NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	10 CRS _____
STATE OF NORTH CAROLINA	)	
	)	MOTION TO DISMISS
v.	)	
	)	
_____,	)	
Defendant	)	

NOW COMES THE DEFENDANT, through counsel, and moves this court pursuant to N.C.G.S. § 15A-954(a)(4), U.S. Constitution Amendments IV, V and XIV, and N.C. Constitution Sections 18 and 19 to dismiss the charges of misdemeanor driving while impaired and driving while license revoked. In support of this motion, the defendant contends to the court the following upon information and belief:

1. The defendant was arrested on Monday, July 12, 2010 at 11:03p.m. by W.S.P.D. Cpl. _____ on suspicion of misdemeanor driving while impaired and driving while license revoked;
2. That after the defendant was arrested he was transported to the hospital where blood was taken from his body, at the direction of Officer _____, by means of force, without a warrant and without other lawful justification or excuse;
3. That the withdrawal of blood from the defendant's body constitutes a search and a seizure within the meaning of the Fourth Amendment ("The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated");

4. That the degree and type of force used against the defendant by law enforcement officers was unreasonable, excessive, undignified, and contrary to concepts of fairness and ordered liberty;

5. That the search and seizure of the defendant's body by means of force without a warrant and without other lawful justification or excuse violated the defendant's right to be secure in his person and his effects from unreasonable searches and seizures;

6. That taking the defendant's blood from his body by means of force without a warrant and without other lawful justification or excuse constitutes a deprivation of the defendant's liberty and property within the meaning of the Fifth Amendment ("nor shall be . . . deprived of life, liberty, or property, without due process of law");

7. That depriving the defendant of his liberty and property without lawful justification or excuse violated the defendant's right to Due Process of Law;

8. That the Fourth and Fifth Amendments of the United States Constitution are applicable to the State through the Fourteenth Amendment;

9. That these violations of the defendant's Fourth and Fifth Amendment Rights under Federal law are also violations of the defendant's rights under Sections 18 and 19 of the North Carolina Constitution, "due course of law" clause and "law of the land" clause;

10. That the defendant's Constitutional Rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

That the factual basis for this motion is set out in detail in counsel's affidavit attached hereto and incorporated by reference with this motion.

WHEREFORE, the defendant respectfully requests this Court to Order that further prosecution of these matters cease and to DISMISS all charges currently lodged against him on this, the _____ day of November, 2011.

_____
James R. McMinn
Counsel for the Defendant
8 W. Third St., Suite 400
Winston-Salem, NC 27101
(336) 779-6325

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above-entitled action upon the district attorney's office by placing a file-stamped copy in Derek Gray's designated mailbox in the Office of the District Attorney, 7th floor.

This the _____ day of November, 2011.

_____
James R. McMinn

NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	10 CRS _____
STATE OF NORTH CAROLINA	)	
	)	AFFIDAVIT IN SUPPORT
v.	)	OF MOTION TO DISMISS
	)	
_____,	)	
Defendant	)	

Now comes Counsel for the defendant, _____, and makes the following affidavit. The affiant saith thus:

1. That I have reviewed the State's discovery file in this matter, including the reports of the involved law-enforcement officers contained therein, and further that I have interviewed the defendant and otherwise investigated this matter;
2. That based upon information developed from the aforementioned sources and upon information and belief, the facts as set forth below have caused me to determine that the defendant has been denied his Constitutional Right to Due Process of Law under the Fifth and Fourteenth Amendments of the Federal Constitution as well as under Article I Sections 18 and 19 of the N.C. State Constitution, that the defendant has been denied his Constitutional Right to be free of unreasonable searches and seizures under the Fourth and Fourteenth Amendments of the Federal Constitution as well as under Article I Sections 18 and 19 of the N.C. State Constitution, and that these State and Federal Constitutional Rights have been flagrantly violated causing irreparable prejudice to the defendant.
3. That the facts that support this belief are set forth below:
    a. That the defendant was arrested by Cpl. _____ of the Winston-Salem Police Department on Monday, July 12, 2010 at 11:03p.m. on suspicion of misdemeanor driving while impaired and driving while license revoked;

b. That the arrest took place near the intersection of 1st Street and Hawthorne Rd. in the city of Winston-Salem;

