Melendez-Diaz and Limited Privileges

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If a 0.15 alcohol concentration is not admitted at trial or sentencing, does it count for limited privilege purposes?

I discussed in an earlier post circumstances in which the Confrontation Clause may bar the admission at a sentencing hearing in an impaired driving case of a chemical analysis offered to prove an aggravating factor based on a 0.15 alcohol concentration. If the Confrontation Clause does require the exclusion of such evidence at sentencing upon objection by the defendant when the chemical analyst is not present to testify, it only operates to exclude the evidence for purposes of establishing an aggravating factor under the statute, which functions as the equivalent of an element of the offense of impaired driving. In contrast, to the extent the chemical analysis is offered to inform the judge's exercise of discretion within the level of impaired driving established without reference to chemical analysis, the Confrontation Clause would not apply. This latter scenario is akin to use of evidence to inform sentencing discretion approved in *State v. Sings*, 182 N.C. App. 162 (2007), discussed in my earlier post.

I'd like to follow up by addressing how the exclusion of chemical analysis results based on the Confrontation Clause may affect the issuance of a limited driving privilege for a defendant with an alcohol concentration of 0.15 or more.

G.S. 20-179.3(c1) requires that any limited driving privilege issued to a person "convicted of an impaired driving offense with an alcohol concentration of 0.15 or more at the time of the offense" contain certain restrictions. First, the privilege may not become effective until 45 days after the final conviction. Second, the privilege must require ignition interlock. Third, the privilege may only allow driving to the applicant's work or school, to court-ordered treatment or substance abuse education, and to any ignition interlock service facility. The statute provides that "the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove a person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." Thus, it is clear that where a chemical analysis revealing an alcohol concentration of 0.15 or more is admitted at trial or at sentencing for purposes of proving the aggravating factor in G.S. 20-179(d)(1), any limited privilege issued to the defendant must contain the restrictions set forth in G.S. 20-179.3(c1).

But what if the results were admitted solely for the purpose of informing the judge's exercise of his sentencing discretion? Or were not admitted at all? May the judge consider such results in awarding a limited driving privilege? The Confrontation Clause does not apply to such proceedings, which are not criminal prosecutions. Thus, the answer to these questions depends upon interpretation of the relevant statutory provisions.

As noted above, the limited privilege restrictions apply to *persons convicted of an impaired driving offense with an alcohol concentration of 0.15 or more at the time of the offense*. Does a defendant convicted of impaired driving and sentenced for that offense without a finding of an aggravating factor based on an alcohol concentration of 0.15 or more fall within this category? Or does this encompass only defendants *whose convictions* included the element-like sentencing factor of a 0.15 alcohol concentation? I think it probably means the former, particularly given that a corollary provision in subsection (g5) prescribes ignition interlock for a person whose "drivers license is revoked for a conviction of G.S. 20-138.1, and the person had an alcohol concentration of 0.15 or more." The language in (g5) more clearly separates the requirement of a 0.15 BAC from the underlying conviction of impaired driving, indicating that the 0.15 need not have been an aggravating factor for ignition interlock to be required.

Even if this broader category of defendants is included, does G.S. 20-179.3(c1) restrict the judge to consideration only of a chemical analysis that was presented at trial or sentencing? I don't think so. The statute says that when presented, such an analysis is conclusive and not subject to modification, but it doesn't expressly or implicitly preclude consideration of an analysis that was not presented at trial or sentencing. Significantly, another provision of Chapter 20, § 20-17.8, requires DMV to rely on affidavits reporting chemical analysis results of 0.15 or more for purposes of requiring ignition interlock upon license restoration. Given that DMV is required to rely on affidavits regarding chemical analysis results for similar purposes that are strikingly similar to the awarding of a limited privilege, and given that the statutory scheme generally treats such analyses as reliable, it seems a reasonable conclusion that the General Assembly intended for judges to consider such results in determining whether to award a limited privilege.

But if the chemical analysis was not admitted at trial or sentencing, how is the judge apprised of that result for purposes of a limited privilege petition? A defendant convicted of impaired driving may apply for a limited privilege at or after sentencing. When a defendant applies for a privilege at sentencing, the district attorney is present and may inform the judge of the chemical analysis results. If the defendant applies for a privilege after sentencing, a hearing may not be scheduled until a reasonable time after the clerk files the application with the district attorney's office. This notice provides the district attorney an opportunity to bring the results to the court's attention. But what if the district attorney fails to do so? May the judge on his own initiative take judicial notice of any chemical analysis result contained in the file for the underlying case or reported to DMV and reflected in the defendant's driving history? I think so. Given that a person's eligibility for a limited privilege depends in part upon the level of punishment imposed for the impaired driving offense as well as the person's license status (see GS 20-179.3(b)(1)) and that a privilege is issued "in the discretion of the court for good cause shown," I'm inclined to conclude that the judge may examine the file in the underlying case, including any chemical analysis results contained therein, to determine whether the defendant's alcohol concentration render him or her a "high risk driver" subject to ignition interlock and other privilege restrictions. Of course, if the results were not admitted at trial or sentencing, the judge should afford the defendant an opportunity to proffer the reasons, if any, why the results should not be relied upon.