

Selected Impaired Driving Cases 2000-2008

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Substantive Offense

State v. Cornett, 177 N.C. App. 452, 629 S.E.2d 857 (2006). Dead end dirt road with six homes on it, with driveways leading off of the road to each house is a public vehicular area; it is road within or leading to a subdivision. There were no gates or signs indicating it was a private road. No right to discovery in criminal district court, apart from constitutional interests such as those implicated in *Brady v. Maryland* and its progeny.

State v. Crow, 175 N.C. App. 119, 623 S.E.2d 68 (2005). “Stand-up scooter” is a vehicle; it is not excepted from the impaired driving statute (as bicycles and lawnmowers were until 12/1/06), it is not an electric personal assistive mobility device, and is not intended to aid those with mobility impairments (such as a motorized wheelchair). Legislature’s specific exemptions suggest legislative intent to include all other devices covered by statutory definition of vehicle.

State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586 (2005). Defendant’s admission that he took Floricet, a pain medication was admissible and not in violation of *corpus delicti* rule where expert testified about effects of the drug and officer testified about defendant’s impaired faculties. Involuntary intoxication instruction not required in this case, and is only involuntary when “alcohol is introduced into a person’s system without his knowledge or by force majeure.” Knowing ingestion of drug is not involuntary.

State v. Hudgins, 167 N.C. App. 705, 606 S.E.2d 443 (2005). Defense of necessity applicable to DWI cases; defense applicable when a person “acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice.” Defense is limited to situations where “a human being was thereby saved from death or peril, or relieved from severe suffering.” Defense assertion that defendant steered runaway truck to avoid its running into a house were questions for the jury.

State v. Gregory, 154 N.C. App. 718, 572 S.E.2d 838 (2002). Neither intoxilyzer test nor field sobriety tests are required to establish that a person’s faculties are appreciably impaired. Officer’s opinion, as a lay witness, is competent to establish that defendant’s faculties are impaired.

State v. Mark, 154 N.C. App. 341, 571 S.E.2d 867 (2002). The following evidence was sufficient to withstand a motion to dismiss, based on a failure to prove that the driving occurred on a street: it took place on “Florida Street”, which was near US Hwy 29 and twice the normal width of a “normal street ‘out in the county’”.

State v. Scott, 146 N.C. App. 283, 551 S.E.2d 916 (2001). Following evidence found to be insufficient to support conviction of impaired driving. (1) Defendant brought vehicle to rest in an intersection upon being told to stop; (2) Defendant left vehicle, approached officer, and reenter vehicle at officer’s request; (3) Officer smelled alcohol coming from vehicle; (4) Open beer bottle on the car seat, half full; (5) Officer noticed odor of alcohol from defendant’s person; (6) Defendant had slurred speech. No evidence of difficulty in controlling the vehicle, no weaving in or out of lane while driving, did not stumble or have any trouble walking. Defendant was compliant, courteous and non-combative. Defendant was not asked to submit to field sobriety tests.

State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (2005). Law enforcement officer who is not qualified by specific training to administer field sobriety tests may testify as to the specific actions he takes and a defendant’s response, and may base his opinion about impairment on the specific conduct of the defendant, but not because the “failed the tests.”

State v. Jones, 140 N.C. App. 691, 538 S.E.2d 228 (2000). A truck tractor, designed to pull a commercial trailer weighing more than 10,000 lbs., is a commercial vehicle even when driven without the trailer. Evidence from an officer that the vehicle was a “transfer truck, tractor trailer truck” and admission from driver that the vehicle weighed 78,000 lbs, when loaded with a load of produce was sufficient to establish that the trailer have a vehicle weight of more than 10,000 lbs.

State v. Fuller, 176 N.C. App. 104, 626 S.E.2d 655 (2006). Officer’s testimony that he relied on Alco-sensor to form his opinion that the defendant was impaired was not error where officer did not reveal results and jury was instructed to disregard the testimony.

State v. Speight, ___ N.C. App. ___, 650 S.E. 2d 452 (Sept. 18, 2007). Failure to submit aggravating factors to jury in DWI sentencing ruled harmless error, under facts of the case, finding evidence that aggravating factor present was overwhelming and uncontroverted. Defendant failed to bring forth facts contesting the omitted element and failed to raise evidence sufficient to support a contrary finding. Factors were use of weapon or device that posed great risk of death to more than one person and killing another person in course of the conduct that led to the conviction. (These two factors related to two separate manslaughter convictions arising out of an impaired driving incident).

State v. Morgan, ___ N.C. App. ___, 660 S.E.2d 545 (15 April 2008). Defendant alleged at district court trial that officer's affidavit used to establish probable cause for arrest was notarized by person who was not authorized to do because the document did not contain the expiration date of the person's commission as a notary. The district court judge dismissed the case due to lack of evidence because there was no probable cause for the arrest without the affidavit, and the affidavit was ruled to be deficient by the district court. Since the dismissal was based on lack of evidence, jeopardy had attached and the case could not be reopened. That is true even though the appellate court stated the court was incorrect as a matter of law to exclude evidence based on the technical violation, since there was other evidence to indicate when the notary's commission would expire.

State v. Wilson, ___ N.C. App. ___, 661 S.E.2d 327 (6 May 2008) (unpublished op.). Defendant failed to file motion to suppress prior to trial in superior court, and failed to meet his burden of establishing that he did not have a reasonable opportunity to make motion before trial. (Note: case arose before 2006 amendments, which impose similar rule in district court motions in impaired driving cases.)

State v. Corbett, ___ N.C. App ___, 661 S.E.2d 759 (17 June 2008). Defendant was charged with misdemeanor DWI by citation on January 7, 2006 in Alamance County. Meanwhile, a grand jury indicted defendant in superior court on September 5, 2006 for misdemeanor DWI and felony habitual DWI. Both charges were based on defendant's operation of a vehicle on January 7, 2006, for which he was cited. The grand jury issued a superseding indictment for the same two offenses on September 25, 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on December 11, 2006.

Defendant's misdemeanor DWI citation was not dismissed from district court after he was indicted in superior court. While his case was pending in superior court, he pled guilty in district court on November 27, 2006 to the misdemeanor DWI offense. The district court continued sentencing until December 27, 2006. After the defendant pled guilty in district court, the state dismissed the felony habitual DWI charge in superior court because of the defendant's plea of guilty in district court to misdemeanor DWI for the January 7 offense.

At defendant's December 27, 2006 sentencing in district court, the state moved to strike defendant's guilty plea. The district court entered an order on December 29, 2006 concluding that because defendant had been indicted for the misdemeanor and felony DWI offenses in superior court on September 5, 2006, the district court lacked jurisdiction to accept defendant's guilty plea on November 27, 2006. Therefore, the district court struck defendant's November 27, 2006 guilty plea to the misdemeanor DWI charge as void ab initio. Defendant was never sentenced for the DWI offense in district court.

After defendant's guilty plea in district court was stricken, a grand jury on January 2, 2007, issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI. Defendant moved to dismiss the new charges in superior court on grounds of Double Jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the state from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charge in superior court as a predicate offense for the felony habitual DWI charge. The superior court denied defendant's motion to dismiss. Defendant pled guilty to the felony habitual DWI charge in exchange for the State dismissing the misdemeanor DWI charge.

Defendant appealed to the court of appeals on the basis that the superior court erroneously failed to dismiss the charges against him based on double jeopardy. The state filed a motion to dismiss the defendant's appeal on the basis that he had no statutory right to appeal his conviction and waived appellate review of his double jeopardy argument.

The first issue before the court was whether defendant waived review of double jeopardy issues by pleading guilty. The court began by noting that a defendant's right to appeal is purely statutory. Under G.S. 15A-1444(e), a defendant who pleads guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. The court concluded that under *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971), the defendant had no right to appeal. In *Hopkins*, the defendant was indicted for first degree burglary, which was later reduced to nonfelonious breaking and entering. The defendant moved to dismiss the charge on double jeopardy grounds, but the court denied the motion. The defendant pled guilty to nonfelonious breaking and entering and appealed his conviction based on the denial of his plea of former jeopardy. The Supreme Court determined the defendant had waived his right to appeal that issue by pleading guilty after his plea of former jeopardy was overruled.