c. That the defendant's arrest was recorded on the officer's mobile recording device, such recording containing both audio and video;

d. That Officer _____ has testified under oath at a prior proceeding that he believed the defendant was impaired by crack cocaine based on the defendant's appearance and behavior;

e. That, as the defendant was taken into custody, the Officer announced his intention to transport the defendant to W.F.U. Baptist Hospital and have the defendant's blood taken;

f. That the defendant then announced that he would not allow his blood to be take;

g. That the Officer then responded, "Oh yes Sir, it is.";

h. That the Officer then transported the defendant to W.F.U. Baptist Hospital, which is two city blocks from where the defendant was arrested and less than two miles from the Magistrate's Office;

i. That at 12:18a.m., an hour and fifteen minutes after arrest, the Officer advised the defendant that he had the right to refuse to provide a sample for chemical analysis, as required by N.C.G.S. § 16.2 and the defendant did refuse;

j. That at 12:19a.m., without attempting to obtain a warrant, several officers and hospital staff members held the defendant's body down and attempted to take the defendant's blood by force;

k. That the defendant attempted to resist the officers' aggression, without physically fighting back, by continuing to move his body and head around but was eventually subdued by sheer force from the four or five individuals pinning him down;

l. That the defendant continued to gyrate his hips as much as he could under the circumstances, believing he had the right to refuse to provide a blood sample;

m. That Officer _____ then jumped onto the body of the defendant, placing his rear end on the pelvis and torso area of the defendant, sat upright upon the defendant, used his hand to push the defendant's head down with force into the hospital bed, and ordered a hospital staff member to draw the defendant's blood;

n. That the defendant's blood was drawn and retained for use as evidence;

o. That the officers released the body of the defendant from their grip, but the defendant remained handcuffed;

p. That the defendant became quiet at that point and was later transported to the Magistrate's Office and placed in the Forsyth County Jail under a secured bond;

q. That the compelled blood draw in this case exceeded the scope of authority given to law enforcement officers by N.C.G.S. § 20-139.1(d1) for the following reasons:

    i. There is no evidence that would suggest that a warrant could not first have been obtained. On the contrary, there are facts which suggest that a warrant could easily have been obtained. It was a Monday evening. The Magistrate's Office and the hospital are less than two miles apart. There was an hour and fifteen minute period that passed between the arrest and the blood draw. The Magistrate's Office has warrant forms that are very simple to complete and to get approved for impaired driving cases. There was clearly probable cause to arrest.

    ii. There is no evidence that would suggest that the delay necessary to obtain the warrant under the circumstances, would cause a reasonable person to believe that the amount of impairing substance in the blood would dissipate.

    iii. That N.C.G.S. § 20-139.1(d1) does not authorize the officer to obtain a blood sample without a warrant when the officer

suspects the impairing substance in the blood to be crack cocaine. The statute clearly limits the officer's authority to conduct warrantless blood draws to cases in which the officer suspects the percentage of alcohol, and alcohol alone, would dissipate.

r. That the subjugation of the defendant's body for investigative reasons was accomplished in a most contemptuous manner, simultaneously creating an unreasonable search and unreasonable seizure of the defendant's person and property resulting in irreparable indignities to the defendant;

s. That, under this specific set of circumstances, the defendant has been deprived his Federal Constitutional Right to Due Process of Law under the Fifth and Fourteenth Amendments;

t. That, under this specific set of circumstances, the defendant has been deprived his Federal Constitutional Right to be free of unreasonable searches and unreasonable seizures under the Fourth and Fourteenth Amendments;

u. That, under this specific set of circumstances, the defendant has been deprived of his N.C. State Constitutional Right to Due Course of Law under Article I Section 18 and his N.C. State Constitutional Right to be free of deprivation of liberty and property but by the Law of the Land under Article I Section 19.

That the foregoing five pages of test comprising the body of counsel's affidavit are incorporated by reference with the motion to dismiss filed in this matter. Respectfully submitted on this, the _____ day of November, 2011.

_____

James R. McMinn
Counsel for the Defendant
8 W. Third St., Suite 400
Winston-Salem, NC 27101
(336) 779-6325

SWORN TO AND SUBSCRIBED before me, this the _____ day of November, 2011.

