

Selected Impaired Driving Cases  
2000-2010  
Shea Denning<sup>1</sup>  
UNC School of Government  
September 21, 2010

<b>I. Checkpoints</b>	<b>2</b>
<b>II. Chemical Testing</b>	<b>5</b>
<i>a. Warrantless Blood Draws</i>	5
<i>b. Storage of Blood Sample</i>	5
<i>c. Qualifications of Chemical Analyst</i>	5
<i>d. Implied Consent Rights</i>	6
<i>e. Compliance with Statutory Procedures</i>	6
<i>f. Consecutively Administered Tests</i>	6
<b>III. Double Jeopardy</b>	<b>7</b>
<b>IV. Evidentiary Issues</b>	<b>7</b>
<i>a. HGN testing</i>	7
<i>b. Testimony regarding impairment must be based on personal knowledge</i>	7
<i>c. Provision that “[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration” does not establish unconstitutional presumption.</i>	8
<i>d. Opinion of Impairment</i>	8
<b>V. Habitual Impaired Driving</b>	<b>8</b>
<b>VI. Jury Trial</b>	<b>9</b>
<b>VII. Law Enforcement Jurisdiction/Police Authority</b>	<b>9</b>
<b>VIII. License Revocations</b>	<b>10</b>
<i>a. Refusal</i>	10
<i>b. Conditional License Restoration</i>	10
<i>c. CVR</i>	10
<i>d. Jurisdiction</i>	11
<i>e. Separation of Powers</i>	11

---

<sup>1</sup> Some of the summaries included herein were prepared by Jim Drennan, Director of the Judicial College at the School of Government, Bob Farb, Professor of Public Law and Government at the School of Government, and Jessica Smith, Associate Professor of Public Law and Government at the School of Government.

<i>f. Ignition Interlock</i>	11
<b>IX. Vehicular Homicide</b>	<b>11</b>
<b>X. Motions Procedures</b>	<b>14</b>
<b>XI. Reasonable Suspicion</b>	<b>15</b>
<i>a. Standard for Stops of Vehicles for all Traffic Violations</i>	15
<i>b. No Reasonable Suspicion</i>	15
<i>c. Reasonable Suspicion</i>	16
<i>d. Tips</i>	17
<b>XII. Sentencing</b>	<b>18</b>
<b>XIII. Substantive Offense</b>	<b>19</b>
<i>a. Street, Highway or Public Vehicular Area</i>	19
<i>b. Motorized scooter is a vehicle</i>	19
<i>c. Knowing Ingestion of Drugs Not Involuntary Intoxication</i>	20
<i>d. Defense of necessity applicable but limited</i>	20
<i>e. Lay opinion Can Establish Impairment</i>	20
<i>f. Evidence that Vehicle was a Commercial Vehicle</i>	20
<i>g. Reliance upon Alcohol Screening Tests</i>	20
<b>XIV. Inconsistent Verdicts</b>	<b>20</b>
<b>XV. Retrograde Extrapolation</b>	<b>21</b>
<b>XVI. Seizure Pursuant to Fourth Amendment</b>	<b>21</b>
<b>XVII. Sufficiency of Evidence</b>	<b>21</b>

## I. Checkpoints

**State v. Jarrett**, \_\_\_ N.C. App. \_\_\_, 692 S.E.2d 420 (May 4, 2010).

The defendant was convicted of DWI. The defendant, accompanied by a passenger, approached a stationary driver's license checkpoint at approximately 11:16 p.m. An officer noticed an aluminum can located between the driver's and passenger's seats. The can was open and a light liquid residue was on the top of the can. The passenger leaned toward the defendant, apparently trying to conceal the can from view. The defendant provided the officer with his license, which revealed that the defendant was eighteen years old, and the vehicle's registration. Before returning these items, the officer asked, "What is in the can?" Neither the defendant nor the passenger responded. When questioned again, the passenger raised the can,

revealing that it was a Busch Ice beer. The officer directed the defendant to a nearby parking lot, where he was eventually arrested for DWI. (1) The court ruled that the driver's license checkpoint was valid under the Fourth Amendment. It was conducted under a written department policy. Six officers with flashlights, two in each lane of traffic, stopped every car coming through the checkpoint to determine if drivers possessed a valid driver's license and vehicle registration. A supervisory officer was at the checkpoint. All officers wore uniforms and traffic vests. Their vehicles had activated blue lights. The court discussed the trial court's findings concerning the checkpoint's primary programmatic purpose and the reasonableness of the checkpoint. (2) The court ruled that the officer had reasonable suspicion to detain the defendant for further investigation based on the officer's observation of the beer can and the occupants' behavior involving the beer can.

**State v. Veazey, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Dec. 8, 2009) (appeal after remand summarized below)**

Deferring to trial court's resolution of conflicts in the testimony, leading to its determination that the primary programmatic purpose of checkpoint was to determine if drivers were duly licensed and adhering to motor vehicle laws. Trial court's conclusion that checkpoint satisfied *Brown v. Texas* balancing test was supported by the findings of fact.

