (a legal U-turn does not itself constitute reasonable suspicion.)

But see: Stroud v. Commonwealth, 6 Va. App. 633, 370 S.E.2d 721 (1988); Michigan Depart of State Police v. Sitz: 496 S.S. 44, 110 S.Ct. 2481 (1990).

9. Failure to wear seatbelt justifies stop.

10. Stopping a car based on a police broadcast may be permissible but not admissible.

11. Stopping someone because they're in a high drug area is not enough.

See: Brown v. Texas, 443U.S. 47, 61 L.Ed. 2d *357,* 99 S.Ct. 2637 (1979); State v. Fleming 106 N.C. App. 165 (1992).

12. Develop the facts.

a. Weaving within lane, absent any other moving violations, should not be sufficient. On voir-dire, establish that there were no moving violations; it is not unusual to move about within one's own lane; it is not against the law to do so; many people who are not impaired do so. Explore how long, for what distance the officer followed the defendant, etc. Were there mechanical problems with the car, which account for bad driving, unusual weather conditions, defendant's unfamiliarity with the area, etc.?

13. Pretext

Don't forget that even something that appears to be a valid stop may in fact be pretextual in nature. The standard is not what a reasonable officer could do (i.e. stop a vehicle for some violation) but what a reasonable officer would do.

See: State v. Aubin 397 S.E. 2d 653 (1990); U.S. V. Guzman, 864 F. 2d 1512 (1988).

Explore the facts in your case and develop an argument that the officer was looking for something other than the reason he gave for initiating the stop (i.e., he's fishing).

14. State must prove officer had jurisdiction.

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II. CAN THE STATE PROVE THAT THE DEFENDANT WAS DRIVING?

A. Corpus Delicti

If there's no officer or witness who can put the defendant behind the wheel, did the defendant admit to driving? If he did, there's a corpus delicti issue. The state must prove that the defendant's "confession is supported by substantial independent evidence tending to establish its trustworthiness...." See State v. Trexler, 316 N.C. 528 (1986).

B. The engine must be running.

If the police arrive and the vehicle is not in motion, i.e., it is parked or pulled over; the state may not be able to prove operation. The definition of driving requires that the defendant is "in actual physical control of a vehicle which is in motion or which has the engine running." State v. Fields, 77 N.C. App. 404, 335 S.E. 2d 69 (1985).

The definition of driver is found in G.S. 20.4.01(7) &

C. The state must prove the defendant was operating on a public highway. street. or a public vehicular area.

These definitions are found in 20-138. 1 and 20-4.01 (13) (32) and (46). The definitions of public vehicular area are broader than that of streets and highways and include areas that would not support a conviction for DWLR (DWLR only applies to driving on highways). But still requires that the driving be on an area that is "generally open to and used by the public for vehicular area. It excludes "any private property not generally open to and used by the public." State v. Snyder, 343 N.C. 61(1996).

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

D. The state must prove the defendant was operating a vehicle.

Although the definition of vehicles at 24-4.01 (49) includes bicycles, the DWI statue at 20-138.1 (e) excludes horses, bicycles and lawnmowers.

III. MOTION TO QUASH. DISMISS OR SUPPRESS

A. Unsigned Citations

N.C.G.S. 15A-302 requires that a copy of the citation be delivered to the defendant who may sign on the original. If the defendant refuses to sign, the officer must sign the original indicating that he delivered a copy to the defendant.

The remedy is a motion to quash. See: State v. Ferguson. 105 N.C. App. 692 (1992).

B. No finding of probable cause by magistrate as required by 15A -511.

N.C.G.S. 15A-511requires that a police officer who makes an arrest without a warrant must take the defendant before a magistrate. The magistrate must determine that there is probable cause to believe a crime has been committed by the defendant and that there is probable case for his detention. The N.C. citation has a space in the top left hand corner where the magistrate signs, indicating that the defendant "has been arrested without a warrant and there is probable cause for his detention on the stated charges." Failure to comply with this requirement is arguably a constitutional as well as a statutory violation.

C. Knoll/Delay Violations

See: 15A 501, 511, and 534
State v. Knoll, 322 N.C. 535, (1988)

See: State v. Hill, 277 N.C. 547 (1971).
State v. Ham, 105 N.C. App. 658 (1992).
U.S. v. Canane, 622 F. Supp. 279 (D.C.N.C. 1985)

IV. THE STOP WAS VALID BUT THERE WAS INSUFFICIENT PROBABLE CAUSE TO ARREST.

Again, this requires exploring and developing the facts or the lack thereof. An officer may have had reasonable suspicion in his or her own mind to stop the defendant, but there is not probable cause to arrest. For example, there may have been weaving outside the lane and slow driving (enough to stop), and there may have the odor of alcohol about the person. If this is the only basis the officer gives for arrest (no sobriety tests), then that's probably not enough for an arrest.