_____
Notary Public

My Commission Expires:

_____

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above-entitled action upon the district attorney's office by placing a file-stamped copy in [redacted] designated mailbox in the Office of the District Attorney, 7th floor.

This the _____ day of November, 2011.

_____
James R. McMinn

NORTH CAROLINA	)	IN THE GENERAL COURT OF JUSTICE
	)	SUPERIOR COURT DIVISION
FORSYTH COUNTY	)	10 CRS

Filed Jan. 18, 2012
Kimberly Calloway
2:02pm

STATE OF NORTH CAROLINA,	)	ORDER
	)	
	)	
vs.	)	
	)	
	)	
	)	
Defendant.	)	

This cause coming on to be heard upon the motion of the defendant to dismiss the misdemeanor charge of driving while impaired. The Court, having heard the evidence and arguments of counsel and having reviewed the court record enters the following Findings of Fact:

1. N.C.G.S. § 15A-954(a) provides: "The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: (1) The statute alleged to have been violated is unconstitutional on its face or as applied to the defendant."
2. The defendant is charged with misdemeanor driving while impaired pursuant to N.C.G.S. § 20-138.1.
3. It is a violation of N.C.G.S. § 20-138.1 for a person to be (1) driving under the influence of an impairing substance, or (2) driving with a blood-alcohol concentration of 0.08 or more, or (3) driving with any amount of a Schedule I controlled substance ... or its metabolites in the driver's blood or urine.
4. N.C.G.S. § 20-16.2(a1) defines "implied-consent offense" as an offense involving impaired driving.
5. N.C.G.S. § 20-16.2(a) provides that any person who drives a vehicle on a public vehicular area impliedly consents to chemical analysis if charged with an implied-consent offense, but before chemical analysis is administered the chemical analyst shall inform the person charged orally and also give the person a written notice that "you can refuse any test, but your drivers license will be revoked for one year . . . and an officer can compel you to be tested under other laws."
6. N.C.G.S. § 20-16.2(c) provides that a law enforcement officer or chemical analyst "shall designate the type of test or tests to be given and may request the person charged to submit to the type of chemical analysis designated. If the person charged willfully refuses to submit to that chemical analysis, none may be given under the provisions of this section, but the refusal does not preclude testing under other applicable procedures of law."

7. The remainder of N.C.G.S. § 20-16.2 establishes the civil process and penalties (in the form of license revocation) that flow from a refusal and which are designed to encourage cooperation with the testing procedures.
8. Clearly, since a driver's license is considered a conditional privilege and not a right, revocation and any number of other civil consequences could be established by the legislature as means of "compelling" drivers who violate implied-consent laws to provide a chemical analysis, as well as "punishing" such drivers, without ever resorting to the criminal courts for enforcement.
9. N.C.G.S. § 20-139.1 establishes the statutory scheme governing the methods of obtaining chemical analysis from suspected impaired drivers and using chemical analysis results as evidence in criminal prosecutions for implied-consent offenses. The statute refers to the right of refusal by the motorist four times, in subsections (b4), (b5), (d1) and (f).
10. N.C.G.S. § 20-139.1(d1) provides that if a person "refuses to submit to any test or tests pursuant to this section, any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine."
11. In this case, the undisputed facts are as follows:
    a. Following an initial encounter with the defendant at 10:44p.m., the defendant was arrested by Winston Salem Police Officer [redacted] on Monday, July 12, 2010 at 11:03p.m. on suspicion of driving while impaired and driving while license revoked.
    b. The arrest occurred near the intersection of First Street and Hawthorne Street in downtown Winston Salem, less than two miles from the Forsyth County Magistrate's Office and less than three blocks from Wake Forest University Hospital.
    c. Prior to arrest, the officer personally observed the defendant driving a vehicle in a public vehicular area.
    d. During the officer's initial encounter with him, the defendant voluntarily performed five separate field sobriety tests at the officer's request.
    e. Within a few minutes of his encounter with the defendant, Officer [redacted] suspected that the defendant was impaired by alcohol and some unknown controlled substance. By the time he administered the second field sobriety test, the officer believed he had probable cause to arrest for driving while impaired with alcohol and cocaine in the form of "crack cocaine" being the impairing substances.
    f. After arresting the defendant, the officer announced his intention to take the defendant to Baptist Hospital for a "blood draw" to identify any impairing substances in the defendant's blood as well as to determine the defendant's blood-alcohol concentration for use as evidence at trial.
    g. The defendant immediately and vociferously objected and refused to allow any blood to be drawn from his body against his will.