**State v. Veazey, 191 N.C. App. 181, 662 S.E.2d 683 (2008)**

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. If the primary purpose is legitimate, the court must then judge the reasonableness of the stop by weighing (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. If, on balance, these factors weigh in favor of the public interest the checkpoint is reasonable and therefore constitutional.

As to the primary programmatic purpose of the checkpoint, when 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 evidence was conflicting in this case regarding the State's primary purpose. The trooper who set up the checkpoint testified that the purpose was "[t]o enforce any kinds of motor vehicle law violations," but also that he was "looking for all violations," including criminal violations that were not motor vehicle violations. The trooper also testified that the primary purpose of the checkpoint was to check for driver's license, registration and insurance violations, as contrasted from all motor vehicle violations. Thus, 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 the trooper'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.

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 to determine whether the checkpoint itself was reasonable. Trial court made findings only under the third prong. Moreover, those findings weighed in favor of a conclusion that the checkpoint was unreasonable. Thus, the trial court had to explain why it concluded that the public interest in the checkpoint outweighed the intrusion on the defendant's liberty interests.

**State v. Gabriel, 192 N.C. App. 517, 665 S.E.2d 581 (2008)**

State Highway Patrol troopers set up driver's license checkpoint in an area where there had been several armed robberies the week before and where robbery suspects had been seen driving a stolen sports utility vehicle. The defendant was stopped by the checkpoint and ultimately charged with impaired driving. At trial, the defendant filed a motion to suppress the evidence obtained at the checkpoint on the basis that the checkpoint was unconstitutional.

A trooper testified that the checkpoint was set up because of the armed robberies, but later said its purpose was to "issue citations for anything that came through." Because the testimony varied regarding the primary programmatic purpose, the trial court could not simply accept the State's assertion of a proper purpose, but instead had to closely review the checkpoint scheme. This "searching inquiry is required to ensure an illegal multi-purpose checkpoint is not made legal by the simple device of assigning the primary purpose to one objective instead of the other."

**State v. Burroughs, 185 N.C. App. 496, 648 S.E.2d 561 (2007)**

Charlotte-Meck PD set up a checkpoint on Park Road in Charlotte, where the defendant was stopped. Officer testified that this was a DWI checkpoint. The court noted that only certain purposes for checkpoints are constitutionally allowed and that where the stated purpose is at odds with the evidence, the trial court must inquire as to the actual purpose. But neither *State v. Rose*, 170 N.C. App. 284, 612 S.E.2d 336 (2005), nor *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), requires that every trial court make extensive inquiries into the purpose behind every checkpoint. No evidence suggested that the stated purpose of the checkpoint (sobriety) was a mask for an unconstitutional purpose. Thus, the trial court erred in holding that the lack of evidence as to the *actual* -- versus the *stated* -- purpose required it to exclude the evidence obtained by the stop.

**State v. Rose, 170 N.C. App. 284, 612 S.E.2d 336 (2005)**

Defendant appealed drug and firearm convictions, alleging that evidence uncovered during an unlawful checkpoint stop should have been suppressed. Five police officers in Onslow County decided to "spontaneously throw a checkpoint up" for the stated purpose of checking licenses and registrations. The officers noted that passengers in Rose's car "seemed nervous" and, after questioning, discovered they had marijuana and a gun. The officers' statements regarding purpose of checkpoint were belied by other facts. No plan was created for the checkpoint or approved before-hand. The state offered no evidence as to why there was a particular need for checkpoint in this area of the county. Four of five officers were narcotics detectives, and the arrest was for drugs, not a license violation. A second officer was positioned to scan cars during the stop. Thus, evidence showed that actual purpose of checkpoint was to check for possible criminal activity -- specifically narcotics possession.

The court of appeals held that the trial court was required to make findings of fact as to the checkpoint's purpose and that it could not simply accept State's invocation of a proper purpose, but had to closely review the scheme at issue. Moreover, even if court determines the primary programmatic purpose was lawful, it must determine the reasonableness of stop. This requires balancing the public's interest with the individual's privacy interest under the test set forth in *Brown v. Texas*, 443 U.S. 47 (1979), which considers the (1) gravity of the public concern, (2) the degree to which the seizure advances public interest; and (3) the severity of the interference

with individual liberty. The court noted that the tailoring of the checkpoint was in question given that the checkpoint was spontaneous and no evidence was presented regarding why the location was chosen. The severity of the interference, specifically the amount of discretion afforded field officers, also appeared to be an issue since the evidence suggested a lack of any limitation on the officers' discretion in the field other than the requirement that they stop every car.

## II. Chemical Testing

### a. Warrantless Blood Draws

#### **State v. Fletcher, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (January 19, 2010)**

Holding that competent evidence supported findings that officer reasonably believed that a delay would result in the dissipation of the alcohol in defendant's blood and that exigent circumstances existed that allowed a warrantless blood draw. Evidence included officer's testimony that magistrate's office was 12 miles away and was often very busy on weekend nights as was the emergency room. Upheld GS 20-139.1(d1) as constitutional and rejected argument that acceptance of retrograde extrapolation methodology negated exigency.

### b. Storage of Blood Sample

#### **State v. Corriher, 184 N.C. App. 168, 645 S.E.2d 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. 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 G.S. 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.