Defendant Corbett argued that *Menna v. New York*, 423 U.S. 61 (1975), controlled – rather than *Hopkins*. In *Menna*, the defendant was indicted in state court in New York for refusing to testify before a grand jury. The defendant moved to dismiss the case on double jeopardy grounds, claiming that he had previously been adjudicated in contempt of court for refusing to testify on the same occasion. The trial court denied the defendant's motion, and the defendant pled guilty to the indictment. The defendant appealed his conviction on Double Jeopardy grounds, and the New York Court of Appeals held that the defendant had waived appellate review of his Double Jeopardy claim by entering a counseled guilty plea.

The U.S. Supreme Court reversed, holding that “[w]here the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law

requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.” In a footnote, the Supreme Court clarified: “We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.”

The state Court of Appeals concluded that even though *Menna* and *Hopkins* conflicted, it was bound by *Hopkins*, the Supreme Court of North Carolina’s interpretation, “until otherwise instructed.”

Judge Elmore dissented, concluding that the Court was bound by *Menna*, and that defendant’s felony habitual DWI conviction should be vacated.

The dissent noted that the U.S. Supreme Court carved out an exception to the general rule applying to collateral challenges to guilty pleas in *Blackledge v. Perry*, 417 U.S. 21 (1974). In *Blackledge*, the defendant was convicted in district court of misdemeanor assault. The defendant gave notice of appeal for a trial de novo in superior court. After the defendant filed his notice of appeal, but before his trial in superior court, the prosecutor obtained an indictment charging the defendant with felony assault based on the same circumstances as the original misdemeanor charge. The defendant pled guilty to the felony charge in superior court. Months later, the defendant filed a habeas corpus petition in federal district court, claiming that the felony indictment for which he pled guilty constituted double jeopardy and deprived him of due process. The district court granted the writ. The U.S. Supreme Court held that the due process clause of the Fourteenth Amendment prohibited the state from responding to defendant’s invocation of his statutory right to appeal by bring a more serious charge. The court further held that the defendant’s guilty plea did not preclude him from challenging his conviction in a habeas corpus proceeding since “[t]he very initiation of the proceedings against him in superior court operated to deny him due process of law.”

The dissent concluded that *Menna*, which was decided a year after *Blackledge*, was directly on point since the trial court could determine the merits of Defendant Corbett’s claim based solely on the indictment without seeking new evidence.

While recognizing that the court of appeals cannot overrule the state supreme court, the dissent reasoned that *Hopkins* did not control as it was decided before *Blackledge* and *Menna* and therefore “was not informed by the constitutional principles later established by the United States Supreme Court in those cases.”

The dissent stated that while a defendant’s right to appeal in a criminal proceeding derives from G.S. 15A-1444, which does not authorize a criminal defendant who pled guilty at trial to challenge his conviction on Double Jeopardy grounds as a matter of right, United States Supreme Court precedent makes clear that under these facts a defendant has the ability under the Fifth and Fourteenth amendments to challenge the

State's power to bring him into court on the impaired driving charge. For these reasons, the dissent concludes that the court should deny the state's motion to dismiss and proceed to the merits.

The dissent began its analysis of the merits by reviewing the lower courts' jurisdiction. Under state statute, district courts have exclusive, original jurisdiction for the trial of misdemeanor criminal actions. G.S. 7A-272(a). Superior courts have exclusive, original jurisdiction over "all criminal actions not assigned to the district court division," including felony criminal actions. G.S. 7A-271(a). Therefore, when defendant was issued the citation for the misdemeanor impaired driving charge on January 7, 2006, the district court gained jurisdiction over the case.

Superior courts, however, have jurisdiction to try a misdemeanor case in limited circumstances, including when the misdemeanor charge is a lesser included offense of a felony on which an indictment has been returned. G.S. 7A-271(a)(1). A lesser included offense is a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime. Impaired driving under G.S. 20-138.1 is a lesser included offense of felony habitual DWI under G.S. 20-138.5 as all of the elements of the lesser charge are required to convict a defendant of the greater charge. Therefore, under G.S. 7A-271(a)(1), the superior court gained jurisdiction to try defendant on the misdemeanor impaired driving charge when the grand jury indicted defendant on the felony habitual impaired driving charge on September 5, 2006.

The dissent disagreed with the state's assertion that the district court lost jurisdiction over the misdemeanor charge when the superior court gained jurisdiction. The dissent recognized that the superior court has jurisdiction over lesser included offense – but not exclusive jurisdiction. The dissent reasoned that when district court has jurisdiction over a misdemeanor criminal action under G.S. 7A-272(a) and a superior court acquires jurisdiction of the action pursuant to G.S. 7A-271(a), the two courts share concurrent jurisdiction in the action. The State may choose to prosecute the action in district or superior court.

Given that the jurisdiction was concurrent, the first court to exercise jurisdiction obtained it to the exclusion of others. The district court accepted Defendant's guilty plea on November 27, 2006, while the superior court did not attempt to exercise jurisdiction until April 2, 2007, when the defendant moved to dismiss and then pled guilty to the misdemeanor and felony DWI offenses. The dissent therefore concluded that the district court obtained jurisdiction to the exclusion of the superior court. The dissent further concluded that jeopardy attached on the misdemeanor impaired driving charge when the district court accepted the defendant's plea and that the superior erred by failing to dismiss the misdemeanor impaired driving charge and the felony habitual DWI charge on Double Jeopardy grounds.

State v. Hernandez, ___ N.C. App. ___, 655 S.E.2d 426 (January 15, 2008). On September 17, 2005, Hernandez and Pedro were involved in an automobile accident at the intersection of NC 210 and Little Kelly Road in Pender County. The car hit a ditch and landed thirty to forty feet away in a bean field. Two Highway Patrol Troopers, Dezso and Henline arrived after the accident. When Trooper Dezso arrived, no one was in the car. Trooper Dezso saw the steering wheel air bag had deployed and there was blood on the airbag. He also noticed Hernandez had blood near his nose and on his shirt. Trooper Henline saw that Pedro had a fabric burn extending from her right shoulder to her collarbone, Hernandez's nose was bleeding, and bloodstains were on his shirt. Trooper Henline asked Hernandez to produce a driver's license. He did not have an NC license in his possession. Later, Pedro told Trooper Henline that she had been driving.

Trooper Henline smelled a strong odor of alcohol from Hernandez. Trooper Henline took Hernandez to a law enforcement center and an Intoxilyzer test was administered, resulting in a BAC of .26. Hernandez was charged with driving while impaired and operating a motor vehicle without a license. Pedro was charged with giving false information for a motor vehicle crash report in violation of G.S. 20-279.31(b).

At trial, Hernandez and Pedro moved to dismiss the charges at the conclusion of the State's evidence. The trial court denied their motions. They moved again to dismiss the charges at the close of all the evidence. The trial court reserved its ruling on those motions. The jury returned guilty verdicts, and defendants moved for judgments notwithstanding the verdicts. The trial court granted the defendants' motions and vacated the jury's verdicts. The State appealed, contending the trial court erred in vacating the jury's verdicts because the evidence was sufficient to submit the case to the jury, and contending that the court erroneously relied on an overruled principle of law that stacking inferences is not permitted in determining guilt or innocence on a motion to dismiss.

Hernandez and Pedro appealed on the basis that the trial court's decision to reserve its ruling on the defendants' motions to dismiss at the close of all the evidence violated G.S. 15A-1227(c) and the defendant's rights under the Fifth and Fourteenth Amendments to the U.S. constitution.

The court of appeals began by reciting the standard of review of a motion to dismiss for insufficient evidence, which is whether the State presented substantial evidence of each element of the offense and "defendant's being the perpetrator." Substantial evidence is relevant evidence that a reasonable person might accept as sufficient to support a conclusion. The court reviews the evidence in the light most favorable to the state, giving every reasonable inference arising from that evidence to the State, even if the same evidence supports reasonable inferences of the defendant's innocence.

The court noted that where the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the crime or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.

The court of appeals noted that G.S. 15A-1445 permits the state to appeal from the superior court to the court of appeals “unless the rule against double jeopardy prohibits further prosecution.” Double jeopardy did not bar the state’s appeal in this case because the jury had rendered verdicts; thus, defendants would not be subject to a second trial if the verdicts were reinstated.