h. The Officer immediately responded that blood would be taken.
i. Approximately one and a quarter hours after arrest, the defendant was advised of his rights pursuant to N.C.G.S. § 20-16.2 at 12:18a.m., including the defendant's right to refuse to submit to the testing as requested by the officer.
j. Following the defendant's refusal to submit as requested, the officer informed the Defendant that he would "compel" the defendant to submit pursuant to N.C.G.S. § 20-139.1(d1).
k. Without trying to obtain any search warrant or judicial approval for the use of physical force, the officer, with the assistance of two other law enforcement officers and two security guards forcibly held the defendant's body down on a hospital gurney so that a nurse could take the defendant's blood involuntarily.
l. The defendant resisted against being held down but was not assaultive or combative towards the officers or security guards.
m. Because the defendant continued to resist by swinging his head from side to side and "bucking up" his midsection which was not otherwise restrained, the officer climbed onto the belly of the defendant and sat there while pushing the defendant's face down and to the side. This positioning reduced the defendant's movements and blood was seized from the defendant's body for evidence.

12. Whether the officer's actions in "compelling" the search and seizure of the defendant's blood under the aegis of N.C.G.S. § 20-139.1(d1) were appropriate must be evaluated initially under the terms of that statute. First, the defendant refused to submit to any chemical analysis. Second, the officer had probable cause to believe that the defendant had committed an implied-consent offense. Defendant, however, challenges the reasonableness of the officer's belief that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the defendant's blood.
13. In this case, the officer had adequate probable cause to arrest the defendant for driving while impaired and, in fact, the defendant does not challenge that probable cause to arrest existed.
14. However, Officer [redacted] belief that the circumstances were such that the delay necessary to obtain a court order for a blood test would result in the dissipation of the percentage of alcohol in the defendant's blood is compromised by the following facts:
    a. The officer knew within twenty minutes of contact with the defendant that he had probable cause to arrest for driving while impaired;
    b. The officer observed that the defendant had a "droopy look" on his face and red, watery eyes;
    c. The officer noticed that the defendant had a faint odor of alcohol which at times increased to a moderate odor;
    d. That the defendant admitted to the officer that he had been drinking alcohol that night;

e. Even after having gathered enough evidence for probable cause, the officer continued to request, and the defendant continued to perform three more field sobriety tests, each of which, in the officer's opinion, indicated various clues of impairment;

f. That the defendant had a very poor ability to understand the officer's instructions;

g. That the officer believed that the defendant looked "very impaired";

h. The defendant announced his intention to refuse to provide a blood sample even before being transported to the hospital;

i. A search warrant was obtainable within a reasonable period of time because it was late on a Monday night and the Magistrate's Office was a short distance and brief travel time away from the scene of the arrest;

j. That there is no evidence as to whether the Officer even considered whether to obtain approval from a judicial official to use physical force to compel a blood draw against the defendant's will;

k. That if the officer, a 24-year veteran of law enforcement who has investigated over 1,400 driving while impaired cases, believed the defendant was "very impaired" and exhibited this many clues of impairment, it was not reasonable for the officer to think the delay necessary to obtain a court order would result in the dissipation of alcohol in the defendant's blood in the short amount of time it would have taken to obtain the court order;

l. The officer knew that North Carolina's courts have accepted the reliability of extrapolation evidence in computing the reduction in blood alcohol concentration from the time of arrest to the time of testing to establish what the defendant's blood alcohol concentration would have been at the time of driving. Therefore, the officer was not truly concerned about the "exigency" created by the dissipation of alcohol. Certainly it was not a true "exigent circumstance" in this case during the next hour or so following arrest, which, at most, might have been lost in obtaining a search warrant.

m. It was the officer's decision to go straight to Wake Forest Hospital. Processing the defendant into the hospital delayed everything by more than forty minutes. It was not until then that the officer asked the defendant a second time to submit to chemical analysis and asked whether the defendant wanted to contact a witness to view the blood draw.

n. The law enforcement officer then waited another one-half hour before attempting to have blood drawn. Other officers had responded to the scene to assist Officer [redacted], and another officer could have taken the defendant to the hospital while Officer [redacted] independently obtained a search warrant.

o. Furthermore, the officer suspected that the defendant was also impaired by "crack" cocaine and knew that cocaine, if present, would remain in a person's blood long after the time of arrest.

