This issue distributed to:

Law Enforcement Officers, Judges, Prosecutors, Public Defenders, Highway Safety Personnel

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

October 1979

No. 79/14

LEGAL ASPECTS OF CHEMICAL TESTING FOR INTOXICATION

By James C. Drennan and Allen Moseley

Contents

LEGAL ASPECTS OF CHEMICAL TESTING FOR INTOXICATION

by

James C. Drennan and Allen Moseley

I. Introduction

A. Purpose and Scope of the Paper

In some areas of North Carolina, up to half the time in a criminal term of court may be devoted to the trial of drunk driving cases. Despite the large percentage of such cases on the trial docket, the single most important piece of evidence for determining intoxication or degree of intoxication was for many years the subjective and often inaccurate conclusion of the person making the determination based upon observation. The General Assembly in 1963 saw a need for a more objective, reliable means of testing intoxication. As a result, the legislature passed a bill making it easier to use the results of a chemical analysis of breath or blood in cases for driving under the influence of liquor.

North Carolina authorizes the use of either blood or breath tests, depending on which test the arresting officer designates. G.S. 20-16.2(a). The most common is the breath test, which will be focused upon in this paper.

Chemical test evidence obtained from an approved breath test instrument or from a blood test is admissible in court if it is obtained in accordance with the legal requirements discussed in this paper. The statutes and regulations dealing with chemical tests are intertwined and at times confusing. For this reason, this memo presents admissibility requirements in chronological order so that a law enforcement officer might make a mental checklist of his proper order of procedure as he reads through the paper.

B. The Chemical Test Statutes

There are two rather complicated statutes regulating the use of chemical tests in North Carolina. The first statute, G.S. 20-139.1, controls admissibility of chemical tests. Normally the results of any chemical test could not be introduced into evidence unless (1) the test used is proved to be accurate in measuring whatever is to be measured; (2) the test provides information relevant to the issue being tried; and (3) the test was conducted and interpreted properly.

G.S. 139.1(a) eases that burden by providing that a person's blood alcohol content is admissible in evidence in any criminal action "arising out of acts alleged to have been committed by any person while driving or operating a vehicle while under the influence of intoxicating liquor or with a blood alcohol content of 0.10 percent or more by weight." The statute also sets up standards for who may administer the tests and methods by which it may be administered. If a chemical breath test operator possesses a valid permit from the Department of Human Resources and follows the procedures set out in the rules of the Commission for Health Services and in the statutes, the test results will be admitted. G.S. 20-139.1(b).

The second statute is North Carolina's implied consent law. G.S. 20-16.2(a) provides that "any person who drives or operates a motor vehicle upon any highway or public vehicular area shall be deemed to have given consent, subject to the provisions of G.S. 20-139.1, to a chemical test or tests of his breath or blood for the purpose of determining the alcoholic content of his blood if arrested for any offense arising out of acts alleged to have been committed while the person was driving or operating a motor vehicle while under the influence of intoxicating liquor." The implied consent law does not require a person to take the breath test; however, in most cases a refusal to submit will result in a six month revocation of the person's driving privilege. G.S. 20-16.2(a).

The procedural details of these two statutes will be discussed more fully later in this memo.

C. Constitutional Basis for Chemical Tests

There have been many objections, on various constitutional grounds, to the introduction of blood and breath test results to determine alcohol content in vehicle related crimes. Most of these objections were resolved by the United States Supreme Court in Schmerber v. California, 384 U.S. 757 (1966). In that case, Schmerber was arrested for driving under the influence while he was at a hospital receiving treatment for an injury sustained in an automobile accident. Police officers asked a doctor to test Schmerber's blood for alcohol content. Schmerber, upon advice of his attorney, refused to consent to the test, and a blood sample was withdrawn over his objection.

Schmerber was later convicted of driving under the influence. He appealed his conviction to the United States Supreme Court and claimed that the use of the results of the blood test in evidence against him violated four constitutional rights: (1) due process; (2) the privilege against self-incrimination; (3) the right to counsel; and (4) the right not to be subjected to unreasonable searches and seizures.