This situation often occurs at Operation Eagle stops or license checks. The officer will have observed very little driving and in the absence of sobriety tests there may be no probable cause to arrest.

The results of the field alcohol screening test devices (alco-sensor) may be admissible in court to show probable cause to arrest, but only if the State proves compliances with the DEHNR regulations (see 20-16.3 and the DEHNR regulations). [The defendant removes all food, drink, tobacco; > .08, wait 5 minutes and do a second test; must use approved device, device must be calibrated once every 30 days]

The horizontal gaze nystagmus (HGN) is only admissible if there's a proper foundation showing scientific reliability of the test.

See: State v. Helms, 490 S.E. 2d 565 (N.C. App. 1997), 34 N.C. 578 (1978).

V. <u>MOTION TO SUPPRESS INTOXILYZER AFFIDAVIT AND/OR INTOXILYZER RESULTS.</u>

A. N.C.G.S. 20-139.1 (el) allows the intoxilyzer affidavit to be admitted in district court when it is "sworn to and <u>properly executed</u> before an official authorized to administer oaths" (emphasis added).

1. <u>Problem with the notary signature /seal</u>.

The affidavit must be sworn to and properly executed. If the notary signature/seal/stamp is defective argue that it is not properly executed and therefore the affidavit is not admissible. N.C.G.S. Sec. 10A-9 sets out requirements for a "notarial act". It states that a notarial act <u>shall</u> be attested by all of the following (emphasis added):

a. The signature of the notary, exactly as shown on the notary's commission.

b. The readable appearance of the notary's name, either from the notary's signature or otherwise.

c. The clear and legible appearance of the notary's stamp or seal.

d. A statement of the data the notary's commission expires.

2. <u>Intoxilyzer results not part of affidavit.</u>

In Mecklenburg County and other parts of the state law enforcement agencies are using a new machine to check for Blood Alcohol Content. Instead of the familiar Breathalyzer, they are now using the Intoxilyxer 5000. This machine prints the results of a test directly on a form (DEHNR 3098) which also contains the rights of a person asked to submit to chemical analysis. After the results have been recorded, an affidavit is completed by the Intoxilyer operator, and the affidavit is notarized. It is clear under N.C.G.S. Sec. 20-139.1 (el) that the chemical analyst's affidavit is admissible as evidence in District Court as long as all other technical requirements are fulfilled, e.q. date of last maintenance, properly notarized, etc. The greatest difference between the old Breathalyzer affidavit and the new Intoxilyzer affidavit is that, unlike the old affidavit, the Intoxilyer afffidavit does not show the test results. The only place the results are recorded is on the SEPARATE form DEHNR 3098. These results are not recorded by the chemical analyst on the affidavit. This presents a problem for the State. Since the affidavit does not reflect the test results, and according to the statute only the affidavit is admissible as evidence, in order to get the results admitted, the State must show that the SEPARATE form DEHINR 3098 is actually a part of the affidavit.

B. Defendant not advised of intoxilyzer rights 20-16.2.

20-16.2(a) requires that before any type of chemical analysis is administered, the defendant must be informed orally and given a copy in writing. (Emphasis added) of his right to refuse, the consequences of refusal, the admissibility of the test results, the right to have another chemical test administered by the person of his choosing, and the right to an attorney or witness if that person can be present within thirty (30) minutes.

Failure to inform defendant of these rights makes the chemical test inadmissible in evidence. State v. Gilbert. 85 N.C. App. 594, 355 S.E. 2d 261 (1987).

C. Defendant not observed for fifteen (15) minutes as required by the intoxilyzer regulations.

If you don't have a copy of the regulations in the Administrative Code, call the Department of Environment, Health and Natural Resources and get a copy. The regulations require an observation period of fifteen minutes, during which a chemical analyst observes the person to be tested. If the box on the affidavit is not checked, or if it shows less than fifteen minutes of observation, the intoxilyzer results are inadmissible.

D. State can't prove proper preventive maintenance.

The regulations differ according to which machine is used. Breathalysers 900, 900A, 2000, and 3000 must have preventive maintenance at least once every thirty (30) days. The Intoximeter 3000 also requires maintenance at least once every thirty days. The Intoxilyzer 5000 requires maintenance at least once every four months; however, the breath simulator solution must be changed every four months or after 125 tests, whichever occurs first. The affidavit does not provide this information.

E. Intoxilvzer readings not within .02.

N.C.G.S. 20-139.1 (b3) and the intoxilyzer regulations at Sect 0313 "Breath-Testing Instruments: Reporting of Sequential Test "require" a pair of consecutively administer tests (that) do not differ from each other by an alcohol concentration of greater than 0.02."