15. These facts are distinguishable from those presented in State v. Fletcher, 202 N.C. App 107 (2010), which analyzed the issue of an officer's compliance with N.C.G.S. § 20-139.1(d1) in the context of a motion to suppress blood test results obtained as a result of a "compelled" blood draw from an arrestee suspected of driving while impaired.
16. In Fletcher, the Court found on appeal that competent evidence existed in the record for the trial court's finding as a fact that the arresting officer in that case had a reasonable belief that the delay necessary to obtain a court order, under the following circumstances, would result in the dissipation of the percentage of alcohol in the person's blood:
    a. The arresting officer testified that the Magistrate's office was twelve miles away, Fletcher at 110;
    b. The offense was during the weekend, and the arresting officer testified that the Magistrate's office is often very busy on the weekends, Id.;
    c. The officer testified that she has had to stand in line at the Magistrate's office several times before seeing a Magistrate, Id.;
    d. The officer testified that the emergency room at the hospital is busy on weekend nights most of the time, Id.; and
    e. Based upon the officer's four years of experience, she believed that had she driven to the Magistrate's office, stood in line, filled out the required forms, returned to the hospital and had the defendant's blood drawn, it would have taken anywhere from two to three hours. Id. at 110-111.
17. In Fletcher, Judge Jackson opined that the N.C. legislature "has codified what constitutes "exigent circumstances" with respect to DWI's" in the form of N.C.G.S. § 20-139.1(d1).
18. Under these circumstances, this Court finds that exigent circumstances, as "codified" in N.C.G.S. § 20-139.1(d1) were not present.
19. Under these circumstances, this Court also finds it was not reasonable for Officer [redacted] to "compel" a blood draw from the defendant, with or without the use of physical force.
20. The blood draw was therefore not authorized under N.C.G.S. § 20-139.1(d1).
21. Having found that there was a statutory violation, the Court next analyzes the facts of this case in light of the due process clause of the Fourteenth Amendment of the U.S. Constitution as well as Article I Sections 18 and 19 of the N.C. Constitution;
22. North Carolina Courts have thus far considered the due process clause of the Fourteenth Amendment of the U.S. Constitution as being synonymous with the "Law of the Land" clause of the N.C. Constitution, *see* Simeon v. Hardin, 339 N.C. 358, 377 (1994). This Court, therefore, addresses these two issues together.
23. The defendant has moved to dismiss the charge of driving while impaired based upon his contention that he was deprived due process of law.
24. The Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amendment XIV.

25. In Rochin V. California, 342 U.S. 165 (1952), the United States Supreme Court considered an issue related to the one in this case in the context of the Due Process Clause.
26. In Rochin, three law enforcement officers, having "some information" that the defendant was selling narcotics, forced their way into his home and saw him swallow two capsules that had been lying on a bedside table. The officers first attempted to remove the capsules by force. When that was unsuccessful, the officers took the defendant to a hospital where his stomach was forcibly "pumped" against his will. The matter that was produced from the "pump" included the two capsules, which proved to be morphine, and were used as evidence to convict him. Rochin at 186-187.
27. Mr. Justice Frankfurter explained that the Supreme Court granted certiorari in the case because the defendant raised a "serious question" as to the limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States. These limitations concern restrictions upon the manner in which the States may enforce their penal codes. Id. at 187-188.
28. The Court's responsibility is to exercise its judgment upon the whole course of the proceedings resulting in a conviction in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized Constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . or are implicit in the concept of ordered liberty." Id. at 188.
29. Justice Frankfurter explained, the "vague contours" of the Due Process Clause will inevitably cause judgment to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guaranty of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked sharp divisions among Supreme Court Justices. Id. at 189.
30. In order for judges to practice the requisite detachment and to achieve sufficient objectivity no doubt demands of them the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. Id. at 189-190.
31. The Court in Rochin then felt "compelled" to conclude that the search and seizure that occurred did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically." The Court held that breaking into the defendant's home, struggling to open his mouth, and the forcible extraction of his stomach's contents, "shocks the conscience" and is "bound to offend even hardened sensibilities." Id. at 190.
32. A general requirement of Due Process is that States in their prosecutions must respect certain decencies of civilized conduct. Id. at 190.