The Supreme Court held there was no violation of any of his rights. The Court found nothing to offend due process because the sample was taken in a simple, medically accepted manner and there was nothing in the circumstances that offended a sense of justice. Second, with respect to Schmerber's privilege against self-incrimination, the Court noted that a chemical test does not involve "testimonial compulsion" of a communicative nature and therefore is not protected by the Fifth Amendment. Third, defendant's right to counsel was not denied

because he had the advice of his counsel; the fact that the counsel erroneously advised him to refuse the blood test when he was not entitled under California law to refuse did not deny him his right to counsel. Finally the Court held there was no unreasonable search and seizure because there was probable cause to make the search, and the method used was a reasonable one considering that taking the time necessary to obtain a warrant would have frustrated the purpose of the search and threatened the destruction of the blood test evidence.

North Carolina courts have agreed that the chemical breath and blood tests are important evidentiary tools. See State v. Powell, 264 N.C. 73 (1965). Furthermore, they will rely on the Schmerber decision to strike down similar constitutional objections to North Carolina's chemical test statutes. See State v. Karbas, 28 N.C. App. 372 (1976).

II. Preliminary Requirements for Admissibility of Breath Test Results

Before a law enforcement officer is able to effectively request or administer a breath test, he must be able to recognize the situations in which the results will be admissible. G.S. 20-139.1(a) states that chemical tests are admissible in a criminal action arising out of acts alleged to have been committed while a person was driving under the influence or with a blood alcohol content of 0.10 percent or more by weight. There are three principal statutory offenses in which the results of a chemical test will be used as evidence and thus rely on G.S. 20-139.1 to have the results admitted: G.S. 20-138, 20-140(c), and 20-12.1. To assist officers in knowing when those offenses occur, a brief discussion of the elements required to convict a person under each of these three statutes follows.

A. G.S. 20-138--Persons Under the Influence of Intoxicating Liquor
In North Carolina, it is unlawful to:

1. drive or operate
2. a vehicle
3. on a highway or public vehicular area
4. while under the influence of intoxicating liquor.

1. A driver or operator is "a person in actual physical control of a vehicle which is in motion or which has the engine running: G.S. 20-4.01(25). The statute clearly indicates a vehicle need not be in motion in order for a person to be operating it; if the engine is running, the vehicle is in operation. The key issue will be whether the person is "in actual physical control" of the vehicle. What is actual physical control? Clearly, the driver need not necessarily be behind the wheel of the vehicle; otherwise, persons such as rural mail carriers would be excluded under the statute. Is an unconscious person in actual physical control of the vehicle? In State v. Turner, 29 N.C. App. 163 (1976), the North Carolina Court of Appeals provided a partial answer to this question. In that case, defendant was found in a semi-conscious state with his head slumped on the steering wheel and leaning toward the door on the left side. The court held the evidence was sufficient to find that defendant was in actual physical control of the vehicle.

2. A vehicle is "Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks; provided, that for purposes of this Chapter bicycles shall be deemed vehicles and every rider of a bicycle upon a highway shall be subject to the provisions of this Chapter applicable to the driver of a vehicle except those which by their nature can have no application." G.S. 20-4.01(49).

Note that this definition excludes trains and devices pulled by human power. Bicycles, however, are specifically included in the definition, except for such rules that can't apply (such as minimum speed limits).

Although G.S. 20-138 applies to all vehicles, some statutes are specifically limited to motor vehicles. For example, under G.S. 20-16.2, a driver does not implicitly consent to a chemical test unless he is driving a motor vehicle. A motor vehicle is "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle." G.S. 20-4.01(23). This definition specifically excludes mopeds, which are vehicles with two or three wheels, operable pedals and a motor rated less than 50 cubic centimeters piston displacement that cannot propel the vehicle at speeds of more than 20 miles per hour on a level surface.

3. A highway is defined by G.S. 20-4.01(13) as "the entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic." By broadly defining highway to include all property included in the right-of-way, Chapter 20 allows for a person to be charged with an offense even if he is not on the roadway itself but is instead on the sidewalk or the shoulder of the road. State v. Perry, 230 N.C. 361 (1949). However, not every area frequently used for vehicular travel can be considered a highway. In Smith v. Powell, 293 N.C. 342 (1977), the court held that the area under a bridge that was used to place boats in a river was not a highway.

