

NORTH CAROLINA CRIMINAL LAW BLOG POSTS

by School of Government faculty member Shea Denning

Proving That Blood Was Drawn by a Qualified Person

Thursday, August 26, 2010

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

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

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

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blood be drawn by a qualified person, it appears that the State is no longer required to establish that the blood was withdrawn by a qualified person before the results of a blood analysis may be introduced at trial.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

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

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

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

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

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

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

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

The Authority of Campus Police

Wednesday, August 25, 2010

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

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

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

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

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

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

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

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

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

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

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

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

Thursday, July 22, 2010

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

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

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

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

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

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

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

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

Thursday, July 8, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Expert Testimony Regarding Impairment

Wednesday, June 9, 2010

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

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

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

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

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

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

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

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

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

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

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

The \$600 Lab Fee

Monday, May 24, 2010

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

First, is such a fee discretionary?

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

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

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

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

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

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

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

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

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

2100 to 1

Wednesday, March 24, 2010

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

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

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

.08 at Any Relevant Time after the Driving

Monday, March 15, 2010

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

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

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

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

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

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

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

State v. Fletcher and Warrantless Blood Draws

Wednesday, January 20, 2010

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

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

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

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

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