33. Just as the police cannot be permitted to extract coerced confessions for use as evidence, they cannot be permitted to extract by force what is in a man's stomach. Id. at 190.
34. The Court reversed the conviction in Rochin, without remand. Id. at 191.
35. This Court is mindful that Rochin was decided prior to the Supreme Court's holding in Mapp v. Ohio, 367 U.S. 643 (1961), which applied the Fourth Amendment exclusionary rule to the states through the Due Process Clause of the Fourteenth Amendment. *See* Lester v. City of Chicago, 830 F.2d 706 (1987).
36. However, Justice Frankfurter's "shocks the conscience" standard of Due Process jurisprudence does not appear to have been overruled. The Supreme Court has cited Rochin in dozens of cases since, most recently in McDonald v. City of Chicago, 130 S. Ct. 3020, 3100 (2010)(Justice Stevens, dissenting); Chavez v. Martinez, 538 U.S. 760, 774 (2003)(indicating that unauthorized police behavior that "shocks the conscience" violates the Due Process Clause); and County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)("... deprivations of liberty cause by the most egregious official conduct may violate the Due Process Clause.").
37. To the extent that the Due Process Clause endows this Court to protect those personal immunities that "are so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . or are implicit in the concept of ordered liberty," this Court should so act.
38. Turning to the case now before the Court, the type of physical assault used by the law enforcement officers against the defendant raises similar concerns to those raised by the Supreme Court in Rochin. If officers are not permitted to extract by force what is in a man's stomach in the name of obtaining evidence of narcotics possession, officers should also not be permitted to extract by force what is in his arm.
39. This is especially true if the officer's purpose in conducting such a search and seizure is to obtain evidence in a misdemeanor prosecution.
40. This is conduct that shocks the conscience: informing the defendant that he has the right to refuse to provide that which is sought; physically assaulting him when he exercises that right; holding him down against his will; and then sitting atop his body while pushing his head down and to the side so that blood may be extracted from his arm.
41. The Court next considers this case in light of the Fourth and Fourteenth Amendments of the U.S. Constitution as well as Article I Section 19 "Law of the Land" clause and Article I Section 20 "General Warrants" clause of the N.C. Constitution.
42. As Judge Jackson recognized in Fletcher, North Carolina courts have treated the "Law of the Land" Clause of the N.C. Constitution as synonymous with "due process of law" as found in the Fourteenth Amendment to the Federal Constitution. North Carolina court have also treated the "Law of the Land" and "General Warrants" clauses of the N.C. Constitution as synonymous with the Fourth Amendment of the Federal Constitution. Id. at 112. This Court therefore addresses these issues together.

43. The defendant has moved to dismiss the charge of driving while impaired based upon what he has alleged was an unreasonable search and an unreasonable seizure and on the grounds that excessive force was used against him.
44. Federal Courts now analyze excessive force claims under the Fourth Amendment. Lester at 710.
45. Our Supreme Court has approved warrantless blood draws so long as exigent circumstances and probable cause are present. The two factors, exigent circumstances and probable cause, in effect, justify what would otherwise be an unreasonable search under standard Fourth Amendment analysis. Fletcher at 112; *citing* State v. Carter, 322 N.C. 709, 714 (1988) and State v. Welch, 316 N.C. 578 (1986).
46. The U.S. Supreme Court considered this issue in Schmerber v. California, 384 U.S. 757 (1966), which established that "blood tests clearly fall within the purview of the Fourth Amendment," *see* Fletcher at 112, and that "probable cause and the destruction of evidence caused by the body's diminution of alcohol in the bloodstream together meet the Fourth Amendment's requirements for a reasonable- in this case warrantless- search of the person." Schmerber at 767-771.
47. The Supreme Court in Schmerber stated, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. (Empasis added) Id. at 768. The issue in Schmerber was "whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Id.
48. In its analysis, the Schmerber Court reflected on the importance of the informed, detached and deliberate determination [of a neutral and detached magistrate] on the issue whether or not to invade another's body in search of evidence of guilt, an issue that is indisputable and great, "instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Schmerber at 760; *citing* Johnson v. United States, 333 U.S. 10, 13-14 (1948) *and* Aguilar v. Texas, 378 U.S. 108, 110-111 (1964).
49. The Schmerber Court determined that the blood test was a reasonable test and that the test was performed in a reasonable manner (emphasis added) and therefore presented "no violation of the petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." Schmerber at 772.
50. The Schmerber Court then added a caveat: "It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." (Emphasis added) Id. at 772.