The court of appeals proceeded to review the elements of the charges against Hernandez and the evidence of each. Citing the essential elements of driving while impaired, which are (1) driving any vehicle, (2) upon any highway, street, or public vehicular area within the State, (3) while under the influence of an impairing substance, the court concluded that elements (2) and (3) were uncontroverted. The issue with respect to this charge was whether Hernandez was the driver. The court agreed with the state that a reasonable jury could infer from the physical evidence that Hernandez was the driver based upon Pedro’s right shoulder burn, the lack of blood on the passenger side of the vehicle, the blood on the driver’s side air bag, and blood on Hernandez. This circumstantial evidence of driving also supported the conclusion that Hernandez was the driver of the car also supported the conviction for driving with no operator’s license.

The court further concluded that the state presented substantial evidence that Pedro gave false information in violation of GS 20-279.31(b). Pedro argued that if the state’s evidence was to be believed, she was not the driver and therefore could not be guilty of failure to give information in a reportable accident. Noting that G.S. 20-279.3(b)(1) provides that “[a]ny person who does any of the following commits a Class 1 misdemeanor: (1) Gives information required in a report of a reportable accident, knowing or having reason to believe the information is false,” the court concluded that Pedro “gave information” when she told Trooper Henline that she was the driver and that the identity of the driver is implicitly required to be included in a reportable accident report. Thus, the court concluded that there was substantial evidence of the crime charged and that the jury’s verdict as to Pedro should be reinstated.

As to the trial court’s decision to reserve ruling on the motions to dismiss at the close of all the evidence, the court recognized that G.S. 15A-1227(a) requires that a judge rule on a motion to dismiss for insufficiency of the evidence before the trial can proceed. However, to establish reversible error, the court held that a defendant must show a reasonable probability that had the error not been committed, a different result would have been reached at trial. Defendants argued that had the court ruled on their motions to dismiss before the jury’s verdict, the court’s decision would not have been appealable under G.S. 15A-1445(a). A dismissal granted before a jury verdict bars appeal because reversal on appeal would subject the defendant to a new trial in violation of the Double Jeopardy Clause of the United States Constitution. The court stated that

defendants' argument presumed that their motions would have been granted if the court had entered its decision before the jury reached its verdicts, but noted that the judge's comments indicated that the judge would have denied the motions had he ruled at that stage. Only if there was a reasonable possibility that their pre-verdict motions would be granted would the error be considered prejudicial error; and the court found there was no such reasonable probability. Furthermore, the court concluded that there was sufficient evidence in the record to withstand a motion to dismiss.

State v. Hatley, -- NC App --, 661 S.E.2d 43 (May 20, 2008). Defendant was arrested for DWI and transported to the Cabarrus County Sheriff's Office for an intoxilyzer test. At 3:01 a.m., she was advised of her rights pursuant to G.S. 20-16.2(a). G.S. 20-16.2(a) provides, in pertinent part:

A law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.

Before any type of chemical analysis is administered, the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person notice in writing that:

...

(6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes for longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted your attorney or your witness has not arrived.

Defendant said she wanted to call a witness. She called her daughter and spoke to her at 3:04 a.m. Defendant told the officer that her daughter was on her way to the sheriff's office from Rowan County. While the arresting officer normally informed the front duty officer that a witness was expected, the officer could not specifically remember doing so in this case. The test was delayed 34 minutes to give defendant's daughter time to arrive. Defendant submitted to the test without a witness after 34 minutes. The test concluded at 3:37 a.m. with a result of .11. Defendant was then taken immediately to a magistrate. She ran into her daughter on the way. The arresting officer then directed the defendant's daughter to the magistrate's office and indicated to her that defendant would most likely be released into her custody. Defendant was released into the custody of her daughter on a written promise to appear at 4 a.m.

Amy Hatley, defendant's daughter, testified that she received her mother's call at approximately 3:05 a.m. She immediately left her house and arrived at the Cabarrus County Sheriff's Office approximately 15 minutes later. When she arrived, she told the desk duty officer that she was "there for Debra Hatley." Amy Hatley waited approximately 15 minutes after she arrived. She then saw her mother and the arresting officer, who directed her to the magistrate's office. Amy Hatley did not tell the front desk officer that she was there to witness an intoxilyzer test.

At the end of the suppression hearing, the trial court stated that "[b]ecause Amy Hatley did not tell the officer she was there to be a witness," the motion was denied. The trial court concluded that Defendant's statutory rights were not violated and denied her motion to suppress.

The court of appeals began its analysis by noting that a witness selected to observe testing procedures must make reasonable efforts to gain access to the defendant. And, though a defendant may waive the statutorily prescribed right to select a witness, the denial of the right requires suppression of the intoxilyzer results. See *State v. Myers*, 118 NC App 452, 455 SE2d 492 (1995); *State v. Gilbert*, 85 N.C. App. 594, 355 S.E.2d 261 (1987); *State v. Shadding*, 17 N.C. App. 279, 194 S.E.2d 55 (1973).

The court noted that the trial court's findings establish that 1. Defendant was advised of her right to select a witness to view the testing procedures; 2. Defendant did not waive that right; 3. Defendant notified the officer that she had contacted a witness who was en route; and 4. The witness arrived at the sheriff's office to observe the testing procedures within the statutorily allotted thirty minutes. The state argued that because Amy Hatley did not tell anyone she was at the sheriff's department to witness the intoxilyzer test, defendant was not deprived of her statutory right.

The state relied principally on *State v. Lyle*, 157 N.C. App. 718, 580 S.E.2d 97 (2003) (unpublished op.). In *Lyle*, a Highway Patrolman arrested the defendant for DWI and took him to a law enforcement center. The trooper took the defendant to a test room to administer the intoxilyzer test. Before giving the test, the trooper told the defendant that he had the right to have a witness present. The defendant's wife was in a waiting area in the law enforcement center, but neither the defendant nor the trooper knew she was there. The wife told the dispatcher that she was there to see the defendant, but she was not taken to the test room. The court of appeals held that since neither the trooper nor the defendant knew the wife was at the law enforcement center, and since the dispatcher did not know that the wife was there to witness an intoxilyzer test, the defendant's statutory rights were not violated.

The court of appeals rejected the state's argument, noting, that in the present case, the officer knew that the defendant had contacted a witness and that she was on her way to the sheriff's office. Moreover, the witness, Amy Hatley, testified that she told the dispatcher she was "there for Debbie Hatley" who was "there for . . . a DUI." The court

concluded that Amy Hatley timely arrived and made reasonable efforts to gain access to the defendant and therefore that defendant's statutory right to have a witness view the testing procedure was violated. The court rejected the proposition that a potential witness to an intoxilyzer test must state unequivocally and specifically that he or she has been called to view a test. The court of appeals reversed the trial court's order denying defendant's motion to suppress and the judgment entered upon defendant's guilty plea.

State v. Coffey, __ NC App __, 658 S.E.2d 73 (March 18, 2008). Coffey was charged with DWI, DWLR, speeding 92 in a 45 mph zone, and reckless driving to endanger. At 12:05 a.m. on September 8, 2005, Corporal Anderson of the Caldwell County Sheriff's Department saw defendant's Ford Contour speeding down Connelly Springs Road, a two-lane road. Using a radar gun, Corporal Anderson determined that the vehicle was traveling 92 mph in a 45 mph zone. After passing Corporal Anderson, defendant's vehicle ran off the shoulder of the road, slinging rocks and gravel on to the patrol car. Corporal Anderson turned around and began to follow the defendant. Defendant slowed down, pulled into a driveway and stopped. Corporal Anderson walked up to the vehicle, where defendant was seated in the driver's seat, with his seatbelt on. Corporal Anderson smelled a strong odor of alcohol coming from the car and saw that defendant's eyes were red and glassy. Corporal Anderson asked the defendant to get out of the car. When he did, he had trouble maintaining his balance and used the side of the car to support himself.

Defendant refused to perform field sobriety tests. Corporal Anderson arrested him. When Corporal Anderson asked defendant to submit to an intoxilyzer test, defendant responded: "I'm not doing a f----- thing or signing sh--." After reviewing defendant's vehicle registration and license information, Corporal Anderson determined that defendant was driving with a suspended license.

The jury found the defendant guilty of driving while impaired, speeding in excess of 80 mph in a 45 mph and reckless driving. The trial court sentenced defendant to a Level 1 term of imprisonment of 24 months, finding two grossly aggravating factors: (1) that defendant had been convicted of a prior offense of driving while impaired within the last seven years; and (2) at the time of the current offense, defendant was driving while his license was revoked due to an impaired driving revocation.