### c. Qualifications of Chemical Analyst

#### **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. 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.

#### d. Implied Consent Rights

**State v. Hatley, 190 N.C. App. 639, 661 S.E.2d 43 (2008)**

Defendant entitled to suppression of Intoxilyzer results based upon the denial of her statutory right to have a witness observe the test. Witness arrived in time to view test and made reasonable efforts to gain access to the defendant by telling the desk officer that she was “there for Debra Hatley” who was there for “a DUI.” There is no requirement that a potential witness to an Intoxilyzer test specifically state that he or she has been called to view such a test.

**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. 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. The implied consent warnings were amended in 2006 to advise defendants that “an officer can compel you to be tested under other laws.”

#### e. Compliance with Statutory Procedures

**State v. Simmons, \_\_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 20, 2010).**

The trial court did not err by denying the defendant’s motion to suppress the results of the chemical analysis performed on the defendant’s breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant’s argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the defendant’s analysis was performed only 23 days after the December maintenance.

**State v. Tappe, 139 N.C. App. 33, 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.

#### f. Consecutively Administered Tests

**State v. Shockley, \_\_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (December 8, 2009)**

Alcohol concentration readings from two of four attempted breath samples collected within 18 minutes of one another met the “consecutively administered tests” requirement for admissibility of a chemical analysis pursuant to former G.S. 20-139.1(b3). (As amended in 2006, the provision now requires “at least duplicate sequential breath samples.”)

### III. Double Jeopardy

#### **State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545 (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. Corbett, 191 N.C. App. 1, 661 S.E.2d 759, aff'd, 362 N.C. 672, 669 S.E.2d 323 (2008) (per curiam)**

Defendant pled guilty in district court to impaired driving, but plea was later stricken as void ab initio. Defendant then was indicted in superior court for misdemeanor and habitual impaired driving based on the same incident. Defendant moved to dismiss the charges on double jeopardy grounds. After the superior court denied the defendant's motion, the defendant pled guilty to habitual impaired driving in exchange for the State's dismissal of the misdemeanor impaired driving charge. Defendant then appealed from the superior court's denial of his motion to dismiss. The appellate court held that the defendant waived review of double jeopardy claim by pleading guilty to the habitual impaired driving charge in superior court.

### IV. Evidentiary Issues

#### a. HGN testing

#### **State v. Smart, \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 684 (2009)**

Rule 702(a1) of the North Carolina Rules of Evidence obviates the need for the State to prove that the HGN testing method is sufficiently reliable. The person testifying as to the HGN test does not have to be an expert on the methodology itself, but instead must be qualified as an expert in the administration of the HGN test.

#### b. Testimony regarding impairment must be based on personal knowledge

#### **State v. Cook, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 795 (2008)**

Officer's testimony that defendant was impaired at time of wreck was inadmissible as his opinion was not based on personal knowledge but instead upon written statements of witnesses, the damage to the cars involved, and what another officer told him. But admission of testimony was harmless error.

- c. Provision that “[t]he results of a chemical analysis shall be deemed sufficient evidence to prove a person’s alcohol concentration” does not establish unconstitutional presumption.

**State v. Narron, 193 N.C. App. 76, 666 S.E.2d 860 (2008)**

Upholding G.S. 20-138.1 as constitutional and rejecting defendant’s argument that the provision 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. Provision does not create an evidentiary or factual presumption but instead simply states the standard for prima facie evidence of a defendant’s alcohol concentration. In other words, the statute simply authorizes the jury to find that the report is what it purports to be—the results of a chemical analysis showing the defendant’s alcohol concentration.

Trial court has no need 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. If a case is submitted to the jury, then by definition, the court has determined that the State presented sufficient evidence to prove each of the elements of the offense. But court finds no prejudice to the defendant in the court’s statement to the jury that the results of the chemical analysis are deemed sufficient evidence to prove a person’s alcohol concentration.

- d. Opinion of Impairment

**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.”

## V. Habitual Impaired Driving

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

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

## VI. Jury Trial

### **State v. Simmons, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 20, 2010).**

Trial court did not abuse its discretion in denying defendant's challenge for cause of a juror while granting the state's challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defendant was employed with a local university police department as a traffic officer. This juror had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

Reversed for a new trial on the basis that the trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error.

## VII. Law Enforcement Jurisdiction/Police Authority

### **State v. Yencer, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 17, 2010).**

A Davidson College Police Department officer who arrested the defendant for impaired and reckless driving had no authority to do so. Applying precedent, the court held that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force pursuant to G.S. 74G was unconstitutional under the Establishment Clause of the First Amendment. Thus, the court reversed the trial court's denial of defendant's motion to suppress evidence resulting from her stop and seizure by the Davidson officer. The court "urge[d]" the North Carolina Supreme Court to grant a petition for discretionary review.

### **Hyatt v. Parker, \_\_ N.C. App. \_\_, 675 S.E.2d 109 (2009)**

Plaintiff sued defendant wildlife officer in his individual capacity, claiming that he lacked legal authority to stop her vehicle based on his suspicion that she was driving while impaired and, as a result, committed the tort of false imprisonment in carrying out the stop. Appellate court held that wildlife officer was authorized by G.S. 113-136(d) to stop the defendant based upon a reasonable suspicion that she was driving while impaired in his presence, an offense that constitutes "a threat to public peace and order which would tend to subvert the authority of the State if ignored," and to subsequently arrest her based upon probable cause for the offense.

