

## State v. Dewalt and Speeding to Elude

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The court of appeals decided [State v. Dewalt](#) last week, holding that the aggravating factor of driving while license revoked, when used to elevate misdemeanor speeding to elude arrest to a felony offense pursuant to [G.S. 20-141.5\(b\)\(5\)](#), does not require proof that the defendant drove on a street or highway.

The facts of the case, gleaned from the opinion and the parties' briefs, are as follows: Law enforcement officers who had a warrant for the defendant's arrest cornered him in his Land Rover Discovery in the parking lot of shopping center. When one of the officers told the defendant he was under arrest, the defendant grinned and allowed the Land Rover to roll backward toward a patrol car. The defendant then "gunned it," negotiating the narrow space between two patrol cars parked in front of him and driving over concrete barriers in the parking lot. The defendant drove toward the parking lot's exit, which led on to Shallowford Road. The officers lost sight of defendant's vehicle before it left the parking lot.

Shortly thereafter, officers received word that defendant's vehicle was at 120 Sunny Acres Lane, the address of a residence with a large yard adjacent to the shopping center. When the officers arrived, they discovered defendant's vehicle in a ditch across the street from the house. Tire tracks suggested the vehicle had traveled from Shallowford Road across the yard, and then across Sunny Acres Lane and into the ditch. A boy who lived at the house testified that he was in his yard playing soccer when he saw the defendant's vehicle drive off Shallowford Road and across the yard. The boy watched as the defendant jumped out of the moving vehicle, did a front flip, and ran into the woods. Before his mother called him inside, the boy watched the defendant's vehicle roll unmanned across Sunny Acres Lane and into the ditch.

The defendant was indicted for felony speeding to elude by driving "on a public vehicular area, 6900 BLOCK OF SHALLOWFORD ROAD, LEWISVILLE, NORTH CAROLINA AND ON A STREET, SUNNY ACRES DRIVE, LEWISVILLE, NORTH CAROLINA," while "driving recklessly in violation of G.S. 20-140" and by "driving while the defendant's drivers license was revoked." The same indictment charged defendant with resisting, delaying and obstructing a public officer in violation of G.S. 14-233.

A second indictment, issued the same day and based on the same conduct, charged the defendant with reckless driving in violation of G.S. 20-140(b) and driving while license revoked in violation of G.S. 20-28(a) by operating a motor vehicle on a public highway while his license was revoked.

The defendant was tried before the jury for all four offenses in a single trial. Though it is unclear whether the defendant formally moved to dismiss the felony charges at the close of the State's evidence, he argued during the charge conference that the State failed to demonstrate that he drove on a street or highway as required for driving while license revoked pursuant to G.S. 20-28(a). The defendant contended that the failure of proof as to this aggravating factor required the trial court to instruct the jury only on the elements of misdemeanor speeding to elude rather than the felony offense.

The trial court opined that, while proof of driving on a street or highway was required for conviction of driving while license revoked under G.S. 20-28(a), such proof was not required to establish the aggravating factor of driving while

license revoked for purposes of felony speeding to elude arrest. Instead the court opined that driving while license revoked in a public vehicular area was sufficient. Notwithstanding the child's testimony that the defendant drove off Shallowford Road and into his yard, the trial court accepted the defendant's argument that the State failed to show he drove on a street or highway, instructing the jury that to return a verdict of guilty it had to find, among other facts, that at the time defendant fled from police, he was driving while license revoked and that he "knew of the revocation at the time of the driving in the public vehicular area."

Perhaps the trial court instructed only as to the driving in the public vehicular area because it considered the State bound to proving driving on the street alleged in the indictment—Sunny Acres Drive—and the defendant had jumped out of his vehicle by the time it reached Sunny Acres Drive. Yet, even assuming that the defendant was not "operating" the vehicle once he jumped out of it, I doubt the appellate courts would view proof that the defendant drove on Shallowford Road rather than Sunny Acres Drive as problematic since the street name is not an element of the offense and, as such, need not be included in the indictment. Moreover, given that the indictment alleged that defendant drove on a public vehicular area in a specified block of Shallowford Road—the very road where the child saw the defendant driving—the indictment appears to have provided sufficient notice to the defendant regarding the conduct giving rise to the charges.

What makes this case even stranger is that the defendant in *Dewalt* was convicted of driving while license revoked in violation of G.S. 20-28(a) in addition to the other offenses. Thus, the jury must have concluded that he, in fact, drove on a street or highway. There is no mention in the briefs or the opinion of this inconsistency, and I haven't read the transcript, so I don't know whether it was raised at trial.

My view before *Dewalt* was that the State had to prove driving while license revoked as defined under G.S. 20-28(a) to establish the aggravating factor under G.S. 20-141.5. The court of appeals stated as much in *State v. Funchess*, 141 N.C. App. 302 (2000), prefacing its discussion of the proper charging of this factor with the heading "Defining a Statutory Factor Which Is Itself a Crime," and referring to G.S. 20-28 as establishing the requisite elements. The *Funchess* defendant argued that the trial court should have charged the jury that the State was required to prove that he had knowledge of the license revocation. But because there is no requirement, even under G.S. 20-28(a), that the court instruct on knowledge where there is evidence that DMV mailed notice in compliance with G.S. 20-48 and no evidence that the defendant did not receive the notice, see *State v. Chester*, 30 N.C. App. 224, 227 (1976), *Funchess* held that it "need not reach the question of whether the trial court is required to charge the jury on the elements of the separate crimes" that enhance misdemeanor speeding to elude arrest to a felony offense. In so stating, *Funchess* assumed that the "driving while license revoked" referred to in G.S. 20-141.5(b)(5) was the driving while license revoked made a separate crime by G.S. 20-28(a)—the very issue in *Dewalt*.

Yet *Dewalt* dismissed *Funchess* as having "no precedential value" and concluded that because driving while license revoked, unlike several other aggravating factors listed in G.S. 20-141.5(b), did not incorporate a reference to the statute defining it as a crime, it did not mean driving while license revoked under G.S. 20-28(a).

*Dewalt* leaves unanswered other questions regarding the proof required to demonstrate that a person eluded arrest while driving while license revoked. Must the State prove that the defendant knew of the revocation? The State must prove actual or constructive knowledge to obtain a conviction under G.S. 20-28(a). See *State v. Atwood*, 290 N.C. 266, 272-73 (1976). Arguably this requirement, which provides the guilty knowledge evincing the criminal character of the act, ought to apply to G.S. 20-141.5(b)(5). Indeed, the trial court in *Dewalt* instructed the jury that the State had to prove that the defendant drove "knowing . . . that his licenses had been . . . revoked because he had been notified properly by the Division of Motor Vehicles."

Is driving while one's license is revoked by another state an aggravating factor under G.S. 20-141.5(b)(5), given that G.S. 20-28(a) requires a North Carolina order of revocation? My guess is no, since the definitions of "license" and "revocation" in G.S. 20-4.01 and other relevant statutory provisions apply with equal force to G.S. 20-28(a) and G.S. 20-141.5(b)(5).

Readers, if you have a different take on *Dewalt* or see issues I've failed to identify, please share your thoughts.