Defendant argued that the trial court's imposition of a sentence in the aggravated range violated *Blakely v. Washington*, 542 U.S. 296 (2004), and his Sixth Amendment right to trial by jury. He argued that the trial court should have submitted to the jury the issue of whether he was driving while his license was revoked for a prior impaired driving license revocation. The court finds that the trial court should have submitted this issue to the jury but that its failure to do so was harmless beyond a reasonable doubt.

Blakely holds that a court may not enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factor beyond a reasonable

doubt. There is an exception for aggravating factors that the defendant admits to personally or through counsel, see *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915, 918 (2007), but the court determined that it did not apply in this case.

Under the harmless error standard, the court must determine from the record whether the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt. *State v. Blackwell*, 361 NC 41, 49, 638 S.E.2d 452, 458 (2006). The court then noted that, pursuant to G.S. 20-19(c1) when a person's license is revoked for impaired driving, the revocation period is one year, unless prior impaired driving convictions require a three-year or permanent revocation under G.S. 20-19(d) or (e). The court further noted that the period of revocation is extended indefinitely until DMV receives certification that the driver has completed an alcohol and drug education traffic (ADET) school or a substance abuse treatment program. G.S. 20-17.6(b)(c). The court rejected the defendant's argument that once the one-year period for revocation expired, he was merely guilty of driving without a valid operator's license rather than DWLR. The court held that G.S. 20-17.6(b) extends the period of revocation due to an impaired driving conviction from a one-year period to an indefinite period of time. The court noted that defendant's driving record, which was admitted into evidence by the State, showed that defendant's license was indefinitely revoked due to his October 31, 2001 impaired driving conviction and that it had not been reinstated. The court found "overwhelming and uncontroverted" evidence that at the time of the offense defendant was driving while his license was revoked for a prior impaired driving revocation and concluded that if the case were remanded to the jury for determination of the aggravating factor, there was no serious question regarding whether the State would offer identical evidence in support of that aggravator.

The defendant also contended that the court erred in denying his motion to dismiss the charges of driving while impaired and reckless driving to endanger at the close of the state's evidence. The court made short work of overruling these assignments of error.

License Revocations

State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2002). Increase in length of pretrial revocation under CVR statute (GS 20-16.5) does not reflect legislative purpose to make it a "punishment" for double jeopardy purposes (notwithstanding some public statements by governmental leaders that could be read as reflecting that purpose); nor is the effect punitive, nor is the fact that limited privileges require economic resources not available to everyone.

Cooke v. Faulkner, 137 N.C. App. 755, 529 S.E.2d 512 (2000). Courts have no jurisdiction to review permanent revocations entered pursuant to GS 20-138.5 (habitual DWI).

State v. Bowes, 360 NC 55, 619 S.E.2d 502 (2005), vacated court of appeals decision reported at 159 N.C. App. 18, 583 S.E.2d 294 (2003) and dismissed appeal to supreme court as moot. Vacated court of appeals opinion had held that trial court was authorized to grant limited driving privilege, such that judgment was binding on DMV, even if entered contrary to law; statute authorizing DMV to determine if limited driving privilege would be recognized as valid violated separation of powers doctrine; and DMV's invalidation of defendant's limited driving privilege violated defendant's right to due process.

State v. Reid, 148 N.C. App. 548, 559 S.E.2d 561 (2002). Revocation under CVR statute (GS 20-16.5) without the availability of a limited privilege to operate a commercial vehicle is not "punishment" and thus it was not double jeopardy to also try and convict the defendant for the conduct that led to the license revocation.

State v. Streckfuss, 171 N.C. App. 81, 614 S.E.2d 323 (2005). Revocation under CVR statute (GS 20-16.5) of license of an out-of-state resident was not "punishment" and thus it was not double jeopardy to also try and convict the defendant for the conduct that led to the license revocation; the fact that the driver might have been unable to drive in his home state during the period was not sufficient to convert the license revocation to one that constituted "punishment" for double jeopardy purposes.

State v. Benbow, 169 N.C. App. 297, 610 S.E.2d 297 (2005). Trial court has no jurisdiction to exempt motorist from requirement that he or she use an ignition interlock as a condition of getting a restored license, even if medical testimony suggests that is an appropriate thing to do. (*Note: 2006 legislation addressed this issue, for offenses committed on or after 12.1.06.*)

State v. Hinchman, __ N.C. App ____, __ S.E.2d __ (16 September 2008). On June 23, 2004, defendant (who was then under 21) and some of his friends were drinking alcohol at defendant's parents' house. They then left the house in defendant's car. Defendant lost control of the car and hit a guard rail. The car turned over. Trooper William Brown of the State Highway Patrol arrived on the scene minutes after the crash. Defendant said that he was driving and that he was not hurt. Trooper Brown smelled alcohol on defendant's breath and saw that his eyes were red and glassy. Trooper Brown also noticed that the defendant did not look like he was 21. Trooper Brown arrested the defendant and charged him with impaired driving [G.S. 20-138.1], driving after consuming by a person under 21 [G.S. 20-138.3], and reckless driving [G.S. 20-140]. Trooper Brown had a permit from the North Carolina Department of Health and Human Services (DHHS) allowing him to administer chemical analyses of blood, and he took the defendant to Pitt County Memorial Hospital to have blood drawn. June Anderson, an employee of the blood laboratory at the hospital drew the defendant's blood. Trooper Brown submitted the blood to the SBI for chemical analysis. The blood was analyzed by SBI chemical analyst Richard Waggoner, who held a DHHS permit to perform chemical analysis of blood. Waggoner analyzed the blood sample and completed a laboratory

report on August 30, 2004, which stated that testing revealed a blood alcohol concentration (BAC) of .10.

On September 16, 2004, the defendant was served with the laboratory report. Trooper Brown 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, in defendant's absence, ordering him to surrender his driver's license and revoking his license for a minimum of thirty days pursuant to G.S. 20-16.5. Defendant surrendered his license on November 10, 2004.

On November 18, 2004, defendant filed a motion to dismiss the impaired driving charge on the basis that revocation of his license was criminal punishment and that further prosecution would subject him to double jeopardy. On April 11, 2005, the district court granted defendant's motion and later entered a written order dismissing all the charges. The district court found that "[t]he revocation of Defendant's drivers license, approximately 140 days after the date of the offense, does not constitute the necessary prompt legal action to remove Defendant from the highways of North Carolina in order to protect the public and therefore, is punishment which prohibits further prosecution of the Defendant for these charges which would subject him to double jeopardy."

The state appealed the district court's order to superior court pursuant to G.S. 15A-1432. Defendant moved to dismiss the state's appeal. The superior court vacated the order dismissing the charges and remanded the case to district court.

On January 25, 2007, the district court found defendant guilty of impaired driving. Defendant appealed to superior court, where he again filed a motion to dismiss based upon double jeopardy. The superior court denied the motion to dismiss, concluding that its previous order was the law of the case, and that defendant was not twice put in jeopardy for the same offense.

Defendant was tried before a jury, which found him guilty on July 27, 2007. The defendant appealed his conviction and sentence to the court of appeals.

1. Defendant argued that the revocation report was not properly executed and was not "expeditiously filed" with the court, as required by G.S. 20-16.5(c) because it was filed 132 days after his arrest. The court of appeals noted that G.S. 20-16.5(c) requires the charging officer to ensure that the affidavit and revocation report is "expeditiously filed with a judicial official" and that G.S. 20-16.5(g) permits a defendant to contest the validity of a revocation by filing a request for hearing within 10 day of the effective date of the revocation. Because the defendant did not request a hearing to contest the validity of the revocation through the means

prescribed in G.S. 20-16.5(g), the court found that the issue was not properly preserved.