The court's interpretation in Smith hinged upon the requirement that a highway be "open to the use of the public as a matter of right for the purposes of vehicular traffic." G.S. 20-4.01(13). The court found that "[w]hile the record shows people, with some frequency, drive motor vehicles beneath the bridge here in question, nothing in the record indicates that they have a right to drive upon any part of this area."

The crime of driving under the influence may also be committed on a public vehicular area, which includes "any drive, driveway, road, roadway, street, or alley upon the grounds and premises of any public or private hospital, college, university, school, orphanage, church, or any of the institutions maintained and supported by the State of North Carolina, or any of its subdivisions or upon the grounds and premises of any service station, drive-in theater, supermarket, store, restaurant or office building, or any other business, residential or municipal establishment providing parking space for customers, patrons or the public or any drive, driveway, road, roadway, street, alley or parking lot upon any property owned by the United States and subject to the jurisdiction of the State of North Carolina . . . . The term 'public vehicular area' shall also include any street opened to vehicular traffic within a subdivision which has been offered for dedication to the public by the filing of a map, plat or written instrument in the office of the Register of Deeds; provided however,

a public authority (1) has not accepted the dedication of the street, and (2) a public authority has not assumed control over the street." G.S. 20-4.01(32).

The latter part of the statute designating federal property subject to the jurisdiction of North Carolina and subdivision streets offered for dedication as public vehicular areas was added by the 1979 Session of the General Assembly. The effect of including subdivision streets offered for dedication is that roads which are offered for dedication but are not accepted because they do not meet state standards are still public vehicular areas under G.S. 20-4.01(32).

It is apparent from recent Attorney General opinions that that office will broadly construe the definition of public vehicular areas. For example, one Attorney General's opinion concluded that a public vehicular area includes streets leading into privately owned trailer parks which rent, lease and sell individual lots. The opinion relies on the portion of the statute stating that "any other business . . . providing parking spaces for customers, patrons or the public is a public vehicular area." Since a trailer park is a business open to customers or patrons who are potential buyers, its roads are public vehicular areas. Opinion of Attorney General to Mr. Henry A. Harkey, 45 N.C.A.G. 284 (1976).

Would a condominium drive be included in the definition of public vehicular area? The driveways of an apartment complex are public vehicular areas because an apartment complex is a "residential establishment . . . providing parking space for customers, patrons, or the public." An apartment complex is clearly a "residential establishment" because it is run for a profit and a tenant's monthly rent helps to maintain the parking areas and driveways in the complex. In a condominium area, however, the drives are privately owned and maintained by the residents, which would make them more like a private road in a subdivision area. Of course, if some of the condominiums are for sale, it might be argued that the drives are public vehicular areas because the owners are in the "business" of selling condominiums and the drives provide parking space for their customers. Thus, the question of whether condominium drives are public vehicular areas is a difficult one that may depend on the facts of each individual case. In such a case, the officer may want to consult a superior before arresting for motor vehicle offenses.

4. Intoxicating liquor includes alcohol, whiskey, rum, beer, wine, etc., as well as any "spirituous vinous, malt or fermented beverages, liquids and compounds, whether medicated, proprietary patented, or not, and by whatever name called, containing one-half of one percent or more of alcohol by volume, which are fit for use for beverage purposes." G.S. 18A-2(4). It should be noted that this definition comes from G.S. Ch. 18A, which regulates the sale, consumption, and manufacture of liquor, and not its relationship to driving. Perhaps a broader definition should be used for DUI purposes, but G.S. 18A-2(4) is the only definition of intoxicating liquor available in the statutes.

What should an officer do when he stops a person who is under the influence of a compound which contains both drugs and alcohol or who has been drinking and taking drugs? The safest action to take would be to arrest the person for driving under the influence of liquor and request that he take a breath test. If it is later determined that the person was not under the influence of liquor, the officer may still be able to charge him with driving under the influence of drugs under G.S. 20-139, if there is sufficient evidence of drug use by the defendant.

A person is under the influence of intoxicating liquor if he has drunk a sufficient amount of liquor to cause him to lose the normal control of his bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties. State v. Carroll, 226 N.C. 237 (1956). The amount of liquor a person drinks is not important to convict under G.S. 20-138(a), so long as it is enough to cause his faculties to be impaired (i.e., it can be a "spoonful or a quart"). State v. Ellis, 261 N.C. 606 (1964). Thus, a breath or blood alcohol reading is important evidence, but it is not required for a G.S. 20-138(a) conviction. For this reason, when an officer arrests a person for driving under the influence, he should gather all the evidence he can under the assumption that the driver will refuse to take a chemical test. If there is enough evidence to show appreciable impairment, an officer may be able to obtain a DUI conviction whether a test is taken or not.

