



State v. Lindsey: Another Close Call on Probable Cause for DWI

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Do the following facts provide probable cause to arrest for impaired driving?

An officer pulls behind a vehicle at a stoplight around 3 a.m. and sees that its registration is expired. He activates his blue lights, and the defendant turns into a nearby parking lot. When the officer approaches the car, the defendant tells him that his license is revoked for DWI. The officer smells a medium odor of alcohol coming from the defendant's breath and sees that the defendant's eyes are red and glassy. The officer performs an HGN test, noting 5 of 6 indicators of impairment. The defendant tells the officer that he had three beers at 6 p.m. the previous evening.

The court of appeals answered this question earlier this week in [State v. Lindsey](#), ___ N.C. App. ___ (2016). Its answer, and the outcome of the case, may surprise you.

Yes, the court of appeals held, these facts **do** provide probable cause to arrest for impaired driving. The absence of poor driving, a traffic violation, an accident, or slurred speech does not dictate a different result; nor does evidence that the defendant was steady on his feet, cooperative, and able to follow instructions.

What about *State v. Sewell*? Last year, the court of appeals held in [State v. Sewell](#), ___ N.C. App. ___, 768 S.E.2d 650 (2015) (unpublished) (discussed [here](#)) that an officer's observation of the driver's red, glassy eyes, six of six clues on the HGN test, and positive results on a portable breath test did **not** provide him with probable cause that the defendant was driving while impaired.

Why was there probable cause to arrest *Lindsey* but not *Sewell*? The *Lindsey* court provided two reasons.

First, *Sewell* was an unpublished decision and therefore not controlling legal authority.

Second, the odor of alcohol in *Sewell* came from the defendant's car rather than from the defendant herself, and *Sewell* was accompanied by a passenger. The defendant in *Lindsey* was alone in the car, and the officer smelled alcohol coming from the defendant's breath.

The factual distinction doesn't hold up very well in my view. It seems to me that *Sewell*'s positive results on the portable breath tests indicate that she was a likely source of the alcohol odor. If one accepts that linkage, the two defendants' circumstances aren't notably distinguishable when it comes to the smell of alcohol.

I'll note a third distinction. The trial court in *Sewell* granted the motion to suppress, concluding that the officer lacked probable cause to arrest, while the trial court in *Lindsey* denied the defendant's motion, concluding that, though it was "a really close case," the officer had probable cause. Of course, this shouldn't affect the appellate court's ruling since, in both cases, it found the trial courts' factual findings supported by the evidence and relied upon those findings in evaluating the totality of the circumstances.

The takeaway? *Lindsey* controls; *Sewell* does not. And despite the court of appeals' attempt to factually distinguish

the cases, *Lindsey* very nearly directly contradicts *Sewell*. My prediction is that trial courts will rarely, if ever, employ *Sewell* to evaluate probable cause in future impaired driving cases.

What's sufficient for a conviction? Even those who correctly predicted the *Lindsey* court's probable cause holding may find its ruling on the sufficiency of the evidence surprising.

At trial, the State relied on the facts noted at the outset of this post and the following additional evidence:

(1) Before arresting Lindsey, the officer tried more than once to obtain a sample of Lindsey's breath for analysis on a portable breath testing device; Lindsey repeatedly failed to provide enough breath to register;

(2) Lindsey, who apparently was not handicapped, pulled into a handicapped parking space when he was stopped;

(3) Lindsey refused to submit to a breath test after his arrest; and

(4) the officer who arrested Lindsey believed that he was appreciably impaired by alcohol and his opinion did not change over the two hours he spend with the defendant.

The court of appeals deemed this evidence sufficient to survive the defendant's motion to dismiss, notwithstanding evidence that the defendant drove properly and was steady on his feet.

The outcome. Lindsey was convicted of habitual driving while impaired and driving while license revoked for impaired driving. The State not only procured a conviction against Lindsey, but, in the process of litigating his appeal, gained favorable precedent for its use in future DWI prosecutions.