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MEMORANDUM

(via E-Mail)

TO: Clerks of Superior Court¹

FROM: Matt Osborne, Associate Legal Counsel²

DATE: 2 November 2011

RE: New G.S. 20-141.5 Felony Speeding to Elude Vehicle Seizure

Effective for offenses committed on or after 1 December 2011, the General Assembly has enacted a procedure for the seizure and forfeiture of motor vehicles used in the commission of the offense of felony speeding to elude arrest under G.S. 20-141.5.

The enabling legislation for this new procedure is HB 427, enacted as Session Law 2011-271. The full text of the legislation is available at the following link:

<http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H427v7.pdf>

(If this link does not work from this PDF document, you may want to copy the link and paste it into your Internet browser.)

The General Assembly largely modeled the new felony speeding to elude seizure process after the prearranged racing seizure process in G.S. 20-141.3(g). The felony speeding to elude seizure law is not modeled after the impaired driving seizure law in G.S. 20-28.2 through G.S. 20-28.9, although the General Assembly did insert a pretrial "innocent owner" release option into the new felony speeding to elude seizure law.

To follow is a summary of the new seizure process.

SEIZURE AND CUSTODY OF VEHICLE

1. Statute and Effective Date

The new seizure process is located in new subsections (g), (h), (i) and (j) of G.S. 20-141.5, which is the speeding to elude arrest statute. As noted above, these new seizure provisions apply to felony speeding to elude offenses committed on or after 1 December 2011.

¹ The Administrative Office of the Courts (NCAOC) asks that elected clerks provide a copy of this memo to the appropriate personnel in their offices and to their criminal magistrates.

² Professor Shea Denning from the UNC School of Government and NCAOC Associate Counsel Troy Page provided helpful input during the preparation of this memorandum.

2. Seizure Requirement

The new G.S. 20-141.5(g) provides that when a person is arrested for felony speeding to elude arrest, the law enforcement agency shall seize the motor vehicle used in the commission of the offense and deliver the motor vehicle to the sheriff. The seizure requirement applies even if the driver is not the owner of the vehicle.

Presumably, if the original charge is a misdemeanor speeding to elude violation under G.S. 20-141.5(a), and the State later decides to pursue a felony speeding to elude charge under G.S. 20-141.5(b) or (b1), law enforcement may seize the motor vehicle following the formal lodging of the felony charge. The owner of the vehicle perhaps could argue, though, that under the literal wording of G.S. 20-141.5(g), the defendant's arrest was not for felony speeding to elude and therefore a seizure is not proper. An owner also could possibly object to the seizure if he or she took title to the vehicle after the offense, but before the felony charge was lodged, and therefore argues that he or she is an innocent third party with no connection to the offense.

3. Exceptions

The new G.S. 20-141.5(g) does not expressly provide for any exceptions to the seizure requirement.

The impaired driving vehicle seizure law provides exceptions for stolen vehicles and certain rental vehicles. See G.S. 20-28.3(b). The new felony speeding to elude seizure law does not contain any exceptions of this sort. So if, for example, law enforcement were to seize a stolen vehicle used in the commission of felony speeding to elude, the owner would need to petition for release as an "innocent owner" as discussed on page three, below.

However, it appears that, just as with the impaired driving seizure law, mopeds are exempt from the new felony speeding to elude seizure law. Like the impaired driving seizure law, the new felony speeding to elude seizure law applies to "motor vehicles," and a moped, although it is a "vehicle," is not a "motor vehicle." See G.S. 20-4.01(23).

4. Custody of Vehicle/Towing and Storage Costs

Following seizure and delivery to the sheriff, the motor vehicle remains in the sheriff's custody until the vehicle is released or forfeited, as discussed on pages three through six, below. See G.S. 20-141.5(g).

The new law does not directly address the assessment of towing and storage fees by the sheriff. However, if the motor vehicle is later forfeited and sold, the new G.S. 20-141.5(h)(1) provides that "[t]he expenses of keeping the motor vehicle" and "[t]he fee for the seizure" are to be deducted from the gross sale proceeds. This is some indication that the sheriff may be able to recover costs associated with the towing and storage of the vehicle.

5. No Review by Magistrate

Unlike the impaired driving seizure law, there is no review of a felony speeding to elude seizure by the magistrate. The determination that seizure is appropriate is solely that of law enforcement.

If the magistrate were to find no probable cause for the felony speeding to elude charge at initial appearance, there is no provision in the new law for the magistrate to order the release of the vehicle. Presumably the charging agency would arrange for the release of the vehicle in this instance.

6. No DMV System Entries

In contrast to the impaired driving seizure law, the new felony speeding to elude seizure law does not provide for the imposition of a title hold on the vehicle or any other entries into the DMV title and registration system (STARS).

PRETRIAL RELEASE

1. Pretrial Temporary Bond Release

The new felony speeding to elude seizure law provides for the temporary pretrial release of the seized motor vehicle to an owner who posts a bond to secure the return of the vehicle at the time of trial.