## VIII. License Revocations

### a. Refusal

#### **Lee v. Gore, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 17, 2010).**

After a rehearing, the court issued a new opinion, over a dissent, superseding and replacing its prior opinion. See *Lee v. Gore*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 19, 2010). The court rejected the DMV's implicit argument that a suspension of driving privileges can occur based on a refusal to submit to chemical analysis in the absence of willfulness. As in its prior decision, the court held that form DHHS 3908 is not a substitute for a properly executed affidavit required by G.S. 20-16.2(c1). The court noted that form DHHS 3908 or other relevant documents may be attached to a properly executed affidavit but held "that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful." Because the officer here testified that he did not check the box indicating that there was a willful refusal before executing the affidavit, the requirements of G.S. 20-16.2(c1) were not satisfied. Construing G.S. 20-16.2, the court held that before the DMV can revoke a person's driving privileges, it must receive a properly executed affidavit that meets all of the requirements in G.S. 20-16.2(c1). Given this, the DMV had no authority to revoke the Petitioner's license and there was no authority for a DMV review hearing or appellate review in the superior court. The court remanded for reinstatement of the Petitioner's driving privileges.

#### ***Powers v. Tatum*, \_\_ N.C. App. \_\_, 676 S.E.2d 89 (2009)**

The district court's dismissal of the criminal charge of driving while impaired based upon a violation of petitioner's right to have a witness present did not operate as collateral estoppel on the issue of willful refusal to submit to an Intoxilyzer test in a subsequent administrative license revocation hearing. Where petitioner fails to challenge any of the trial court's findings of fact on appeal, they are binding on the appellate court, and establish that petitioner's refusal to take the Intoxilyzer test was not based upon the fact that his witness was not present.

### b. Conditional License Restoration

#### ***Brunson v. Tatum*, \_\_ N.C. App. \_\_, 675 S.E.2d 97 (2009)**

Holding that petitioner attempted to drive his truck within the meaning of his conditional license restoration agreement when he had the intent to drive and blew into the ignition interlock device in order to start the truck so that he could drive it. Rejecting petitioner's argument that he could only attempt to drive by switching on the ignition.

### c. CVR

#### ***State v. Hinchman*, 192 N.C. App. 657, 666 S.E.2d 199 (2008)**

Rejecting defendant's contention that the license revocation was criminal rather than civil because the 135 day delay between his arrest and license revocation did not serve purpose of the statute. 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 *State v. Evans*, 145 N.C. App. 324, 334, 550 S.E.2d 853, 860 (2001), in concluding that the defendant's 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. 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. 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. 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.

d. Jurisdiction

**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).

e. Separation of Powers

**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 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.

f. Ignition Interlock

**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.*)

IX. Vehicular Homicide

**State v. Davis, \_\_ N.C. \_\_, \_\_ S.E.2d \_\_ (Aug. 27, 2010)**

Trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a

deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: “Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]” Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case. By failing to raise a constitutional double jeopardy argument at trial, the defendant failed to preserve the argument for appellate review. However, notwithstanding his failure to raise at trial a claim that under G.S. 20-141.4(b) the trial court lacked authority to impose punishment for certain motor vehicle crimes, the issue was preserved for appeal. When a trial court acts contrary to a statutory mandate and a defendant suffers prejudice, the right to appeal is preserved, notwithstanding a failure to object at trial.

**State v. Armstrong, \_\_\_ N.C. App. \_\_\_, 691 S.E.2d 433 (20 April 2010).**

The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled that double jeopardy does not prohibit the convictions of both second-degree murder and DWI; the court relied on *State v. McAllister*, 138 N.C. App. 252 (2000).

**State v. Tellez, \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 733 (2009)**

Upholding the defendant’s conviction of two counts of second-degree murder and one count of felonious hit and run arising from a fatal car crash. Evidence of defendant’s (1) reckless driving, (2) consumption of alcohol before and during driving, (3) prior convictions for impaired driving and driving while license revoked, and (4) flight and elusive behavior after the collision constituted substantial evidence of malice based upon depravity of mind.

**State v. Davis, \_\_\_ N.C. App. \_\_\_, 680 S.E.2d 239 (2009)**

The offenses of felony death by vehicle and involuntary manslaughter do not have the same elements; while impaired driving satisfies the culpable negligence prong of involuntary manslaughter and is a requirement for felony death by vehicle, acts other than impaired driving also may establish the culpable negligence element of involuntary manslaughter. A defendant may not be punished, however, for both involuntary manslaughter and felony death by vehicle arising from the same death because the legislature has expressed its clear intent not to allow such multiple punishments.

In addition, a defendant may not be sentenced for both felony death by vehicle and driving while impaired, which is a lesser-included offense of felony death by vehicle. DWI is not, however, a lesser included offense of involuntary manslaughter, and a defendant may be punished for both involuntary manslaughter and impaired driving.

Trial court’s instruction allowing the jury to consider several possible motor vehicle law violations did not violate the defendant’s right to a unanimous verdict on the offense of involuntary manslaughter.