Driving with Blood Alcohol Content of .10% or higher--G.S. 20-138(b)

It is unlawful to

1. drive
2. a vehicle
3. on a highway or public vehicular area
4. when the driver's blood alcohol content is 0.10% or higher.

G.S. 20-138(b), which is a lesser included offense of driving under the influence of liquor under G.S. 20-138(a), contains the same elements as G.S. 20-138(a) except for element 4; that element under G.S. 20-138(b) requires no impairment of faculties. The statute simply makes it unlawful to drive a vehicle on a highway or public vehicular area when the amount of alcohol in the driver's blood is 0.10 percent or more by weight. The source of alcohol need not be an intoxicating beverage as required by G.S. 20-138(a). State v. Hill, 31 N.C. App. 733 (1976). However, if this is the charge made by the law enforcement officer, as discussed later, there must be reasonable grounds on the part of the officer to believe that the defendant is driving with a blood alcohol content of 0.10 percent or more by weight. Furthermore, as the statute clearly indicates, a chemical test must be given in order to obtain a conviction under G.S. 20-138(b).

Punishment Under G.S. 20-138:

1. First Offense - fine of not less than $100 nor more than $500 and/or imprisonment for not more than six months.
2. Second Offense - fine of not less than $200 nor more than $500 and imprisonment for not less than three days nor more than one year.
3. Third Offense - fine of not less than $500 and imprisonment for not less than three days nor more than two years.

The first three days of imprisonment for a second offense committed within three years of the first is not subject to suspension or parole except when defendant with permission of the court successfully completes an alcohol rehabilitation program approved by the Department of Human Resources. The first three days of imprisonment for a third offense within three years of the first may not be suspended (only offenses committed after July 1, 1977 count for this purpose). In re Greene, 297 N.C. 305 (1979).

For a first offense under both sections (a) and (b), a person's driver's license is revoked for one year, although a judge may issue a limited driving privilege for a first conviction under G.S. 20-138 or G.S. 20-139. Effective January 1, 1980, the limited privilege must contain a condition, unless specifically excluded by a judge, that the person complete an Alcohol and Drug Education Traffic School. The main difference between the two offenses is that a subsequent conviction under subsection (a) for driving under the influence carries increased revocations. Subsection (b) carries the same one year revocation for subsequent convictions.

B. G.S. 20-140(c) - Reckless Driving
In North Carolina, it is unlawful to:
1. drive
2. a motor vehicle
3. on a highway or public vehicular area
4. after drinking enough intoxicating liquor
5. to directly and visibly affect one's operation of the motor vehicle

For a discussion of elements 1 - 4, see the section on driving under the influence. Note that the reckless driving offense applies only to motor vehicles.

G.S. 20-140(c) is a lesser included offense of driving under the influence. When a defendant is indicted for driving under the influence, he may be convicted of reckless driving when the greater offense under G.S. 20-138 includes all the essential elements of the lesser offense under G.S. 20-140(c). State v. Snead, 295 N.C. 615 (1978). Thus,chemical test results are clearly admissible in reckless driving cases.

Before a defendant may be tried for the lesser offense of reckless driving, an additional element not included under G.S. 20-138 must be proved. The state must show that the defendant drank enough intoxicating liquor to directly and visibly affect his operation of the motor vehicle. Courts have held that this element may be proved by circumstantial evidence. For example, a driver was properly convicted of reckless driving when the officer's opinion that the driver was under the influence was coupled with the fact that he had an accident. State v. Burrus, 30 N.C. App. 250 (1976). However, a driver cannot be charged with the lesser offense when an officer observes the driver shortly before an accident and notices nothing suspicious about his operation of the vehicle, even though the driver could be charged under G.S. 20-138 on the basis of physical symptons of intoxication. State v. Pate, 29 N.C. App. 35 (1976). Thus, the requirements for proving reckless driving are far from clear. The safest and easiest procedure for a police officer is to always arrest the driver for driving under the influence and leave it to the driver's attorney and the prosecutor to argue over the lesser offense of reckless driving.