The bond release procedure is governed by the new G.S. 20-141.5(g)(1). Unlike bond release under the impaired driving seizure law, where bond release is a matter between the owner and the clerk, bond release under the felony speeding to elude seizure law is a matter between the owner and the sheriff. The clerk has no role in the bond release process: "The sheriff shall restore the seized motor vehicle to the owner upon execution by the owner of a good and valid bond, with sufficient sureties, in an amount double the value of the property, which bond shall be approved by said sheriff and shall be conditioned on the return of the motor vehicle to the custody of the sheriff on the day of trial of the person or persons accused." Id.

Unlike the impaired driving seizure law, the speeding to elude seizure law does not expressly limit pretrial bond release to a non-defendant owner. So, it appears that under the speeding to elude seizure law, a defendant-owner may be able to obtain the temporary bond release of the motor vehicle from the sheriff.

2. Pretrial Permanent "Innocent Owner" Release

Permanent "innocent owner" release is available prior to trial under the new G.S. 20-141.5(h)(4). However, unlike the impaired driving vehicle seizure law, the felony speeding to elude seizure law does not define the term "innocent owner." The new G.S. 20-141.5(h)(4) simply provides that "[a] nondefendant motor vehicle owner may file a petition with the clerk of court seeking a pretrial determination that the petitioner is an innocent owner." One possible interpretation of "innocence" in this context is that the owner did not know and had no reason to know that the defendant would use the vehicle to speed to elude arrest. However, because the General Assembly has not defined the term, the clerk will have some discretion in determining whether the petitioner is "innocent."

The new law also does not define the term "owner." Accordingly, it appears that "owner" for purposes of the felony speeding to elude seizure law will be a person who meets the general definition of "owner" in G.S. 20-4.01(26): "A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter. For the purposes of this Chapter, the lessee of a vehicle owned by the government of the United States shall be considered the owner of said vehicle." This is broader than the definition of "owner" that appears in the impaired driving seizure law, which limits "owner" to "[a] person in whose name a registration card or certificate of title for a motor vehicle is issued at the time of seizure." See G.S. 20-28.2(a1)(3a).

The new petition and order form for this pretrial innocent owner release procedure is **AOC-CR-275**. The AOC will post this form to www.nccourts.org in time for the 1 December 2011 effective date of the law. The new law requires the clerk to "consider the petition and make a determination as soon as may be feasible." G.S. 20-141.5(h)(4). Unlike the impaired driving seizure law, the owner need not provide proof of insurance or execute an acknowledgement. The clerk simply determines whether the petitioner is a person other than the defendant who is an "innocent owner" of the vehicle.

If the clerk grants the petition, the vehicle is permanently released to the owner. Id. If the clerk denies the petition, the petitioner may ask the court to “reconsider” the clerk’s decision as part of the forfeiture hearing following the conviction of the defendant. Id.

The clerk must send a copy of the order granting or denying innocent owner release to the Office of the District Attorney and to the sheriff. Id.

3. Pretrial Permanent “Immediate Family” Release

In addition to the pretrial innocent owner release petition before the clerk, G.S. 20-141.5(h) also provides for a pretrial release petition before a judge if, among other things, the defendant was an immediate family member of the owner at the time of the offense.

Specifically, G.S. 20-141.5(h)(3) provides that an owner is entitled to the release of the vehicle if the owner can establish to the satisfaction of the court that the defendant (i) “was an immediate member of the owner’s family at the time of the offense,” (ii) “had no previous felony or misdemeanor convictions at the time of the offense and had no previous or pending violations of any provision in Chapter 20 of the General Statutes for the three years previous to the time of the offense,” and (iii) “was under the age of 19 at the time of the offense.” Subsection (h)(3) further provides that the owner is “entitled to a trial by jury” on these three issues.

It is possible that the General Assembly intended for this method of release to be available only following the defendant’s conviction, but one could reasonably read G.S. 20-141.5(h)(3) as applying both prior to trial and following the defendant’s conviction. Accordingly, until the General Assembly or the appellate division directs otherwise, this method of release appears to be available both prior to trial and following conviction.

The form for this method of release is **AOC-CR-277**.

4. Pretrial Lienholder Release

The new G.S. 20-141.5(g)(2) provides that, “on petition by a lienholder, the court, in its discretion and upon such terms and conditions as it may prescribe, may allow reclamation of the vehicle by the lienholder.” In contrast to the impaired driving vehicle seizure law, the felony speeding to elude seizure law does not define “lienholder.” Presumably a “lienholder” under G.S. 20-141.5(g)(2) will be a person or entity that holds a perfected security interest in the motor vehicle under G.S. 20-58 through G.S. 20-58.10.

Unlike the impaired driving seizure law, the felony speeding to elude seizure law does not expressly require the lienholder to sell the vehicle, but it does require the lienholder to “file with the court an accounting of the proceeds of any subsequent sale of the vehicle and pay into the court any proceeds received in excess of the amount of the lien.” G.S. 20-141.5(g)(2).

