Boating While Impaired

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Labor Day marks the unofficial end of summer around these parts, and I thought I'd mark the occasion with a post related to boating (a favorite summer pastime) and crime (since this is, after all, the criminal law blog). Specifically, this post discusses the crime of boating while impaired.

G.S. 75A-10(b1) prohibits the operation of any vessel while underway on the waters of this State: (1) while under the influence of an impairing substance; or (2) after having consumed sufficient alcohol that the person has, at any relevant time after the boating, an alcohol concentration of 0.08 or more. In addition, G.S. 75A-10(b) bars a person from "manipulat[ing] any water skis, surfboard, nonmotorized vessel, or similar device on the waters of this State while under the influence of an impairing substance." Violation of either provision is a Class 2 misdemeanor.

Practitioners of motor vehicle law will readily recognize similarities between G.S. 75A-10 and G.S. 20-138.1, the statute prohibiting driving while impaired. Indeed, G.S. 75A-10(b2) provides that relevant definitions contained in G.S. 20-4.01 apply to its provisions criminalizing impaired boating, skiing and surfing. Thus, the Chapter 20 definitions for "under the influence of an impairing substance," "alcohol," and "alcohol concentration," as well as the "relevant time after" portion of the "relevant time after driving" definition apply to the determination of whether a boater, skier or surfer was impaired. Other terms such as "vessel," "underway" and "waters of this State" are separately defined in G.S. 75A-2, along with the term "operate," which means to "navigate or otherwise use or occupy any motorboat or vessel that is afloat." (As an aside, I'm not sure what it means to "occupy" a boat. Does a passenger in a vessel satisfy this definition?)

Despite sharing common definitions with impairing driving laws, boating while impaired and surfing or skiing while impaired are not implied consent offenses. See G.S. 20-16.2(a1). This means that boaters, skiers and surfers—unlike drivers—are not deemed to consent to testing to a chemical analysis if charged with impaired operation and that a refusal to be tested does not give rise to a civil driver's license revocation. Thus, any consideration of whether a boater, skier or surfer may be compelled to submit breath or blood for analysis is strictly a Fourth Amendment, rather than a statutory, inquiry.

Because subjecting a person to a chemical analysis of his or her breath is a Fourth Amendment search, see Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 617 (1989), a warrant is required, absent consent or exigent circumstances, to obtain the person's breath for analysis. Of course, a defendant's consent to a search obviates the need for a warrant.

My understanding is that in practice, upon arresting a suspect for impaired boating, wildlife officers (who are charged with enforcement of Chapter 75A) typically ask the suspect to submit to a chemical analysis of his or her breath. If the person's consent is given freely and voluntarily, without coercion, the subsequent analysis is not rendered inadmissible for lack of a warrant.

In practice, the person's consent is prefaced by the reading of a notice of rights form, promulgated by the state's Department of Health and Human Services, which states:

You have been charged with boating, skiing or surfing on the waters of this state while under the influence of an impairing substance. In my presence the law enforcement officer will request you to submit to a chemical analysis to determine the alcohol concentration of your body. It is first required that you be informed both orally and given a notice in writing of your rights, which are as follows:

1. The test results, or the fact of your refusal, will be admissible in evidence at trial.

2. After you are released, you may seek your own test in addition to this test.

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

See DHHS T463.

For the most part, these rights afford a defendant rights additional to those secured by the Fourth Amendment or required by statute. I'm curious, however, about the impact of informing the defendant that evidence of a refusal is admissible at trial. Not only is this statement contrary to law, see State v. Jennings, 333 N.C. 579, 605 (1993) (recognizing that it is constitutional error to admit testimony as evidence of guilt that a defendant exercised his constitutional rights and refused to consent to a warrantless search), but such a warning arguably is coercive, thus calling into question the voluntariness of a defendant's consent.

If a suspect refuses a breath test, or an officer suspects that the person is impaired by a substance other than alcohol, the officer may seek to obtain a search warrant for withdrawal of the defendant's blood, based upon an affidavit alleging facts that establish probable cause that the defendant boated while impaired and that evidence of impairing substances are present in the defendant's blood. And, in certain emergency circumstances in which the delay necessary to obtain a warrant threatens the dissipation of alcohol in the defendant's blood (*cf. State v. Fletcher*, ___ N.C. App. ___ (Jan. 19, 2010), discussed here), an officer may be able to obtain blood for analysis without a search warrant pursuant to the exigency exception to the warrant requirement of the Fourth Amendment.

As I mentioned earlier, the foundational requirements in Chapter 20 for admission of a chemical analysis do not apply to chemical analyses performed in connection with charges of impaired boating, surfing and skiing. In theory, this could portend a heightened foundational showing for the admission of such evidence at a defendant's trial for a violation of G.S. 75A-10, requiring the State to demonstrate the reliability of the testing method. I'm curious, though, about how this plays out in practice, given that the State utilizes virtually the same procedures for obtaining a chemical analysis in a boating while impaired and a driving while impaired case. Does the routine admission of such analyses in implied consent cases facilitate their admission in other cases?

Readers, please share your thoughts about the questions raised in this post and any other noteworthy aspects of impaired boating, skiing and surfing cases.