

## Got Probable Cause for Impaired Driving?

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Two recent North Carolina Court of Appeals opinions help delineate when an officer has probable cause to believe a driver is driving while impaired. In each case, the court of appeals reversed the trial court's determination that the officer lacked probable cause.

[State v. Parisi](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2018). This case has been to the court of appeals [before](#). But take heart, readers, I am not going to review its criminal history in this post except to say that the court of appeals granted certiorari review to consider whether the evidence gathered following Parisi's arrest on impaired driving charges was admissible.

Parisi was stopped at a checkpoint. The officer saw "an open box of alcoholic beverage[]" on the passenger floorboard, but did not see any open individual containers. Parisi, who was driving, had glassy, watery eyes and smelled of alcohol. He told the officer he had consumed three beers earlier in the evening.

The officer administered three field sobriety tests: a horizontal gaze nystagmus (HGN) test, the walk and turn test and the one leg stand test. The defendant's performance on each test indicated impairment, and the officer arrested Parisi for driving while impaired.

Both the district court and the superior court (reviewing the district court's preliminary ruling) determined that Parisi's arrest was not supported by probable cause.

The court of appeals reversed, concluding that the odor of alcohol, the admission of drinking, and multiple indicators of impairment on field sobriety tests were sufficient to establish probable cause. The court noted the similarities between the observations in *Parisi* and those in *State v. Townsend*, 236 N.C. App. 456 (2014), in which the court found that the defendant's bloodshot eyes, odor of alcohol, positive alcosensor results, and clues indicating impairment on three field sobriety tests were sufficient to establish probable cause.

[State v. Clapp](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2018). *Clapp*, unlike *Parisi*, hasn't been to the court of appeals before. Clapp himself, however, had been to the police station just three hours before his arrest on the impaired driving charges at issue in this case.

Clapp was first arrested for impaired driving at 9:30 p.m. on September 5, 2015. He submitted to a breath test at 10:25 p.m., which revealed a breath alcohol concentration (BAC) of 0.16. Clapp was released from the Wilkes County Jail at 11:35 p.m.

Thirty minutes later, the officer who had arrested Clapp a few hours earlier saw Clapp seated in the driver's seat of his car, with the engine running, at a gas station about a half-mile away from the parking lot where he had been arrested earlier. The officer stopped Clapp. He noted that Clapp smelled of alcohol, had slurred speech, and was unsteady on his feet. The officer did not ask Clapp to perform any field sobriety tests. He testified that he knew Clapp had registered

a 0.16 BAC on a breath test an hour and 40 minutes earlier, that an average person's blood alcohol concentration declines by about 0.015 an hour, and that Clark was an average-sized person. Based on his earlier reading and the amount of time that elapsed, the officer concluded that "he still had plenty of alcohol in his bloodstream." Clapp, who was driving a BMW, said to the officer, "How am I supposed to leave a \$75,000 car sitting in the Wendy's parking lot?" Clapp told the officer that he was driving to "where his son was," and asked the officer to follow him the rest of the way.

The trial court concluded that these facts were insufficient to establish probable cause. The court of appeals reversed, concluding that the following facts, taken as a whole provided the officer with probable cause:

- defendant's admission to driving,
- defendant's red-glassy eyes, moderate odor of alcohol, slurred speech, and unsteadiness on his feet; and
- defendant's 0.16 BAC result one hour and forty minutes earlier combined with the officer's knowledge of the standard blood-alcohol elimination rate for an average individual.

**Takeaways.** The probable cause determinations in *Parisi* and *Clapp* were, of course, fact-specific. But given the commonality of investigative procedures utilized by officers in impaired driving cases, these cases, like others decided in recent years (discussed [here](#) and [here](#)), do provide some general guidance for evaluating probable cause determinations in impaired driving cases. *Parisi*, for example, demonstrates the significance of poor performance on field sobriety tests. When that performance is combined with evidence that the person has been drinking, the State appears to need little more to clear the probable cause threshold. For its part, *Clapp* demonstrates that a lack of field sobriety testing, even in a case where no bad driving was observed, does not necessarily deprive the State of probable cause. It also shows the court's willingness to credit back-of-the-envelope calculations about alcohol elimination rates when those calculations are used to establish probable cause as opposed to [proof beyond a reasonable doubt](#).