Also unlike the impaired driving seizure law, the felony speeding to elude seizure law does not require the lienholder to make any showing that the obligor is in default, and it does not expressly prevent the lienholder from returning the vehicle to the obligor.

The new lienholder release form is **AOC-CR-276**.

5. No Pretrial Permanent Defendant-Owner Release

Unlike the impaired driving seizure law, there is no provision in the new law for permanent pretrial release to an owner who was the driver at the time of the offense. If, however, the defendant is not convicted of felony speeding to elude, the sheriff must return the vehicle the defendant-owner. See G.S. 20-141.5(g)(1).

6. No Pretrial Sale

In contrast to the impaired driving seizure law, there is no provision for the pretrial sale of the vehicle in order to maximize its sale value. Presumably the General Assembly deemed a pretrial sale provision unnecessary because the sheriff, rather than a private contractor, will be storing the vehicle, and therefore there is less of a chance that the accrued towing and storage costs will overtake the value of the vehicle.

7. No Insurance Proceeds Limitations

Unlike the impaired driving seizure law, there is no provision requiring an insurer to pay into the clerk's office proceeds for a seized vehicle that has been damaged or totaled. The felony speeding to elude seizure law makes no mention of damaged or totaled vehicles.

8. Retrieval of Personal Property Left in Seized Vehicle

In another difference from the impaired driving seizure law, the felony speeding to elude seizure law does not address the retrieval of personal property from a seized vehicle. The owner of the personal property would need to address any retrieval request to the sheriff given that the sheriff is the custodian of the vehicle.

POST-TRIAL FORFEITURE AND RELEASE

1. Post-Trial Release If Defendant Not Convicted of Felony Speeding to Elude

If the defendant is not convicted of felony speeding to elude arrest, the sheriff must return the seized motor vehicle to the owner. See G.S. 20-141.5(g)(1).

2. Post-Trial Forfeiture and Sale Following Conviction

If the defendant is convicted of felony speeding to elude arrest, and the motor vehicle has not already been permanently released to an owner or lienholder, the court shall order the sale of the vehicle at a public auction. See G.S. 20-141.5(h). Presumably the sheriff, as the custodian of the vehicle, will coordinate the sale, but the statute refers only to "the officer making the sale." See G.S. 20-141.5(h)(1).

The net proceeds of the sale are payable to the county school fund. Id. Prior to any payment to the school fund, the officer coordinating the sale must first deduct from the gross sale proceeds (i) "[t]he expenses of keeping the motor vehicle," (ii) "[t]he fee for the seizure," (iii) "[t]he costs of the sale," and (iv) "all liens, according to their priorities." Id.

The court may order that the vehicle be retained by law enforcement or another governmental entity rather than being sold at auction if the vehicle is specially equipped in a such as way as to increase its speed and the special equipment cannot easily be removed. Specifically, if the court finds that the vehicle has been "specially equipped or modified from its original manufactured condition so as to increase its speed, the court shall, prior to sale, order that the special equipment or modification be removed and destroyed and the vehicle restored to its original manufactured condition." G.S. 20-141.5(j). If, however, "such equipment and modifications are so extensive that it would be impractical to restore [the] vehicle to its original manufactured condition, then the court may order that the vehicle be turned over to such governmental agency or public official within the territorial jurisdiction of the court as the court shall see fit, to be used in the performance of official duties only, and not for resale, transfer, or disposition other than as junk." Id.

The new forfeiture/retention order form is **AOC-CR-278**.

3. Post-Trial Release to Owner

There are two methods by which an owner may obtain the release of the vehicle following the defendant's conviction.

First, as noted above, a person whose innocent owner petition was denied by the clerk may ask the court to reconsider the petition following the conviction of the defendant. See G.S. 20-141.5(h)(4).

Second, an owner is entitled to the release of the vehicle following the defendant's conviction if the owner can establish to the satisfaction of the court that the defendant (i) "was an immediate member of the owner's family at the time of the offense," (ii) "had no previous felony or misdemeanor convictions at the time of the offense and had no previous or pending violations of any provision in Chapter 20 of the General Statutes for the three years previous to the time of the offense," and (iii) "was under the age of 19 at the time of the offense." See G.S. 20-141.5(h)(3).

The form for these two methods of post-trial release is **AOC-CR-277**.

4. Post-Trial Release to Lienholder

A lienholder may obtain the release of the vehicle following the defendant's conviction in the same manner described above for pretrial release to a lienholder.

As noted above, the lienholder release form is **AOC-CR-276**.

APPEALS

The only appeal allowance in the new felony speeding to elude seizure law is the court's authority following conviction to reconsider a pretrial innocent owner release petition denied by the clerk. Other than this reconsideration provision, the new law does not address appeals from orders granting or denying release petitions, or appeals from forfeiture orders.

Court officials and court staff persons with any questions regarding this new seizure process should feel free to contact Matt Osborne at matt.e.osborne@nccourts.org, or (919) 890-1301.