Punishment - Effective January 1, 1980, fine of not less than $100 nor more than $500 and a term of imprisonment not to exceed six months. If the term of imprisonment is suspended, the suspended sentence must require the defendant to complete a program of instruction at an Alcohol and Drug Education School within 75 days of the date of his conviction. Under special circumstances, the trial judge may waive the requirement that defendant complete an alcohol education program. (The current penalty is a maximum of $500 fine and/or maximum six months imprisonment).

C. G.S. 20-12.1 - Instructing Another to Drive While Under the Influence.

In North Carolina, it is unlawful to:

(1) accompany or instruct
(2) another person who is learning how to drive pursuant to a learner's permit
(3) while under the influence of intoxicating liquor.

G.S. 20-12.1 subjects persons accompanying or instructing others to the provisions of G.S. 20-16.2 "to the same intent and in the same manner as persons who drive or operate a motor vehicle." The intent of the statute is apparently to subject such persons to the implied consent provisions of the chemical test statute. It is not certain, however, that the language used achieves that result since G.S. 20-16.2 clearly states that its provisions apply only to persons who drive a motor vehicle. G.S. 20-16.2(a).

Punishment. A conviction under 20-12.1 may result in a fine up to $500 or imprisonment up to six months. Persons convicted may also have their license suspended.

It is important to note that the use of chemical tests is not exclusively confined to the three previously discussed statutes. If the crime charged is committed while the person was driving a motor vehicle under the influence or with 0.10 percent alcohol in his blood, the test results can be admitted into evidence. Manslaughter where culpable negligence for driving under the influence is an issue is a common example of another crime that will support the introduction of the results of a chemical test. See State v. Stewardson, 32 N.C. App. 344 (1977).

D. G.S. 20-139(b) - Driving Under the Influence of Drugs.

Because it is related to driving under the influence of liquor and sometimes will be the proper charge, even though the officer stops the driver because he suspects he is under the influence of liquor, the elements of this offense are included. Note that the chemical test statutes do not apply when a person is arrested for this offense.

It is unlawful for a person

(1) to drive
(2) a motor vehicle
(3) on a highway or public vehicular area
(4) (a) while he is under the influence of a narcotic drug, OR
    (b) while he is under the influence of any drug to such degree that his physical or mental faculties are appreciably impaired.

The punishment, driver's license revocations, and limited privilege provisions are the same as for driving under the influence of liquor.

The first and third elements of this offense are identical to the elements of driving under the influence of liquor. The second element is different because it limits the offense to motor vehicles.

Because of Element (4)(b), this element is satisfied whenever the person is under the influence of any drug, even if it's not a narcotic drug. There is no requirement that it be a prescription drug.

Marijuana is a "drug," although it is not a narcotic drug [G.S. 90-87(12), (17)]. A person sniffing glue is probably not under the influence of a "drug," although the point is debatable.

Proving this offense is difficult because there is no simple breath or blood test suitable for use in detecting drug content in the blood. Proof must come from other evidence, such as physical characteristics, performance tests, presence of drugs in car, admissions by the driver or passengers, and elimination of other causes for the behavior. An experienced officer's opinion concerning whether a defendant is under the influence is admissible, but more evidence would probably be required to convict (State v. Lindley, 286 N.C. 256).

III. The Arrest

When a police officer has reasonable grounds to believe that a driver is under the influence and wishes to request that he submit to a chemical test, the officer must first arrest the driver in order for the implied consent law to apply. He may not merely be given a citation. Thus, if the driver is not arrested, he does not have to take a chemical test, and his refusal to take the test will not result in a revocation of his driving privilege. G.S. 20-16.2(a).

A. Arrest Procedures

1. What is an arrest? The pre-arrest chemical test.

The issue of what constitutes an arrest is very important, especially in determining the availability of pre-arrest chemical tests. G.S. 20-16.2(i) provides that a person who is stopped by an officer who has reasonable grounds to believe the person is driving under the influence of liquor may, if he does so before he is arrested, ask that he be given a chemical test to determine blood alcohol content. The officer is not required to inform the driver of his right to make such a request. If the person makes the request in time, the officer may not arrest the person for driving under the influence until after the pre-arrest test is given. The provision is designed to allow persons to avoid having an arrest record by proving their innocence with a low blood alcohol reading. Results of this test may be used as evidence at trial.