2. The defendant then argued that the court erred in denying his motion to dismiss the State's motion to appeal because the State's motion was filed in the wrong division of the court and failed to specify the legal basis of its appeal. The court summarily rejected the first argument, finding the state's assertion that "no competent evidence was presented to support the motion and order to dismiss" and that the dismissal was "contrary to law," a sufficient statement of the basis for appeal. The court further concluded that the district court caption on the State's motion to appeal, even if incorrect, was not prejudicial to the defendant and did not deprive the superior court of jurisdiction.
3. The defendant further contended that the trial court erred in admitting evidence related to the chemical analysis of his blood because the state failed to establish that June Anderson, the person who withdrew his blood, was a qualified person and the laboratory report and the chemical analyst's permit were inadmissible testimonial evidence under *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals determined that Trooper Brown's testimony that Anderson was a lab technician at the hospital was sufficient to show that she was a qualified person under G.S. 20-139.1(c).
4. The court further determined that introduction of the laboratory report and chemical analyst's permit was proper. Citing its holding in *State v. Heinrich*, 183 N.C. App. 585, 591, 645 S.E.2d 147, 151, disc. review denied, 362 N.C. 90, 656 S.E.2d 593 (2007), that a chemical analyst's affidavit is nontestimonial evidence under *Crawford* when the "affidavit [i]s limited to [the analyst's] objective analysis of the evidence and routine chain of custody information," the court determined that the laboratory report for the defendant's blood sample was properly admitted into evidence. The court further determined that the chemical analyst's permit was not testimonial evidence inadmissible pursuant to *Crawford* since the permit was "neutral evidence . . . created to serve a number of purposes other than to be used as evidence at trial, and [] is not the type of testimonial evidence described in *Crawford*."
5. Finally, the court addressed the defendant's contention that his conviction of DWI after his license was revoked subjected him to double jeopardy in violation of the U.S. and N.C. Constitutions. The court began by citing its determination in *State v.*

Evans, 145 N.C. App. 324, 334, 550 S.E.2d 853, 860 (2001), that a license revocation pursuant to G.S. 20-16.5 is a civil remedy rather than a criminal punishment. The court rejected the defendant's contention that *Evans* was inapplicable because the 135 day delay between his arrest and license revocation did not serve the intended purpose of the statute. The court of appeals cited *Hudson v. United States*, 522 U.S. 93 (1997), as establishing the principle that the criminal or civil nature of a sanction is "determined on the face of the statute" rather than on "an individual basis." Accordingly, the court relied upon *Evans* in concluding that the defendant's 2004 license revocation was a civil remedy. Thus, the court held that the defendant's right to be free from double jeopardy was not violated by his trial and conviction for a crime after the civil revocation.

State v. Corbett, ___ N.C. App ___, 661 S.E.2d 759 (17 June 2008). Defendant was charged with misdemeanor DWI by citation on January 7, 2006 in Alamance County. Meanwhile, a grand jury indicted defendant in superior court on September 5, 2006 for misdemeanor DWI and felony habitual DWI. Both charges were based on defendant's operation of a vehicle on January 7, 2006, for which he was cited. The grand jury issued a superseding indictment for the same two offenses on September 25, 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on December 11, 2006.

Defendant's misdemeanor DWI citation was not dismissed from district court after he was indicted in superior court. While his case was pending in superior court, he pled guilty in district court on November 27, 2006 to the misdemeanor DWI offense. The district court continued sentencing until December 27, 2006. After the defendant pled guilty in district court, the state dismissed the felony habitual DWI charge in superior court because of the defendant's plea of guilty in district court to misdemeanor DWI for the January 7 offense.

At defendant's December 27, 2006 sentencing in district court, the state moved to strike defendant's guilty plea. The district court entered an order on December 29, 2006 concluding that because defendant had been indicted for the misdemeanor and felony DWI offenses in superior court on September 5, 2006, the district court lacked jurisdiction to accept defendant's guilty plea on November 27, 2006. Therefore, the district court struck defendant's November 27, 2006 guilty plea to the misdemeanor DWI charge as void ab initio. Defendant was never sentenced for the DWI offense in district court.

After defendant's guilty plea in district court was stricken, a grand jury on January 2, 2007, issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI. Defendant moved to dismiss the new charges in superior court on grounds of Double Jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the state from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charge in superior court as a predicate offense for the felony habitual DWI charge. The superior court denied defendant's motion to dismiss. Defendant pled guilty to the felony habitual DWI charge in exchange for the State dismissing the misdemeanor DWI charge.

Defendant appealed to the court of appeals on the basis that the superior court erroneously failed to dismiss the charges against him based on double jeopardy. The state filed a motion to dismiss the defendant's appeal on the basis that he had no statutory right to appeal his conviction and waived appellate review of his double jeopardy argument.

The first issue before the court was whether defendant waived review of double jeopardy issues by pleading guilty. The court began by noting that a defendant's right to appeal is purely statutory. Under G.S. 15A-1444(e), a defendant who pleads guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. The court concluded that under *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971), the defendant had no right to appeal. In *Hopkins*, the defendant was indicted for first degree burglary, which was later reduced to nonfelonious breaking and entering. The defendant moved to dismiss the charge on double jeopardy grounds, but the court denied the motion. The defendant pled guilty to nonfelonious breaking and entering and appealed his conviction based on the denial of his plea of former jeopardy. The Supreme Court determined the defendant had waived his right to appeal that issue by pleading guilty after his plea of former jeopardy was overruled.

Defendant Corbett argued that *Menna v. New York*, 423 U.S. 61 (1975), controlled – rather than *Hopkins*. In *Menna*, the defendant was indicted in state court in New York for refusing to testify before a grand jury. The defendant moved to dismiss the case on double jeopardy grounds, claiming that he had previously been adjudicated in contempt of court for refusing to testify on the same occasion. The trial court denied the defendant's motion, and the defendant pled guilty to the indictment. The defendant appealed his conviction on Double Jeopardy grounds, and the New York Court of Appeals held that the defendant had waived appellate review of his Double Jeopardy claim by entering a counseled guilty plea.

The U.S. Supreme Court reversed, holding that “[w]here the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.” In a footnote, the Supreme Court clarified: “We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.”

The state court of appeals concluded that even though *Menna* and *Hopkins* conflicted, it was bound by *Hopkins*, the Supreme Court of North Carolina's interpretation, “until otherwise instructed.”

Judge Elmore dissented, concluding that the court was bound by *Menna*, and that defendant's felony habitual DWI conviction should be vacated.

The dissent noted that the U.S. Supreme Court carved out an exception to the general rule applying to collateral challenges to guilty pleas in *Blackledge v. Perry*, 417 U.S. 21 (1974). In *Blackledge*, the defendant was convicted in district court of misdemeanor assault. The defendant gave notice of appeal for a trial de novo in superior court. After

the defendant filed his notice of appeal, but before his trial in superior court, the prosecutor obtained an indictment charging the defendant with felony assault based on the same circumstances as the original misdemeanor charge. The defendant pled guilty to the felony charge in superior court. Months later, the defendant filed a habeas corpus petition in federal district court, claiming that the felony indictment for which he pled guilty constituted double jeopardy and deprived him of due process. The district court granted the writ. The U.S. Supreme Court held that the due process clause of the Fourteenth Amendment prohibited the state from responding to defendant's invocation of his statutory right to appeal by bring a more serious charge. The court further held that the defendant's guilty plea did not preclude him from challenging his conviction in a habeas corpus proceeding since "[t]he very initiation of the proceedings against him in superior court operated to deny him due process of law."

The dissent concluded that *Menna*, which was decided a year after *Blackledge*, was directly on point since the trial court could determine the merits of Defendant Corbett's claim based solely on the indictment without seeking new evidence.

While recognizing that the court of appeals cannot overrule the state supreme court, the dissent reasoned that *Hopkins* did not control as it was decided before *Blackledge* and *Menna* and therefore "was not informed by the constitutional principles later established by the United States Supreme Court in those cases."

The dissent stated that while a defendant's right to appeal in a criminal proceeding derives from G.S. 15A-1444, which does not authorize a criminal defendant who pled guilty at trial to challenge his conviction on Double Jeopardy grounds as a matter of right, United States Supreme Court precedent makes clear that under these facts a defendant has the ability under the Fifth and Fourteenth amendments to challenge the State's power to bring him into court on the impaired driving charge. For these reasons, the dissent concludes that the court should deny the state's motion to dismiss and proceed to the merits.

The dissent began its analysis of the merits by reviewing the lower courts' jurisdiction. Under state statute, district courts have exclusive, original jurisdiction for the trial of misdemeanor criminal actions. G.S. 7A-272(a). Superior courts have exclusive, original jurisdiction over "all criminal actions not assigned to the district court division," including felony criminal actions. G.S. 7A-271(a). Therefore, when defendant was issued the citation for the misdemeanor impaired driving charge on January 7, 2006, the district court gained jurisdiction over the case.

Superior courts, however, have jurisdiction to try a misdemeanor case in limited circumstances, including when the misdemeanor charge is a lesser included offense of a felony on which an indictment has been returned. G.S. 7A-271(a)(1). A lesser included offense is a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.