51. This case is distinguishable from the facts in Schmerber. This Court makes a particular note that the officers in Schmerber did not resort to physical force or an assault of the defendant's person to obtain the blood sample. Id. at 759.
52. The U.S. Supreme Court also considered a related issue in Graham v. Connor, 490 U.S. 386 (1989). In Connor, Chief Justice Rehnquist stated in his opinion that, "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Connor at 396.
53. The proper application of the test of reasonableness requires careful attention to the facts and circumstances of each particular case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest." Id. *citing* Tennessee v. Garner, 471 U.S. 1, 8-9 (1984)("The question is whether the totality of the circumstances justifies a particular sort of seizure.")
54. Chief Justice Rehnquist wrote, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Connor at 396. "The question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397.
55. Turning to the facts now before the Court, the defendant was charged with a misdemeanor, he was not resisting or attempting to avoid arrest, and he was not a danger to any other person once arrested.
56. It is also telling that this is the first time this officer, currently a member of the D.W.I. Task Force, has used the degree of force exercised in this case in 24 years with law enforcement, with over 1,400 driving while impaired investigations.
57. The amount of force used by the officer in this case was excessive.
58. The officer's reliance on the statute, N.C.G.S. § 20-139.1(d1), is also compromised by the fact that the statute does not provide for a method of compulsion. Obviously, the officer could not resort to torture, imposition of injury or extreme pain to "compel" compliance with the request for chemical analysis. The statute even provides that if the taking of the blood sample is too dangerous to proceed, the health care worker has the right to refuse to participate. N.C.G.S. § 20-139.1(d2).
59. Even if the officer's reliance on the statute was reasonable, to the extent the statute "codifies" the law with regard to what constitutes a reasonable, warrantless search and seizure under the Fourth and Fourteenth Amendments of the U.S. Constitution, and the "Law of the Land" and "General Warrants" clauses of the N.C. Constitution, the statute is defective.
60. The statutory scheme equates "exigent circumstances" plus "probable cause" with "reasonableness."

61. The statute does not attempt to evaluate what truly constitutes an exigent circumstance and it finds "reasonableness" to exist in specific circumstances without any attempt at an evaluation of the specific facts and circumstances of a case.
62. In attempting to codify what constitutes exigent circumstances with respect to driving while impaired cases, our legislature has used language from past authoritative court opinions without requiring or engaging in the careful weighing and balancing of circumstances and competing individual and state interests that those decisions have represented.
63. That statutory scheme does not even "pay lip service" to the concept that "the integrity of an individual's person is a cherished value of our society."

Based upon the foregoing Findings of Fact, the Court reaches the following Conclusions of Law:

1. The search *and* seizure of the defendant's blood under the facts and circumstances of this case were unreasonable under the provisions and protections of the Fourth and Fourteenth Amendments to the U.S. Constitution and the "Law of the Land" and "General Warrants" clauses of the N.C. Constitution Article I.
2. The intrusion upon the defendant's body in this case goes beyond what our society would consider reasonable in the State's effort to obtain evidence against one of its citizens without the intervention and evaluation of an independent judicial official in the form of a court order setting forth the nature of the "compulsion" to be applied, and was therefore a violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution as well as Article I, Sections 18 and 19 of the N.C. Constitution.
3. N.C.G.S. § 20-139.1(d2), the statute under which the officer in this case sought to exercise his "authority" to forcibly seize blood evidence from the defendant violates the provisions of the Fourth and Fourteenth Amendments to the U.S. Constitution and the "Law of the Land" and "General Warrants" clauses of the N.C. Constitution as applied to this defendant under the facts and circumstances of this case.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore Ordered that the charge of misdemeanor driving while impaired pending against the defendant should be and is hereby dismissed.

This, the 18 day of January, 2012.

[redacted]

Superior Court Judge, presiding