In practice, the provision has little utility unless several questions are answered. First, the driver apparently has the right to request the pre-arrest test only if he requests it before being arrested. If the officer places him under arrest before the request is made, there is no statutory right to take the test without being arrested first. For this reason, it is important to know exactly when an arrest is complete. In North Carolina, an arrest is complete when a person submits to the control of an officer who has indicated his intention to arrest, or when the officer, with an intent to make an arrest, takes a person into custody by the use of physical force. G.S. 15-401(c). In order for there to be an arrest, there must be either compulsory restraint or voluntary submission. Mead v. Boyd, 19 N.C. 521 (1837). From the moment a person is "deprived

of his liberty," he is considered to be under arrest. State v. Jackson, 280 N.C. 122 (1971). Therefore, a mere declaration by the officer that the person is under arrest probably does not complete the arrest process. If the driver requests the test after being informed that he is under arrest but before being taken into custody, the officer should go ahead and allow the pre-arrest chemical test.

The second question is whether a person should be treated as an arrestee after requesting the test. The answer is apparently yes. The Attorney General in a recent opinion concluded that a person requesting a pre-arrest test can be required to ride to the test site with the officer. If the person refuses to cooperate, an officer may consider the person's request withdrawn and arrest him for driving under the influence. Opinion of Attorney General to P. L. McIver, 47 N.C.A.G. 89 (1977).

The third question is whether a driver has the same rights under G.S. 20-16.2(i) as an arrestee has under G.S. 20-16.2(a). The provision states that the pre-arrest tests must be administered under the same conditions as are provided for the administration of tests after arrest. Thus, although for the prearrest test a chemical test operator would use different forms from the ones he uses for post-arrest tests, the driver presumably has 30 minutes in which to contact his attorney or secure a witness before having to take the test. Furthermore, if the driver after requesting the pre-arrest test subsequently refuses to take it, he should be placed under arrest and, to be cautious, the 30-minute time limit should start over again from the time the person is read his rights after arrest, and all the procedures appropriate for post-arrest tests should be followed.

The fourth question is what an officer must do if the person has a low blood alcohol content. Since a 0.10 percent or greater blood alcohol content is only one form of evidence and is not a required element of driving under the influence under G.S. 20-138(a), a person could still be arrested with a low blood alcohol content if there is enough other evidence to show appreciable impairment. Thus, a pre-arrest test might not prevent a subsequent arrest even though the person has a low blood alcohol content.

2. How the arrest is made.

The preferable way to make an arrest is with a warrant. But under certain circumstances, an officer may arrest without a warrant.

For felonies, if an officer reasonably believes a felony has been committed and reasonably believes that the arrestee committed it, he may arrest without a warrant, regardless of whether the felony was committed in his presence. G.S. 15A-401(b).

For misdemeanors, an officer may arrest without a warrant only if he has probable cause to believe the defendant committed the misdemeanor in his presence or he has probable cause to believe the person has committed the misdemeanor out of his presence and will not be apprehended unless arrested immediately or will cause injury to himself or others or to property unless arrested immediately. G.S. 15A-401(b).

In the usual case an arresting officer will have seen the defendant driving a car in his presence and will be able to arrest without a warrant on the basis of having reasonable grounds to believe that the defendant was driving under the influence in his presence. An officer may, however, occasionally discover a stopped car in circumstances clearly indicating that shortly before the discovery the person was driving under the influence (e.g., scene of an accident). Three basic approaches can be taken. First, if there is reason to believe the driver will not be apprehended unless immediately arrested (e.g., an out-of-state driver) or there is reason to believe it would be dangerous to allow him to drive away, as there would be for almost anyone suspected of being under the influence, the person could be arrested without a warrant under G.S. 15A-401(b). Second, the driver could be arrested for a crime other than that of driving under the influence that is committed in the officers presence (the most common example is probably the crime of being drunk and disruptive in a public place). Thus, when the driver is taken before a magistrate for the drunk and disruptive charge, a warrant could be obtained for the DUI charge. The last choice is to delay the arrest until a warrant is obtained. The danger of this approach is that the defendant could leave while the warrant was being obtained, or that the time delay in obtaining the warrant could render a chemical test ineffective; in some cases, however, it is clearly the proper course of action (e.g., when a suspect is injured in an accident and will require hospitalization and thus will not flee or injure others if not arrested immediately).

