# Nothing Much Shocking about Shockley

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The court of appeals ruled this week in State v. Shockley that alcohol concentration readings from two of four attempted breath samples collected within 18 minutes of one another met the "consecutively administered tests" requirement for admissibility of a chemical analysis pursuant to former G.S. 20-139.1(b3). (As amended in 2006, the provision now requires "at least duplicate sequential breath samples.") Shockley was arrested on September 28, 2006, for driving while impaired and taken to the county jail for a breath test. As required by the administrative regulations incorporated by reference into former and current G.S. 20-139.1, the chemical analyst read Shockley his implied consent rights, observed him for fifteen minutes, verified the accuracy of the instrument, and then asked Shockley to blow into the mouthpiece. (These tests were conducted on an Intoxilyzer Model 5000. Those instruments since have been replaced by the Intoximeter, Model Intox EC/IR II.) Shockley's breath test, administered at 6:05 a.m., revealed an alcohol concentration of 0.16. He then blew a second time, but failed to provide sufficient breath for analysis. Shockley said an exposed nerve in his tooth made it too painful to blow. The operational procedures for the Intoxilyzer 5000 specified that subsequent tests be administered "as soon as feasible" by starting the process over. The chemical analyst waited fifteen minutes before giving Shockley another test. At 6:23 a.m., Shockley provided another breath sample, revealing an alcohol concentration of 0.15. The chemical analyst asked for another sample. Shockley again failed to provide sufficient breath. At 6:33 a.m., the chemical analyst noted his opinion, based on the second and fourth blows, that Shockley willfully refused to provide a sufficient breath sample.

The 0.15 breath test result was admitted at trial over Shockley's objection, and he was convicted of driving while impaired. Shockley appealed, arguing that the trial court erred in admitting the results of "non-consecutive" breath tests as well as testimony regarding his refusal. Shockley unsuccessfully attempted to distinguish *State v. White*, 84 N.C. App. 111 (1987), in which the court held that breath tests separated by two insufficient breath samples were, notwithstanding the intervening attempts, "consecutively administered tests" under G.S. 20-139.1. "To hold otherwise," noted the court in *White*, "would allow an accused to thwart the testing process by deliberately giving insufficient breath samples." The first and fourth tests in White were 11 minutes apart. Shockley argued that White did not control because when the chemical analyst chose to start Shockley's observation period over, "it indicated his intention to start the testing over, effectively nullifying the results of the previous testing period." The court refused to make a distinction based on "nothing more than six minutes" [I actually count seven minutes, but I doubt that matters] and found no error on the admission of the results.

The court then ruled that the admission of testimony regarding Shockley's refusal, which was not objected to at trial, did not arise to the level of plain error, even if the evidence was not relevant.

Would *Shockley* come out the same way under current G.S. 20-139.1? I think so. Current G.S. 20-139.1(b3) requires "the testing of at least duplicate sequential breath samples," and provides that "[t]he results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02." Since an insufficient sample does not generate an alcohol concentration, or, in other words, a test result, I think this language would be applied to reach the same result on facts like Shockley's.