DWI Day at the Court of Appeals

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Yesterday was opinion day at the court of appeals. And while it wasn't officially designated as DWI opinion day, several of yesterday's opinions resolve significant and recurring issues in DWI litigation. Today's post will cover the highlights.

Habitual DWI. G.S. 20-138.5 makes it a felony for a person who has been convicted of three or more offenses involving impaired driving within ten years of the date of the latest offense to drive while impaired. Unlike the statute defining habitual felon status, which requires that each qualifying predicate felony be committed after the person has been convicted of the earlier felony, G.S. 20-138.5 does not require that the prior felonies occur in any particular sequence.

State v. Mayo. Glenn Mayo, Jr. was indicted for habitual impaired driving in December 2015, following his arrest a month earlier for impaired driving. The State alleged that Mayo had three prior convictions for offenses involving impaired driving that occurred within ten years of the November 2015 DWI: a DWI conviction on September 30, 2015 in Johnston County Superior Court, and two DWI convictions on December 20, 2012 in Wake County District Court. Mayo argued on appeal that the habitual DWI indictment was invalid because two of the underlying convictions were on the same court date. He alleged that G.S. 20-138.5 was ambiguous because it did not address how to treat multiple convictions from the same date and that it should thus be construed in a similar manner to the habitual felon statute. The court of appeals rejected Mayo's argument. Noting that G.S. 20-138.5 was silent about the timing of the three prior impaired driving convictions other than to require that they occur within the ten years before the latest offense, the court "decline[d] 'to insert words not used'" by the legislature. (Slip op. at 8.) The court further noted that it previously had ruled that the determination of what qualifies as a predicate conviction was carried out differently under the habitual impaired driving statute and the habitual felon law. As a result, the court held that the defendant failed to show error in his habitual impaired driving indictment.

Corpus delicti. This Latin phrase comes up a lot in impaired driving accidents where the defendant confesses to driving, but no other witness saw him doing so. The traditional formulation of the corpus delicti rule requires that there be corroborative evidence, independent of the defendant's out-of-court confession, to show that the crime occurred. The North Carolina Supreme Court has modified that rule for non-capital cases, permitting the State to rely on a defendant's confession to obtain a conviction so long as there is strong corroboration of the essential facts and circumstances embraced in the defendant's confession.

State v. Sawyers. Jason Sawyers was charged with impaired driving and other offenses after the Dodge Charger in which he and his girlfriend were traveling ran off the road, hit a tree, and landed in a ditch. The first officer arrived about five minutes after the crash and found Sawyers seated in the driver's seat and his girlfriend in the passenger seat. Sawyers, whose license was revoked, later admitted to another officer that he had been driving at the time of the accident. At the conclusion of the State's evidence, Sawyers moved to dismiss the impaired driving charge on the basis that the State had to prove that the vehicle was actually "'moving and running'" and the evidence merely established that he was "'sitting in the passenger seat of a wrecked car.'" (Slip op. at 4.) The trial court denied the motion at that juncture and again when Sawyers renewed it at the close of all the evidence. Sawyers was found guilty

and appealed, arguing, among other things, that the State failed to present sufficient corroborative evidence, independent of his admission that he had been driving, to prove that he was the driver. The court of appeals rejected Sawyer's argument, which it characterized as founded upon "a common misunderstanding of the *corpus delicti* rule." (Slip op. at 8.) The court explained that the rule was designed to guard against the possibility that a defendant will be convicted of a crime that never occurred—not to prevent the wrong defendant from being convicted of a crime that did occur. For that reason, a confession identifying the perpetrator of the crime is not subject to the corpus delicti rule.

The *Sawyers* court explained that State presented substantial evidence at trial to establish that immediately before the crash, the Dodge Charger was speeding down a curvy road. The first officer to arrive at the scene noted that both Sawyers and his girlfriend smelled of alcohol. This evidence satisfied the requirement that the State present evidence tending to show that the crime of impaired driving occurred. It was thus permissible for the State to rely upon the defendant's confession to prove that he was the driver. Moreover, the court noted that witnesses saw the defendant get out of the driver's side of the vehicle seconds after the crash and the girlfriend's purse was found on the passenger floorboard, facts that tended to support the trustworthiness of the defendant's admission.