**State v. Davis, \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 385 (2009)**

Court found the following evidence sufficient to establish the malice required for a second-degree murder conviction based upon vehicular homicide: Defendant's BAC was 0.13 at the time of the accident (based on retrograde extrapolation); defendant would have had to have consumed 9 to 12 beers in two hours time to reach that BAC; at the wreck scene, defendant denied that he had been drinking; driving on well-traveled highway; running over a sign and continuing to drive; weaving from side to side; and failing to brake or turn to avoid the collision.

The court did not review the defendant's claim that trial court erred in failing to arrest his convictions for felony serious injury by motor vehicle and felony death by vehicle on the basis that they were lesser included offenses of offenses for which he was convicted and sentenced. Defendant argued that punishment for these offenses violated principles of double jeopardy. The court did not consider these arguments on the basis that the defendant failed to object at trial.

**State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (2008)**

Defendant's entire driving record admitted in prosecution for second degree murder based on vehicular homicide, including two DWI convictions that occurred more than sixteen years before the instant offense. Court finds no plain error in admission of entire record. Distinguishes *State v. Goodman*, 357 N.C. 43, 577 S.E.2d 619 (2003), *rev'g*, 149 N.C. App. 57, 560 S.E.2d 196 (2002), on the basis that the *Maready* defendant's driving record demonstrates a much more consistent, and therefore more probative, pattern of criminal behavior than the record in *Goodman*. The *Maready* defendant was convicted of DWI four times in the 16 years leading to the instant offense and was convicted of DWI less than six months before the incident giving rise to the current charges. Given that jury was aware of the defendant's four DWI convictions in the 16 years preceding the offense, the court does not find that jury probably would have reached a different verdict if it had not been informed of two older DWI convictions and nine convictions for other traffic related offenses.

Further holds that *Goodman* did not establish a bright-line rule that admission of any traffic-related conviction that occurred more than sixteen years before the events at issue in a second-degree murder case amounts to plain error per se. Relevance of a temporally remote traffic-related conviction to the question of malice does not depend solely on the amount of time that has passed since the conviction. Instead, its probative value depends largely on the intervening circumstances. The court finds that the *Maready* defendant's older convictions are part of a "clear and consistent pattern of criminality that is highly probative of his mental state at the time of the actions at issue here."

**State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (2008), reversing in part, 184 N.C. App. 401, 647 S.E.2d 433 (2007)**

Defendant drove while impaired and crashed into another car, killing one person and seriously injuring two others. As a result, he was convicted of second-degree murder and two counts of assault with a deadly weapon inflicting serious injury arising. Defendant appealed, arguing that the trial court abused its discretion by denying his motion to continue when the State failed to give him sufficient notice of its intent to use blood alcohol concentration retrograde extrapolation evidence within a reasonable time before trial as required by G.S. 15A-903(a)(2). The state supreme court concluded that the State violated G.S. 15A-903(a)(2) and that the trial court abused its discretion in denying the defendant's motion for a continuance, though it

cautioned that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. The court then 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 [the expert] testimony," the court determined that even if a continuance had provided defendant sufficient time to obtain an expert who rebutted that 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 "extrapolation testimony was but a thread in the web of evidence presented by the State."

## X. Motions Procedures

### **State v. Fowler, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 523 (2009)**

Analyzes and ultimately rejects challenges to pre-trial motions procedures for implied consent cases on due process, equal protection, and other constitutional grounds. Interprets G.S. 20-38.6 and G.S. 20-38.7 in a matter that limits the State's right to appeal from district court rulings on motions to suppress or dismiss made *during* trial. Upholds the constitutionality of the procedures as applied in *Fowler*, which involved a *pre-trial* motion to suppress evidence based upon a lack of probable cause. Holds that State can appeal only from a district court's preliminary determination that is (1) made at a time before jeopardy has attached (that is, before the district court sits as the trier of fact to adjudicate the defendant's guilt), and (2) is "entirely unrelated to the sufficiency of the evidence as to any element of the offense or to defendant's guilt or innocence." Holds that G.S. 20-38.6 and G.S. 20-38.7 do *not* grant the State the right to appeal to superior court upon the district court's granting of a motion to suppress evidence or to dismiss charges during trial. For a detailed discussion of this case and *State v. Palmer*, below, see Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after State v. Fowler and State v. Palmer*, available at <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0906.pdf>

### **State v. Palmer, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 559 (2009)**

Considers the proper method for appealing a district court's preliminary determination. Approves the method used by the State in *Palmer*, where State filed a written notice of appeal the day after the court issued its written preliminary determination. Declines to engraft onto G.S. 20-38.7(a) the ten-day time limit for appeals in G.S. 15A-1432, though the court considered other provisions of G.S. 15A-1432 as analogous to the implied consent provisions.