Impaired driving under G.S. 20-138.1 is a lesser included offense of felony habitual DWI under G.S. 20-138.5 as all of the elements of the lesser charge are required to convict a defendant of the greater charge. Therefore, under G.S. 7A-271(a)(1), the superior court gained jurisdiction to try defendant on the misdemeanor impaired driving charge when the grand jury indicted defendant on the felony habitual impaired driving charge on September 5, 2006.

The dissent disagreed with the state's assertion that the district court lost jurisdiction over the misdemeanor charge when the superior court gained jurisdiction. The dissent recognized that the superior court has jurisdiction over lesser included offense – but not exclusive jurisdiction. The dissent reasoned that when district court has jurisdiction over a misdemeanor criminal action under G.S. 7A-272(a) and a superior court acquires jurisdiction of the action pursuant to G.S. 7A-271(a), the two courts share concurrent jurisdiction in the action. The State may choose to prosecute the action in district or superior court.

Given that the jurisdiction was concurrent, the first court to exercise jurisdiction obtained it to the exclusion of others. The district court accepted Defendant's guilty plea on November 27, 2006, while the superior court did not attempt to exercise jurisdiction until April 2, 2007, when the defendant moved to dismiss and then pled guilty to the misdemeanor and felony DWI offenses. The dissent therefore concluded that the district court obtained jurisdiction to the exclusion of the superior court. The dissent further concluded that jeopardy attached on the misdemeanor impaired driving charge when the district court accepted the defendant's plea and that the superior erred by failing to dismiss the misdemeanor impaired driving charge and the felony habitual DWI charge on Double Jeopardy grounds.

Chemical Testing

State v. Hatley, ___ N.C. App. ___, ___ S.E.2d ___ (May 20, 2008). Witness to intoxilizer test arrived fifteen minutes after being called by defendant and before test was to be conducted. Witness identified and described to the front desk officer that she was there to see the defendant for a "DUI". Testing officer knew witness had been contacted and was on the way. On those facts, defendant's right to witness to view test were violated and test results suppressed.

State v. Corriher, N.C. App. , 645 SE2d 413 (2007). State forensic scientist allowed to offer expert testimony on the effect of leaving a blood sample in an unrefrigerated place (patrol car) for 12 days. (Effect is to lower the blood alcohol concentration from what it would have been had the sample been properly preserved.) Any evidence of lack of supporting data in this particular study goes to weight of evidence, but is not sufficient

to establish that the study used was not sufficiently reliable to justify excluding the evidence.

State v. Teate, N.C. App. , 638 S.E.2d 29 (2006). Alco-Sensor results admissible to determine probable cause to arrest. Officer was not certified to conduct field sobriety tests or roadside breath test, but defendant failed to object, so no error for court to consider the results. Retrograde extrapolation of breath test result was admissible; expert was qualified, method was reliable, evidence was relevant and probative value outweighed any prejudice.

State v. Highsmith, 173 N.C. App. 600, 619 S.E.2d 586 (2005). Failure of state to request chemical analysis does not raise an inference of a defendant's sobriety.

State v. Taylor, 165 N.C. App. 750, 600 S.E.2d 483 (2004). Retrograde extrapolation expert testimony admissible when based on average elimination rate and on only one test of defendant's BAC.

State v. McDonald, 151 N.C. App. 236, 565 S.E.2d 273 (2002). Results of test on blood sample left in patrol car for three days admissible where state demonstrates compliance with provisions of GS 20-139.1, even though State Highway Patrol requires that sample be left in vehicle for no more than one hour. Error, if any, goes to weight and not to admissibility of evidence.

State v. Roach, 145 N.C. App. 159, 548 S.E.2d 841 (2001). Failure of chemical analyst to testify that he or she has a valid permit to administer a breath test is error and test result must be suppressed; unless jury verdict is clearly based on impairment of faculties prong of GS 20-138.1, must be retried.

State v. Davis, 142 N.C. App. 81, 542 S.E.2d 236 (2001). Blood test results from sample taken pursuant to search warrant admissible, even though in giving implied consent warnings, defendant told he had right to refuse to be tested. Evidence of refusal admissible, even though defendant not told that if he refused implied consent test, he could still be tested pursuant to other authority. Extrapolation from blood test results admissible.

State v. Thompson, 154 N.C. App. 194, 571 S.E.2d 673 (2002). There is no requirement that a chemical analyst actually hand a defendant a copy of the implied consent rights before the analyst reads the rights to the defendant if there is a copy in front of the defendant and the defendant is given a copy after the test is completed.

State v. Tappe, 139 N.C. App., 533 S.E.2d 262 (2000). Chemical analyst's testimony that he was in habit of performing simulator test was sufficient to establish compliance with regulations governing chemical testing, in a case in which there was ten years between the arrest and the trial.

State v. Fuller, 176 N.C. App. 104, 626 S.E.2d 655 (2006). Expert in retrograde extrapolation may give opinion as to alcohol concentration at the time officer made contact with defendant; that time is a relevant time after the driving even though there was a time gap between the accident and the officer's arriving at the scene (There was no evidence of intervening drinking). It was permissible to show expert's calculations to the jury. (Extrapolation resulted in opinion that reading of 0.07 would have been 0.08 at time of contact with officer). Expert's testimony alone was sufficient to survive motion to dismiss, if other elements proved.

State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (12 June 2008), *reversing in part*, 184 N.C. App. 401 (3 July 2007). Evidence at trial established that on October 28, 2004, the defendant was playing poker and drinking alcoholic beverages with friends. He drove away from the poker game in his own car. Witnesses testified that they saw defendant's car speeding and moving erratically moments before it crashed, swerving around other vehicles and on to the shoulder of the road. Shortly after midnight on October 29, 2004, defendant crashed his car into a car parked on the shoulder of I-40/I-85. Three men were sitting inside the parked car. One of the men was killed. The other two men were seriously injured.

The defendant was taken to a hospital after the crash. A paramedic in the ambulance smelled alcohol on his breath. Defendant told the paramedic he had drunk a couple of beers. At the hospital, an emergency department physician wrote on defendant's medical records that defendant was "intoxicated." A blood sample drawn at 1:30 a.m. had a blood alcohol concentration (BAC) of .059. The hospital's medical records for defendant also included a notation that defendant "admits to alcohol and cannabis." On February 14, 2005, defendant was indicted for second-degree murder and two counts of assault with a deadly weapon inflicting serious injury. On March 23, 2005, defendant filed a "Request for Voluntary Disclosure" pursuant to Article 48 of Chapter 15A of the NC General Statutes. Defendant sought in this request the name and curriculum vitae of each expert witness the state intended to call, a summary of each expert opinion the State intended to present, and the results of all reports of scientific tests or studies made in connection with the case. Defendant filed a second discovery request on January 18, 2006.

The state retained Paul Glover, a research scientist and training specialist with the Forensic Test for Alcohol Branch at the NC Department of Health and Human Services, as an expert witness in blood analysis and the effects of alcohol and drugs on human performance and behavior. Before defendant's trial, Glover had testified approximately 100 times in North Carolina courts regarding toxicology reports.

In a January 13, 2006 report, Glover prepared a retrograde extrapolation of defendant's blood alcohol concentration at the time of the crash. Retrograde extrapolation is a mathematical analysis in which a known BAC is used to determine what an individual's

BAC would have been at a specified earlier time. The analysis determines the prior BAC based on two factors: (1) the time elapsed between the driving event and the blood test; and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. Glover's initial retrograde extrapolation report used defendant's 3 a.m. blood test along with an average blood alcohol elimination rate. This analysis resulted in an estimated BAC of .08 at the time of the crash.

Defendant's trial was set for Monday February 20, 2006. On Wednesday, February 15, 2006, the state notified defendant that Glover would testify as an expert witness and provided Glover's curriculum vitae. On the afternoon of Friday, February 17, 2006, the state sent to defendant Glover's retrograde extrapolation report, which the prosecutor testified he received that day.

Defendant filed a motion to continue the trial upon receiving the report, citing GS 15A-903(a)(2) and arguing that the State had failed to notify him of Glover's expert opinion within a reasonable time before trial. Defendant's counsel said that because of the late notice, he did not have sufficient time to find and consult an expert to rebut Glover's testimony.