3. The effect of an illegal arrest.

An arrest of a driver without a warrant for the offense of driving under the influence is illegal where the driver did not operate the vehicle in the arresting officer's presence and none of the special circumstances under 15A-401(b) exist. The most common example of an illegal arrest is when a driver injured in a wreck is arrested for driving under the influence. If the driver is so injured that he needs medical attention (and as a result will not flee or harm himself or others), special circumstances do not exist for arresting without a warrant. See State v. Stewardson, 32 N.C. App. 344 (1977).

A question of primary concern is what effect the illegality of an arrest will have on admissibility of chemical test results. In State v. Eubanks, 283 N.C. 556 (1973), the court held that the fact that a warrant was not obtained is, in a constitutional sense, immaterial. Therefore, even though an arrest is illegal under state law (because a warrant was not obtained first), that fact alone will not preclude trial of the accused for the offense. Furthermore, chemical test evidence will be admissible in court as long as the arrest does not violate the North Carolina or United States Constitutions and is no more coercive than a legal arrest. An officer should be aware, however, of the fact that he may be sued for an illegal arrest.

4. The requirement of probable cause or reasonable grounds to believe.

An officer must have probable cause to make a legal arrest. When does probable cause exist? The best test for probable cause is to simply ask whether at the moment of arrest the facts and circumstances within the police officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89 (1964). If the answer is yes, there is probable cause to make an arrest.

After a driver is arrested, North Carolina's implied consent statute provides that a blood or breath test may be administered at the request of a law enforcement officer only if the officer has "reasonable grounds to believe" the driver was operating a motor vehicle on a highway while under the influence of intoxicating liquor. G.S. 20-16.2(a). Does the use of the phrase "reasonable grounds to believe" instead of "probable cause" in G.S. 20-16.2(a) indicate their meanings are not the same? The answer is no--North Carolina courts have interpreted "probable cause" and "reasonable grounds to believe" to be "substantially equivalent terms." State v. Matthews, 40 N.C. App. 41 (1979). Therefore, the test for determining whether circumstances are sufficient to warrant a chemical test and the test for establishing probable cause for arrest are the same.

Probable cause and reasonable grounds to believe can be established by using circumstantial evidence, which is the existence of various facts tending to prove the ultimate fact in issue. For example, in State v. Turner, 29 N.C. App. 163 (1976), the fact needed to show that defendant was operating a motor vehicle while under the influence was that he was in "actual physical control" of the vehicle. Even though defendant was never seen driving the vehicle, circumstantial evidence that he was found slumped behind the wheel with the engine running was enough to imply that he had in fact been "in actual physical control" of the vehicle.

What constitutes probable cause or reasonable grounds to believe is by necessity a question to be determined by the facts in each case. The following cases are examples of probable cause determinations made by the courts.

In Church v. Powell, 40 N.C. App. 254 (1979), the arresting officer arrived at a service station where defendant was located about one hour after defendant had been involved in a car accident. The officer observed that the defendant was at that time under the influence of intoxicants. Defendant told the officer that he had been driving the car at the time of the accident. The officer then arrested him for driving under the influence and requested that he take a breath test. On appeal the court held these facts were sufficient to establish probable cause for arrest.

In Church, defendant argued that he had in fact consumed nine to twelve ounces of liquor between the time of the accident in question and the officer's arrival, and therefore was not under the influence while operating the vehicle. Although the Church court did not address this argument, other courts have stated that such a claim will not affect an officer's finding of probable cause. The officer is fully justified in believing that the defendant was, if anything, less intoxicated at the time the officer observed him than at the time of collision. State v. Cummings, 267 N.C. 300 (1966).

In State v. Matthews, 40 N.C. App. 41 (1979), three policemen were forced off the road by defendant's car. The policemen stopped the car, observed that defendant was intoxicated, and asked him to come with them to the Ahoshkie Police Department. There he was placed in the custody of an officer who was not present at the scene. The same officer later arrested defendant for driving under the influence. Defendant argued that since the arresting officer was not present at the scene and did not see him operate a motor vehicle, there was no probable cause for arrest. The court held, however, that considering the arresting officer's own observations of defendant and information given

him by the other officers, there was ample evidence to provide probable cause. It is clear from this case as well as others that an officer may rely on information given him by another officer in making an arrest.

