

DWLR Based upon an Ignition Interlock Violation

Author : Shea Denning

Categories : [Crimes and Elements](#), [Motor Vehicles](#), [Procedure](#), [Uncategorized](#)

Tagged as : [driving while license revoked](#), [dwlr](#), [graves](#), [interlock](#)

Date : April 5, 2010

Last month, the North Carolina court of appeals decided [State v. Graves](#), No. COA09-595 (March 16, 2010), a case involving the defendant's appeal from his convictions for felony speeding to elude, driving while license revoked (DWLR), reckless driving to endanger, and impaired driving. The court vacated the defendant's conviction for DWLR on the basis that the state did not present sufficient evidence that defendant committed that crime, a point conceded by the state in its brief, and upheld the other convictions.

Given the state's concession that the evidence of DWLR was insufficient, the court did not discuss the point in any detail in its opinion. But I was curious so I [read the briefs and reviewed the record on appeal](#).

Turns out that Graves had two prior convictions for impaired driving—one in 1998 and another in 2004. As a result, when his license was restored in 2006, it was restored with a restriction that he operate only a vehicle equipped with ignition interlock (for one year), see [G.S. 20-17.8\(a\)\(2\)](#), (b), and that he not drive with an alcohol concentration greater than 0.00 (for three years), see [G.S. 20-19](#). Both restrictions applied when Graves drove a friend's car on July 24, 2007 in the incident giving rise to the charges. There was no ignition interlock on the vehicle; moreover, Graves was driving while impaired.

G.S. 20-17.8(f) provides that a person who violates an ignition interlock restriction "commits the offense of driving while license revoked under G.S. 20-28(a) and is subject to punishment and license revocation as provided in that section." Accordingly Graves was indicted for DWLR. The indictment alleged that he "operate[d] a motor vehicle on a public street or highway, while the defendant's drivers license was revoked or suspended" in violation of [G.S. 20-28\(a\)](#).

Graves moved to dismiss all of the charges at the close of the evidence, but did not specify that the basis for his motion as to the DWLR charge was a fatal variance between the indictment and the proof at trial. The judge delivered the pattern jury instruction for DWLR (NCPI Crim 271.10), instructing the jury that one element of the offense was that the defendant's license be suspended. Graves lodged no objection to these instructions.

The jury found Graves guilty of DWLR, and Graves was sentenced to 120 days imprisonment for this conviction, which was consolidated with Graves' conviction for reckless driving.

Graves argued on appeal that proof of driving in violation of an ignition interlock restriction did not establish that he drove while his license revoked, an element of DWLR—notwithstanding the provision in GS 20-17.8(f) to the contrary. Graves contended that because his license was not revoked, he could not be convicted of DWLR, though "[t]o be sure, he was liable to punishment under the provision." He argued that he could have been convicted upon a charge "differently pled," and "tried to a jury properly instructed."

Surprisingly, the State conceded in its brief that "the defendant was charged with an offense that he did not commit," agreeing that Graves "should have been charged with operat[ing] a motor vehicle on a public highway *in violation of a restrictive driving privilege* pursuant to N.C. Gen. Stat. 20-17.8(f)." (emphasis in original, internal quotation omitted). But driving in violation of ignition interlock restrictions *is* DWLR in violation of 20-28(a). G.S. 20-17.8(f) doesn't merely state that a person who drives in violation of ignition interlock restrictions is subject to punishment and revocation

pursuant to GS 20-28(a). It also states that a person “who violates any of the restrictions of G.S. 20-17.8 *commits the offense of driving while license revoked under G.S. 20-28(a).*” (emphasis added)

While the evidence at Graves’ trial arguably varied from the indictment, all such variances are not fatal. See, e.g., *State v. Lilly*, ___ N.C. App. ___, 673 S.E.2d 718 (2009); *State v. Hussey*, ___ N. C. App. ___, 669 S.E.2d 864 (2008). Arguably, the indictment against Graves correctly identified the offense charged (a violation of 20-28(a)), was sufficiently specific to protect Graves from being charged twice with the same offense, and gave Graves a basis on which to prepare his defense by identifying that the status of his license on the date of the offense was in question.

In light of *Graves*, prosecutors proceeding on a statement of charges or indictment alleging DWLR based upon an ignition interlock violation should take care to ensure that the charging document sets forth the correct theory for the G.S. 20-28(a) offense and that the jury instructions set forth the requisite elements of proof under this theory. There is no pattern jury instruction for DWLR based upon an ignition interlock violation, but as always, your friends at the School of Government stand ready to help.