The trial court denied defendant's motion to continue. Glover testified that he was able to calculate the rate at which defendant metabolized alcohol because his blood was tested two different times after the crash. Glover testified that based upon defendant's actual blood elimination rate of .0147 in lieu of an average blood elimination rate of .0172, he calculated that defendant had a BAC of .07 at the time of the crash. This was lower than the .08 BAC Glover calculated in the January 2006 report. Glover further testified that the toxicology screen showed amphetamines and marijuana in defendant's blood and that the combination of alcohol, amphetamines, and marijuana in defendant's system could increase defendant's impairment.

The jury found defendant guilty of second-degree murder and both counts of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to consecutive prison terms of 176 to 221 months for second-degree murder and 27 to 42 months for each count of assault. Defendant appealed his second-degree murder conviction to the Court of Appeals, arguing that the trial court abused its discretion by denying his motion to continue.

In a divided opinion the court of appeals found no error in part and remanded in part. In its mandate remanding the case, the majority instructed the trial court to hold a hearing to make findings of fact and conclusions of law concerning whether the State complied with GS 15A-903 when it provided Glover's curriculum vitae and retrograde extrapolation report. The dissenting judge believed the trial court properly denied the continuance pursuant to *State v. Fuller*, 176 NC App 104, 626 SE2d 655 (2006). The state appealed to the Supreme Court on the basis of the dissent.

The state supreme court began its analysis by noting that a defendant's rights to discovery are statutory, not constitutional, as there is no general constitutional or common law right to discovery in criminal cases. The court concluded that the state violated G.S. 15A-903(a)(2) when it failed to furnish the defendant with sufficient notice of its intent to use blood alcohol concentration retrograde extrapolation evidence within a reasonable time before trial. The court determined that *State v. Fuller*, a court of appeals case in which the court found no error in the trial court's denial of a continuance based on the state's notification to the defendant the morning of trial of its intent to call an expert witness on blood alcohol retrograde extrapolation, did not control. The supreme court distinguished *Fuller*, a misdemeanor impaired driving case that originated with in district court, on the basis that the statutory discovery requirements at issue apply only to cases within the original jurisdiction of the superior court. The supreme court further distinguished *Fuller* on the basis that *Fuller* moved to dismiss the case rather than simply for a continuance.

The supreme court then concluded that the trial court's denial of the defendant's motion for a continuance was an abuse of discretion, though it cautioned that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. Moreover, the court proceeded to hold that it could grant a new trial only if the defendant's case was prejudiced by the error. Thus, the court applied harmless error analysis.

The court found that the error was harmless beyond a reasonable doubt. Noting that the defendant's continuance motion "only sought more time to prepare a defense for Glover's testimony," the court determined that even if a continuance had provided defendant sufficient time to obtain an expert who rebutted Glover's testimony in its entirety, "the State had abundant other admissible evidence of defendant's impairment, including witnesses who observed defendant's consumption of alcohol at the poker game; witnesses who saw defendant's erratic driving just before the crash; a paramedic in the ambulance who smelled alcohol on defendant's breath; defendant's admission to the paramedic that he had consumed alcohol; a physician's note on defendant's medical records that defendant was 'intoxicated'; the results of two blood samples showing alcohol, amphetamines and marijuana in defendant's system shortly after the wreck; and the notation in defendant's medical records on the morning after the crash that he admitted to alcohol and marijuana consumption." The court found that the "extrapolation testimony was but a thread in the web of evidence presented by the State."

Thus, the supreme court reversed the court of appeals and vacated its remand to the trial court.

Checkpoints

State v. Veazey, ___ N.C. App. ___, 662 S.E.2d 683 (1 July 2008). Around 5 p.m. on January 1, 2006, Trooper Carroll of the State Highway Patrol set up a driver's license checkpoint on Hwy 311 near the town of Walnut Cove. Forty minutes later, Thomas Marland Veazey (the defendant) drove up to the checkpoint. Trooper Carroll asked the defendant for his drivers license and registration. Defendant gave Trooper Carroll an out-of-state license and a North Carolina registration. Trooper Carroll smelled a strong odor of alcohol coming from defendant's car and saw that the defendant's eyes were red and glassy. Trooper Carroll told the defendant to drive to the shoulder of the highway. Trooper Carroll then performed a sobriety test on defendant. He determined that defendant was impaired and arrested him for DWI. A chemical analysis resulted in a BAC of .08.

Before trial, the defendant moved to suppress all evidence obtained by Trooper Carroll as a result of the checkpoint on the basis that the checkpoint violated his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.

The trial court heard defendant's motion on February 26, 2007. Trooper Carroll was the only witness to testify. The trial court made the following oral findings and conclusions:

[The Court is] going to deny the Motion to Suppress, and finds that the license checkpoint was not an unreasonable detention; and therefore, was valid under the Fourth Amendment. The officers had complied with the necessities of setting up a checkpoint. There were two officers who participated in this checkpoint The trooper checked with his supervisor and verified that he was going to have a-set up a checkpoint. He's not met with any objection. Said the purpose of the checkpoint was to-for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina. It was set up in a safe place, systematically done. They chose to stop every vehicle. And that upon stopping [Defendant] in this case the officers, the officer observed a strong odor of alcohol. And he further investigated the matter to make a determination as to whether or not [Defendant] was operating a vehicle while impaired. Court finds those facts and finds as a matter of law that the license checkpoint was not an unreasonable detention, and was valid under the Fourth Amendment.

The trial court did not issue a written order on February 26, 2007. The defendant pled guilty on June 5, 2007, preserving the right to appeal the trial court's denial of his motion to suppress. The trial court sentenced the defendant to 60 days in prison but

suspended the sentence and placed the defendant on probation for 12 months. Defendant then gave oral notice of appeal from the trial court's denial of his motion to suppress.

The trial court issued a final written order denying defendant's motion to suppress on November 19, 2007. In the order the trial court stated that Trooper Carroll admitted the checkpoint was a "generalized checking station" and that he had significant discretion in operating it. Nonetheless, the trial court concluded that the checkpoint was proper and lawful and denied the motion to suppress. The court also voided the defendant's prior oral notice of appeal because it was entered before the court's written order denying defendant's motion to suppress. Defendant filed a new notice of appeal on November 19, 2007 from the order denying his motion to suppress. The court of appeals began its analysis by reviewing Supreme Court cases on the reasonableness of searches and seizure under the Fourth Amendment. The United States Supreme Court's held in *Terry v. Ohio*, 392 U.S. 1 (1968), that the Fourth Amendment usually requires that a search or seizure be based upon consent or individualized suspicion of the person to be searched or seized. The Supreme Court has, however, recognized that vehicles may be briefly detained at checkpoints without individualized suspicion if the purpose of the checkpoint is legitimate and the checkpoint itself is reasonable. *United States v. Martinez-Fuerte*, 428 U.S. 543, 56 (1976). A reviewing court must undertake a two-part inquiry to determine whether a checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42 (2000). In *Edmond*, the U.S. Supreme Court distinguished between checkpoints with a primary purpose related to roadway safety and checkpoints with a primary purpose related to general crime control. Checkpoints primarily aimed at addressing immediate highway safety threats can justify the intrusion on drivers' Fourth Amendment privacy interests brought about by suspicionless stops. Police must, however, have individualized suspicion to detain a vehicle for general crime control purposes. Thus, a checkpoint with a primary purpose of general crime control violates the Fourth Amendment. *Edmond*, 531 U.S. at 41-42 (finding unconstitutional a checkpoint with a primary purpose of interdicting illegal narcotics and stating that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life").

The Supreme Court in *Edmond* noted that a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers. Otherwise "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also include a license or sobriety check. " Upon determining that the primary purpose of the checkpoint is legitimate, the second prong of the two-prong analysis requires that the court judge the reasonableness of the stop. To determine the reasonableness of the intrusion under the Fourth Amendment,

the court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. This requires the court to weigh (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. *Brown v. Texas*, 443 U.S. 47, 51 (1979). If, on balance, these factors weigh in favor of the public interest the checkpoint is reasonable and therefore constitutional. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (holding that police did not violate Fourth Amendment by conducting a checkpoint aimed at gathering information obtain information about a hit-and-run accident occurring about one week earlier at the same location and time of night).