F. Defendant denied access to witness to breathalyzer.

If the defendant requests a witness, and the witness arrives within thirty (30) minutes, make reasonable efforts to gain access to defendant and is denied access, then the test is inadmissible. See 20-16.2 and State v. Ferguson, 90 N.C. App. 513 (1988). Ferguson also states that in a refusal case this type of violation may require a dismissal. "The denial of access to a witness in this case - when the State's sole evidence of the offense is the personal observations of the authorities - would constitute a flagrant violation of defendant's constitutional right to witnesses... and would require that the

charges be dismissed." Ferguson at 519.

See also: State v. Myers 445 SE 2d 492 (N.C. App. 1995) where defendant asked that his wife be allowed to observe the breath test; but the officer suggested "that might not be a good idea". The Court found the officer's statement to be "tantamount to the refusal the request" (for a witness) and ruled the breathalyzer results inadmissible.

G. Defendant denied right to take alternative test.

N.C.G.S. 20-139.1 (d) states that a person who submits to a chemical analysis may have a qualified person of his own choosing administering an additional chemical test or of this right. Violation of these rights requires suppression of the chemical analysis results. See: State v. Bumgarner. 97 N.C. App. 567, 398 S.E. 2d 425 (1990).

H. State fails to prove chemical analyst had a certificate issued by DEHNR which was current on the test date.

State v. Franks, 87 N. C. App 265 (1987); N.C.G.S. 20-139.1 (b) (1)

VI. PRIVILEGES

A. Under 21 -- State v. Boyles, NCCT App 7/03

When a District Court Judge signed a limited driving privilege for a 19 year old defendant charged with DWI, the DMV sent a notice to the defendant that the privilege was "void." The Court of Appeals held that DMV can not unilaterally invalidate a privilege: to do so violates the defendant's rights to due process and the separation of powers clause of our Constitution.

The ruling in this case makes no sense. The Supreme Court will rule on this issue. Be careful how you advise clients under 21 about privileges in DWI.

VII. INTERLOCK

20-17.8 (a) & (b) require ignition interlock if a defendant blows 0.16 or higher and he/she requests a limited driving privilege. Interlock is also required when the defendant seeks to restore his/her privilege on a second DWI offense within seven (7) years.

Query: if you can suppress the intoxilyzer results, can you avoid the statutory requirement for interlock? If you do suppress the results, have the Judge instruct the Clerk to note "no intoxilyzer results available" on the docket and the Judgment.

One option to suppress intoxilyzer results is if the intoxilyzer operator and their records are subpoenaed and the operator does not comply with the subpoena.

Another option to suppress intoxilyzer results is if the State fails to lay a proper foundation. See: V "Motion to Suppress Intoxilyzer Affidavit and/or Intoxilyzer Results."

Clients who plead guilty to DWI who blew 0.16 or greater, but had a DWI within the past seven (7) years (prior DWI offense date within seven (7) years of current offense date) are not eligible for a limited driving privilege. However they should be advised that when the DMV restores their license interlock will be required.

Instructions for client who are required to install Interlock are available at www.Monitechnc.com.

VIII. GROOVY RECENT CASES

State v. Roach – NC App 2001
Re-iterating ruling in State V. Franks requiring testimony that the officer possessed a current permit issued by the Department of Health & Human Services.

State v. Scott – NC App 2001
Evidence that a defendant who was blue-lighted brought the vehicle to stop in the middle of an intersection, had an odor of alcohol, open beer on the seat beside defendant and defendant had slurred speech is insufficient for a conviction of DWI. The court held that "the trial court was correct in dismissing the impaired driving charge due to insufficient evidence as the State has not proven the defendant was appreciably impaired."

IX. POLICE BROADCASTS/ANONYMOUS TIPS

State v. McCain – Ct. App 7/03
HELD: Trial court should have suppressed evidence of cocaine seized in a stop when police officer received a police dispatch based on an anonymous tip. Even though the officer stopped a car that "exactly matched the description" of the car in an area where there were prior complaints of drug activity "the tip on its own was not sufficiently reliable to create a reasonable suspicion of criminal activity." Affirming holding in Alabama v. White, 496 US 325 (1990) that a stop based on an anonymous tip is not sufficient to justify a seizure when the tip does not possess sufficient indicia of reliability. (such as information about the identity of the tipster, basis for the tipster's knowledge, accurate prediction of defendant's actions or independent observations by the officer.)

State v. Hughes – NC App 2000
Court of Appeals upheld the trial courts order suppressing drugs seized based on information from a confidential reliable informant. Even though the CRI correctly described the defendant as over 300 pounds, 6' feet or taller, between 20-30 years old and clean cut wearing baggy pants and predicted that he would be at the bus station carrying an overnight bag and leaving by taxi "the information provided did not contain the range of details required by Alabama v. White and Illinois v. Gates to sufficiently predict defendant's specific future actions but was instead peppered with uncertainties and generalities."