Speedy trial. DWI cases often take longer than other misdemeanor charges to try. Delays may result from circumstances including (1) the time necessary to obtain the results of a chemical analysis of the defendant's blood from a crime laboratory and to secure the attendance of the chemical analyst at trial; (2) litigation of motions to suppress and dismiss, which may be appealed from district court to superior court and are then remanded for entry of final orders in district court; and (3) the dismissal and re-filing of charges. Several appellate opinions address the merits of speedy trial claims filed by defendants based on such delays. A court considering a defendant's motion to dismiss for violation of the right to a speedy trial must assess and balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right to a speedy trial; and (4) the prejudice to the defendant resulting from the delay.

State v. Armistead. James Armistead was charged with impaired driving in Pitt County on September 3, 2011. On May 1, 2012, two days before his DWI trial was scheduled to begin, Armistead was sentenced in Beaufort County to imprisonment for a term of 108 to 139 months. Neither Armistead's appointed counsel on the DWI charges nor the Pitt County prosecutor knew about the Beaufort County case. Because he was imprisoned, Armistead did not appear in court on May 3. The following September the prosecutor dismissed the DWI charge with leave to later reinstitute the proceedings.

Meanwhile, from prison, the defendant mailed letters in October and November 2012 requesting that charges pending against him in several counties be dismissed. Though some his correspondence related to the Pitt County DWI charge, there was no evidence that the clerk of court or district attorney in Pitt County received these letters. In November 2015, Armistead wrote again to the Pitt County Clerk of Court. The clerk received this letter and notified Armistead's attorney, who notified the district attorney. The prosecutor put the DWI case back on the calendar and it was tried in district court on January 28, 2016. The judge found Armistead guilty. Armistead appealed to superior court where he moved to dismiss the charges on the basis that the four-year delay between his arrest and trial violated his right to a speedy trial. The superior court denied the motion. The case proceeded to trial before a jury, and Armistead was again convicted. He again appealed on the basis that he had been denied a speedy trial.

The court of appeals explained that the delay of four years was sufficiently long to trigger its examination of the remaining factors. As for the second factor, the court determined that the State could have avoided the delay in Armistead's trial by simply searching the DPS database or another database routinely used by prosecutors. Because the State was negligent in its efforts to locate Armistead, the court weighed this factor in Armistead's favor. The third factor—the defendant's assertion of his right—was neutral in the court's view since there was no evidence that Armistead's correspondence reached the proper court officials or the prosecutor until three years after the first trial date. The court weighed the final factor, prejudice, in the State's favor as Armistead failed to show that the pending charges affected his classification in prison or deprived him of a defense at trial. After balancing the four factors, the court determined that Armistead's speedy trial rights had not been violated.

Admission of breath test results. When law enforcement officers obtain breath alcohol concentration results by following the procedures prescribed by statute and administrative regulation, the test results are admissible without the evidentiary foundation that would otherwise be required for such scientific evidence. To benefit from this lowered bar for admissibility, the State must show that the required procedures were followed. One of the requirements is that the test be administered by a person with a current permit issued by the Department of Health and Human Services authorizing the person to perform a breath test on the instrument that was used. G.S. 20-139.1(b)(2). Amendments to the DWI laws enacted in 2006 require courts to take judicial notice of the list of permits issued to the person who conducted the test, the type of instrument on which the person is authorized to perform tests, and the date the permit was issued. *Id.*

State v. Squirewell. Anthony Squirewell II was charged with habitual impaired driving. At trial, the state trooper who administered Squirewell's breath test testified that he was certified to conduct breath tests on the instrument used to test Squirewell. He did not specifically state that he was certified at the time Squirewell's test was performed. Squirewell argued at trial and on appeal that this testimony was insufficient to provide an adequate foundation for introduction of the breath test results. The trial court and the court of appeals rejected Squirewell's argument.

Perhaps because the trial court did not take judicial notice of the trooper's permit, the court of appeals did not rely upon the statutory judicial notice requirement. Instead, it cited older cases that list three ways in which the State can prove the test administrator had a permit: (1) by stipulation; (2) by offering the permit; or (3) by presenting other evidence. The court then considered whether the trooper's testimony in Squirewell's case was adequate to show that he had a permit. Although the trooper did not explicitly state that he had a DHHS permit on the day he conducted defendant's breath test, the court held that his testimony that he was certified and that he carried out the test according to the Department's procedures was adequate to lay the necessary foundation for the admission of chemical analysis results.

That's a wrap of DWI opinion day.