After setting forth the applicable Fourth Amendment principles, the court of appeals turned to its review of the trial court's findings of fact. The state argued that the court should consider only the trial court's oral findings and conclusions at the February 26, 2007 hearing because once the defendant appealed that ruling on June 5, 2007, the trial court no longer had jurisdiction to enter a written order containing findings of fact different from those it announced on February 26, 2007. The court did not reach the issue of whether the court's written order containing findings of fact that differed from the oral findings of the court issued before the notice of appeal had to be vacated, finding instead that its conclusion would be the same regardless of which findings it considered.

As to the primary programmatic purpose of the checkpoint, the court noted that it had previously held that where there is no evidence to contradict the State's proffered purpose for the checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. *State v. Burroughs*, 185 N.C. App. 496, 648 S.E.2d 561 (2007). However, where there is evidence that could support a finding of an unlawful purpose, the trial court cannot rely solely on the officer's statements regarding the checkpoint's purpose but instead must closely review the scheme at issue. The court of appeals concluded that the evidence was conflicting regarding the State's primary purpose. The court cited Trooper Carroll's testimony that the purpose was "[t]o enforce any kinds of motor vehicle law violations," and as well as his testimony that he was "looking for all violations," including criminal violations that were not motor vehicle violations. Trooper Carroll also testified that the primary purpose of the checkpoint was to check for to check for driver's license, registration and insurance violations, as contrasted from all motor vehicle violations.

[The court noted that the U.S. Supreme Court had previously indicated that checking for drivers license and vehicle registration violations is a lawful purpose for a checkpoint and that the North Carolina courts had upheld checkpoints designed to uncover drivers license and vehicle registration violations. However, the court reiterated that a checkpoint designed to find any and all criminal violations is unconstitutional, even if the police have secondary objectives related to highway safety. The court further stated that it was unclear whether a primary purpose of finding any and all motor vehicle

violations is a lawful primary purpose. The court recognized that checkpoints are an appropriate tool for helping police discover certain types of motor vehicle violations, such as the requirement that a driver be licensed and have insurance, since police cannot detect those types of violations simply by observing a vehicle during normal road travel. Checkpoints may not, however, be appropriate to enforce motor vehicle violations that are readily observable.]

The court of appeals held that the trial court was required to make findings regarding the actual primary purpose of the checkpoint and was required to reach a conclusion reading whether this purpose was lawful. Merely reciting Trooper Brown's testimony, as the court did in its oral findings and later in its written order, did not constitute a finding of fact resolving the conflicting evidence. Therefore, the court remanded the case to the trial court to issue new findings and conclusions regarding the primary programmatic purpose of the checkpoint.

Even if the trial court had determined that the primary programmatic purpose of the checkpoint was lawful, it was then required to apply the three prong inquiry set out in *Brown* to determine whether the checkpoint itself was reasonable. Under the first prong, the court must assess the gravity of the public concerns served by the seizure. The U.S. Supreme Court and North Carolina courts agree that license and registration checkpoints advance an important purpose. The U.S. Supreme Court has also held that states have a vital interest in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads. But, without determining the primary programmatic purpose of the checkpoint, the trial court could not have assessed the strength of the State's interest in conducting the checkpoint.

After determining the strength of the State's interest, the trial court was required to determine the degree to which the seizure advanced the public interest, or, in other words, whether the police appropriately tailored the checkpoint stop to serve their primary purpose. Factors to be considered are whether the police spontaneously decided to set up a checkpoint, whether police offered any reason why a particular road was chosen, whether the checkpoint has a set starting or ending time, and whether police offered any reason why that particular time span was selected. Though the court made findings that the checkpoint was tailored, the appellate court noted that the order did not indicate that the court balanced these findings against the other *Brown* factors to determine whether the checkpoint was reasonable.

The third prong of *Brown* requires that the court assess the severity of the interference with individual liberty brought about by the checkpoint. While a checkpoint stop and search are generally less intrusive than a roving patrol stop, courts have required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than necessary to achieve the checkpoint's objectives. Factors relevant to this determination include:

- the checkpoint's potential interference with legitimate traffic;
- whether police put drivers on notice of an approaching checkpoint;
- whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field;
- whether the police stopped every vehicle that came through the checkpoint or stopped vehicles pursuant to a pattern;
- whether drivers could see visible signs of officer's authority;
- whether police operated the checkpoint pursuant to any oral or written guidelines;
- whether the officers were supervised; and
- whether officers received permission from their supervising officer to conduct the checkpoint.

Again the court of appeals noted that while the trial court made some findings under the third *Brown* prong, its failure to make findings under the first two prongs could not support its conclusion that the checkpoint was constitutional.

Moreover, the court of appeals determined that the findings in the trial court's written order weighed in favor of a conclusion that the checkpoint was unreasonable. Thus, the appellate court held that the trial court was required to explain why it concluded that the public interest in the checkpoint outweighed the intrusion on the defendant's liberty interests. The court of appeals instructed the trial court that if it determined on remand that the State's primary purpose for the checkpoint was lawful, it was required to issue new findings and conclusions regarding the reasonableness of the checkpoint.

Finally, the defendant argued that even if the checkpoint was constitutional, he was unreasonably detained by being directed to a secondary checking station. Defendant argued that if the primary purpose of the checkpoint was to check for a valid license, he should have been allowed to proceed through the checkpoint after he presented one. Noting that any further detention beyond the brief detention at a checkpoint must be based either upon consent or individualized suspicion, the court of appeals found that Trooper Carroll's detection of a strong odor of alcohol and his observation that defendant's eyes were red and glassy provided sufficient reasonable suspicion for the continued investigation and detention of defendant.

State v. Gabriel, ___ N.C. App. ___, ___ S.E.2d ___ (2 September 2008). Members of the State Highway Patrol (SHP) established a driver's license checkpoint. Several armed robberies had occurred near the checkpoint location in the preceding week, and suspects in the most recent robbery were seen driving a stolen sports utility vehicle in the vicinity of the checkpoint's location. The court reviewed two cases involving checkpoints: *State v. Rose*, 170 N.C. App. 284 (2005), and *State v. Veazey*, ___ N.C. App. ___, 662 S.E.2d 683 (2008), and noted that when there is no evidence to contradict the

state's proffered purpose for a checkpoint, the trial judge may rely on the officer's assertion of a legitimate primary purpose. However, when there is evidence that could support a finding of either a lawful or unlawful purpose, the trial judge cannot rely solely on an officer's bare assertion of the checkpoint's purpose. A SHP officer was only witness to testify at the suppression hearing. He said that the reason for the checkpoint was several armed robberies having been committed in the area, and the purpose of the checkpoint was to issue citations for "anything that came through." The officer also testified about using the checkpoint to check for driver's licenses. The court concluded that because the officer's testimony varied concerning the primary programmatic purpose of the checkpoint, the trial judge could not simply accept the state's invocation of a proper purpose, but instead was required make independent findings of fact and conclusions of law concerning the primary purpose. Because the trial judge had not done so, the court remanded the case to the trial court to make those findings and conclusions. The court, citing *Rose*, stated that if the trial judge finds that the checkpoint had a proper primary programmatic purpose, the judge must also enter findings of fact and conclusions of law concerning its reasonableness.

State v. Haislip, ____ N.C. App ____, 651 S.E.2d 243 (2 October 2007). Greenville Police Officers set up a checkpoint at 2:30 a.m. on February 2, 2005, a weeknight, on a three-lane road. The officers did not put up signs marking the checkpoint, but parked their cars in the center lane, turned on their blue lights, and set out flares. One officer set up his car as the "chase vehicle " to stop anyone who turned around in view of the roadblock. Defendant turned left onto an intersecting road about 400 yards before the roadblock. The officer driving the chase vehicle followed her, stopped her after she parked her car in the parking lot of an apartment complex and got out, and eventually arrested her for driving while impaired. The court of appeals held that the defendant had standing to challenge the constitutionality of the checkpoint because she was stopped based on the systematic plan of the checkpoint, rather than based upon specific and articulable facts giving rise to a suspicion that she was violating the motor vehicle laws. The appellate court remanded the case to the trial court for findings of fact and conclusions of law on the constitutionality of the checkpoint.

Note: Cases dealing with other issues such as probable cause, reasonable suspicion to stop, pretrial release and jail access issues and *Crawford v. Washington* issues are contained in other School of Government materials available at www.sog.unc.edu.

¹ Some material is drawn from Bob Farb's criminal case summaries, which are available at <http://www.sog.unc.edu/programs/crimlaw/index.html>.