## XI. Reasonable Suspicion

### a. Standard for Stops of Vehicles for all Traffic Violations

#### **State v. Styles, 362 N.C. 412, 665 S.E.2d 438 (2008).**

The defendant, who was operating a vehicle moving in the same direction and in front of an officer's vehicle, changed lanes without signaling. An officer stopped the defendant for that violation. The court ruled, relying on the rulings of several federal courts of appeal, that reasonable suspicion is the standard for stops of vehicles for all traffic violations. The court disavowed statements in prior court opinions and in cases of the North Carolina Court of Appeals that probable cause is the standard for the stop of a vehicle for a readily observed traffic violation. These cases include: *State v. Ivey*, 360 N.C. 562 (2006); *State v. McClendon*, 350 N.C. 630 (1999); *State v. Young*, 148 N.C. App. 462 (2002), and *State v. Wilson*, 155 N.C. App. 89 (2003). The court ruled that the officer had reasonable suspicion to stop the vehicle for changing lanes without signaling under G.S. 20-154(a). The defendant's failure to signal violated the statute because changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle (in this case, the officer's vehicle).

### b. No Reasonable Suspicion

#### **State v. Fields, \_\_\_ N.C. App. \_\_\_, 673 S.E.2d 765 (2009)**

Officer's observation of a defendant's weaving within his lane, standing alone, is not sufficient to support a reasonable suspicion that the defendant was driving while impaired. Officer followed defendant for about one and a half miles around 4 p.m. in the afternoon and, on three separate occasions, saw the defendant swerve to the white line on the right side of the traffic lane.

#### **State v. Myles, 362 N.C. 344, 661 S.E.2d 732 (2008) (per curiam).**

The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals that reasonable suspicion did not support an officer's continued detention of vehicle occupants (defendant was a passenger) after the completion of a traffic stop. An officer stopped a vehicle for weaving on Interstate 40 and running slightly off the highway. The officer did not detect an odor of alcohol on the driver, learned that the car was being operated under a rental agreement executed by the defendant-passenger that was one day overdue, told the driver to be more careful, and asked him to come to the officer's car so the officer could write a warning ticket. The officer noted that the driver was sweating profusely despite the fact it was a cool day. The officer talked with the driver about his travel plans. The officer then went back to the driver's car and spoke to the defendant-passenger about the rental agreement and whether it had been extended. The defendant said he had done so. The officer noticed the defendant's heart beating through his shirt. The officer eventually obtained consent to search the car from the driver and defendant. The court ruled that both the driver and the defendant-passenger were seized under the Fourth Amendment after the completion of the traffic stop, the issuance of the warning ticket, and the totality of circumstances did not support reasonable suspicion for the continued detention of the driver and defendant—the nervous behavior of the driver was insufficient. The court distinguished the ruling in *State v. McClendon*, 350 N.C. 630 (1999). The nervousness of the defendant could not be considered in establishing reasonable suspicion because the officer observed that behavior after the traffic stop had been completed.

**State v. Murray, 192 N.C. App. 684, 666 S.E.2d 205 (2008)**

An officer was performing a property check in an industrial park at 3:41 a.m. He saw a vehicle coming out of the area and decided to pull behind it and run its license plate to determine if it was a local vehicle. The officer conceded at the suppression hearing that the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. The license plate check showed the vehicle was not stolen and was in fact a rental vehicle from a nearby city. Nevertheless, the officer stopped the vehicle. The court ruled that reasonable suspicion did not support the stop. Although the officer's patrol of the area was part of increased policing due to past break-ins, he saw no indication that night of damage to vehicles or businesses in the park and stopped the vehicle because he wanted to make sure there wasn't anything illegal taking place.

c. Reasonable Suspicion

**State v. Hudson, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Aug. 17, 2010).**

An officer had reasonable suspicion to stop the defendant's tractor-trailer car hauler after the officer observed the vehicle twice cross the center dividing lines of northbound lanes of I-95 and weave back over the fog line during a two-mile stretch of travel.

**State v. Simmons, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 20, 2010)**

Defendant was convicted at a jury trial of driving while impaired and possession of an open container of alcohol in the passenger area of a motor vehicle. A highway patrol trooper stopped defendant's vehicle after seeing it weave across and outside the lanes of travel, at one point running off the road. Defendant moved pretrial to suppress breath test results and to suppress evidence obtained as a result of the stop of his vehicle. Defendant's motions were denied. Distinguishing *State v. Fields* \_\_ N.C. App. \_\_, (Mar. 17, 2009) (no reasonable suspicion for a stop where an officer saw the vehicle swerve to the white line three times), the appellate court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

**State v. McRae, \_\_ N.C. App. \_\_, 691 S.E.2d 56 (April 6, 2010)**

The court ruled that an officer A had reasonable suspicion to stop a vehicle for two independent reasons. First, the officer A had the authority to stop the vehicle because the officer had reasonable suspicion that the defendant had committed a violation of G.S. 20-154(a) by failing to use his turn signal when he pulled off the highway into a gas station parking lot. There was medium traffic and the defendant's vehicle was a short distance in front of the officer. The court relied on *State v. Styles*, 362 N.C. 412 (2008), and distinguished *State v. Ivey*, 360 N.C. 562 (2006). Second, the officer also had the authority to stop the vehicle based on an confidential informant's tip to another officer (officer B) that had been broadcast to officer A and other officers before the stop, as follows: be on the lookout for a black male driving a green Grand Am with Pembroke city limits. The informant has worked with officer B on several occasions and had provided reliable information in the past that led to the arrest of drug offenders. The informant identified the driver by name, a name that officer B recognized as someone associated with the drug trade. The informant also described the specific car (a green Grand Am) and advised the officer that the defendant would be driving the car within the city limits of Pembroke with 60 grams of cocaine in his possession.

**State v. Allen, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 519 (2009)**

Officer had reasonable suspicion to stop car based upon an assault victim's in-person statement that the offender had been driven away from the scene in a small, dark car driven by a white female with blonde hair combined with the officer's observation of the defendant, a blonde white female in a small car, driving away from the area where the assault occurred in a hurried manner.

d. Tips

**State v. Johnson, \_\_\_ N.C. App. \_\_\_, 693 S.E.2d 711 (June 1, 2010)**

An anonymous caller at 12:14 p.m. reported that a black male wearing a white t-shirt and blue shorts was selling illegal drugs and guns at the corner of Pitts and Birch streets in the Happy Hill Garden community. The caller said the sales were occurring out of a blue Mitsubishi with a license plate of WT 3456. The caller refused to provide a name, and officers could not contact the caller. The officers did not know how the caller obtained his or her information. The caller telephoned again at 12:32 p.m. and stated that the suspect had just left the area, but would return shortly. Officers were stationed at the only two entrance points to the community. They saw a blue Mitsubishi with a license plate of WT 3453 being driven by a black male wearing a white t-shirt. An officer entered the license plate information into his computer, which revealed that the vehicle was registered to a Kelvin Johnson, black male, date of birth as August 5, 1964. It also showed that Johnson's driver's license was suspended. Officers stopped the vehicle, arrested the defendant for driving while license revoked, placed him in the back of a patrol car, and searched the defendant's vehicle incident to his arrest. (1) The court ruled, relying on *State v. Hughes*, 353 N.C. 200 (2000), and *State v. Peele*, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (2009), that the anonymous information was insufficient evidence to support reasonable suspicion to stop the defendant's vehicle. The court stated that when an anonymous tip forms the basis for a traffic stop, the tip itself must exhibit sufficient indices of reliability, or it must be buttressed by sufficient law enforcement corroboration. The court examined the facts and concluded that neither ground was satisfied. (2) The court ruled that even though the anonymous tip did not support the vehicle stop, the officers had reasonable suspicion to stop the vehicle based on their knowledge that the registered owner's driver's license was suspended. [Author's note: Although not cited by the court, see *State v. Hess*, 185 N.C. App. 530 (2007) (when officer ran vehicle's registration plate and then registered owner's driver's license, which was reported to be suspended, officer had reasonable suspicion to stop vehicle when there was no evidence that owner was not driving vehicle). (3) The court ruled that the ruling in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (Court ruled that officers may search vehicle incident to arrest only if (i) arrestee is unsecured and within reaching distance of passenger compartment when search is conducted; or (ii) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), applied to the defendant's case because it was on direct appeal and not yet final. And the search incident to arrest of the defendant's vehicle violated the Fourth Amendment because it did not satisfy the *Gant* ruling.

**State v. Crowell, \_\_\_ N.C. App. \_\_\_, 693 S.E.2d 370 (June 1, 2010)**

A confidential informant phoned an officer that a black male with cocaine would arrive in a few minutes in a black Lexus SUV at a carwash on Highway 301 in Benson. The informant said he had seen the cocaine. The officer had known the informant for thirteen years and knew his mother and other family members. A month before this phone call, the informant had provided the officer with reliable information about illegal drug activity that resulted in an arrest. Fifteen

minutes after the phone call, a black Lexus SUV pulled into the carwash and parked. The informant was also at the carwash, and he called the officer to confirm the black Lexus SUV was the correct one and the defendant was the driver. Officers stopped the vehicle after it left the carwash. The court ruled that the officers had reasonable suspicion to stop the vehicle based on the confidential informant's information. The court noted that the informant's basis of knowledge was not an essential factor under the totality of circumstances test for determining reasonable suspicion (or probable cause). The informant's information correctly predicted the defendant's future actions, including his mode of transportation, destination, and time of arrival. This information, corroborated by the officers, sufficiently demonstrated that the informant had inside knowledge about the defendant, giving them a basis for believing that the rest of his information concerning the defendant's transportation of cocaine was also accurate.

**State v. Peele, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 682 (2009)**

Uncorroborated anonymous tip that driver of a burgundy Chevrolet pick-up truck was driving carelessly and recklessly and headed toward a particular intersection, combined with officer's observation that defendant weaved within his lane once over the distance of a tenth of a mile were insufficient to provide reasonable suspicion to stop the vehicle.

**State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (2008)**

When police act based on an informant's tip, the indicia of the tip's reliability are among the circumstances that must be considered in determining if reasonable suspicion exists. Potential indicia of reliability include all the facts known to the officer from personal observation, including those that do not necessarily corroborate or refute the informant's statements. Facts in this case: (1) minivan traveling right in front of the defendant's car so driver would have been in position to see what she reported; (2) driver's especially cautious driving and distress were consistent with having observed a nearby motorist driving erratically; (3) minivan driver approached deputies and gave them information at a time and place near the scene of the alleged traffic violations such that she had little time to fabricate; (4) face-to-face encounter meant that tipster was not anonymous even though officers did not obtain her identifying information—she "willingly placed her anonymity at risk."

## XII. Sentencing

**State v. Armstrong, \_\_\_ N.C. App. \_\_\_, 691 S.E.2d 433 (April 20, 2010)**

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

**State v. Dalton, \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 208 (2009)**

Requirement in G.S. 20-179(a1)(1) that State give 10 days' notice of intent to submit grossly aggravating factors does not apply because defendant committed the offense before December 1, 2006, the effective date of this statutory provision.

**State v. Coffey, 189 N.C. App. 382, 658 S.E.2d 73 (2008)**

Defendant entitled to have jury determine whether he was driving while his license was revoked for a prior impaired driving license revocation, an aggravating factor for his impaired driving

conviction. But failure to submit factor to jury was harmless given “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.

**State v. Speight, 186 N.C. App. 93, 650 S.E. 2d 452 (2007)**

Failure to submit aggravating factors to jury in DWI sentencing ruled harmless error since evidence of factors was overwhelming and uncontroverted. 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).

**XIII. Substantive Offense**

**a. Street, Highway or Public Vehicular Area**

**State v. Hopper, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (July 6, 2010)**

The trial court properly concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court’s conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer’s mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop. For purposes of the traffic violation at issue, failure to activate taillights under G.S. 20-129, the term highway is defined by G.S. 20-4.01(13), not case law decided before enactment of that provision.

**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. 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.’”

**b. Motorized scooter is a vehicle**

**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.

c. Knowing Ingestion of Drugs Not Involuntary Intoxication

**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.

d. Defense of necessity applicable but limited

**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.

e. Lay opinion Can Establish Impairment

**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.

f. Evidence that Vehicle was a Commercial Vehicle

**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 had a vehicle weight of more than 10,000 lbs.

g. Reliance upon Alcohol Screening Tests

**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.

#### XIV. Inconsistent Verdicts

**State v. Mumford, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (January 5, 2010)**

Defendant's acquittal on impaired driving charge required trial court to set aside convictions for felony serious injury by vehicle based upon the same incident. Created exception to general rule that a defendant is not entitled to relief from inconsistent verdicts for cases in which a jury convicts the defendant of a greater charge but acquits him or her of a lesser included offense.

## XV. Retrograde Extrapolation

### **State v. Teate, 180 N.C. App. 601, 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. 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. 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.

## XVI. Seizure Pursuant to Fourth Amendment

### **State v. Williams, \_\_\_ N.C. App. \_\_\_, 686 S.E.2d 905 (December 22, 2009)**

An officer saw the defendant driving a vehicle displaying a 30-day tag he suspected was expired because it was dirty and torn. Before a computer inquiry about the tag came back, the defendant pulled into a driveway. The officer did not activate his blue lights or siren, nor did he give any other indication for the defendant to stop. The officer stopped his vehicle on the other side of the street and approached the defendant's vehicle. The officer asked the defendant about the status of the 30-day tag, and the defendant said that it was expired. The officer then asked the defendant for his license, and the defendant handed him an expired registration and admitted that he did not have a driver's license. The officer asked the defendant to step out of his vehicle to speak with him. After a brief conversation, the defendant consented to a search of his person, which resulted in a seizure of cocaine. The court ruled, relying on *State v. Isenhour*, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 264 (16 December 2008), that the officer did not seize the defendant under the Fourth Amendment during the encounter.

## XVII. Sufficiency of Evidence

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

A reasonable jury could infer from the physical evidence that defendant was the driver of the car based upon a fabric burn to the passenger's right shoulder, the lack of blood on the passenger side of the vehicle, the blood on the driver's side air bag, and blood on the driver. Defendants were not prejudiced by trial court's failure to rule on their motion to dismiss until after the jury returned its verdict where there was no reasonable probability that the pre-

verdict motions would be granted and there was sufficient evidence in the record to withstand a motion to dismiss.

**State v. Scott, 356 N.C. 591, 573 S.E.2d 866 (2002)**

Following evidence found to be sufficient to support conviction of impaired driving: (1) defendant was traveling at a speed in excess of sixty miles per hour; (2) defendant's vehicle had no motor vehicle tags; (3) defendant did not immediately stop after the arresting officer activated his red and blue lights and did not do so until after the officer accelerated to keep up with the vehicle and activated his airhorn more than once; (4) defendant did not stop in the rightmost lane of the four-lane highway, but rather stopped at a "T" intersection in such a manner that defendant's and the officer's cars blocked the intersection; (5) defendant left his vehicle and started toward the officer's vehicle before being ordered to return to his vehicle; (6) upon approaching defendant's vehicle, the officer smelled a strong odor of alcohol; (7) the officer observed an open container of beer in the passenger area of defendant's vehicle; (8) defendant's coat was wet from what appeared to the officer to be beer waste; (9) defendant's speech was slurred; (10) defendant refused to take the ALCO-SENSOR test; and (11) defendant refused the Intoxilyzer test. Defendant presented evidence to contradict the State's evidence. Evidence in the record supporting a contrary inference is not determinative on a motion to dismiss.