There is no case law providing an example of when facts and circumstances are insufficient to constitute probable cause or reasonable grounds to believe in a chemical test-related offense. Presumably, the smell of alcohol on a driver's breath will not by itself constitute probable cause. However, evidence of other physical symptoms of intoxication together with circumstantial evidence that the driver shortly before arrest was operating a motor vehicle will nearly always provide an officer with sufficient grounds to believe that an offense has been committed.

B. An Officer's Duty After Arrest

1. Interrogation.

After the driver has been arrested, Miranda warnings must be given before questioning if the questioning is part of an "in-custodial interrogation." "In custody" means that the defendant does not reasonably feel that he can leave, even if he is not formally under arrest. "Interrogation" means that the officer has focused his inquiry on a person and is asking him questions to see if he is guilty.

The safest procedure for an officer to follow is to always read the defendant his Miranda rights immediately after arrest or as soon as he has begun to ask questions that could be useful in proving the elements of a crime, whichever event comes first. However, if an officer is merely investigating an accident, then the questions do not constitute in-custody interrogation and Miranda rights need not be given. This is true even if some of the information is later necessary to prove a criminal case. See Church v. Powell, 40 N. C. App. 254 (1979). Furthermore, volunteered statements made at any time, including after arrest, are admissible without Miranda warnings.

2. Defendant must be taken to the magistrate.

A law enforcement officer making an arrest with or without a warrant must take the arrested person "without unnecessary delay" before a magistrate. The magistrate may order that a defendant who is too drunk to understand the proceedings is to be confined in jail until he sobers up; that action insures that the defendant has an opportunity to exercise his rights. G.S. 15A-511(a).

The question of what is a necessary delay depends upon the facts and circumstances involved. Examples of necessary delays are taking time to administer a chemical test or to have the defendant identified. In order to prove that the delay was unnecessary, a defendant must show that he was prejudiced; if no prejudice is shown, the delay will not affect the validity of the trial. State v. Burgess, 33 N.C. App. 76 (1977).

What is the effect of a complete failure to take an arrested person before a magistrate? The answer to this question is not entirely clear. Courts suggest that foregoing this required procedure entirely could in some circumstances, result in the violation of a person's right to due process. See State v. McCloud, 276 N.C. 518 at 531 (1970). At the same time, however, courts also agree that compliance with the statute is not mandatory, and a failure to comply will

not necessarily affect the validity of a trial. State v. Matthews, 40 N.C. App. 41, (1979), citing State v. Burgess, 33 N.C. App. 76 (1977). The test for determining the effect of noncompliance is substantially the same as the test for deciding what constitutes an unnecessary delay; unless the defendant can show that he was prejudiced by noncompliance, the validity of the trial and the evidence against him, including chemical test results or a refusal, will not be affected. The only way defendant is likely to prove prejudice is to show that the magistrate would not have found probable cause that he committed the crime of which he was accused.

3. Defendant's right to counsel.

Upon arrest, a law enforcement officer must without unnecessary delay advise the arrestee of his right to communicate with counsel and must allow him reasonable time and reasonable opportunity to do so. G.S. 15A-501(5). One who is arrested by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights as any other accused. State v. Morris, 275 N.C. 50 (1969).

In State v. Hill, 277 N.C. 547 (1971), the North Carolina Supreme Court set forth the rights of access to counsel of a defendant charged with driving while intoxicated. The court stated that when one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence because defendant's guilt or innocence depends upon whether he was intoxicated at the time of arrest. Defendant must have access to counsel immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon.

The right of a defendant to communicate with counsel implies the right to have his attorney see, observe, and examine him, with reference to his intoxication. Failure on the part of an officer to allow defendant to exercise these rights will usually result in dismissal of the case.

Defendant's right to counsel in relation to the administration of the chemical test will be discussed more fully in the following section.

IV. Using Chemical Test Results as Evidence

Up to this stage, the procedures and issues that have been discussed are merely prerequisites to the actual administration of the chemical test. In this section of the paper, G.S. 20-16.2 and 20-139.1 will be examined more closely, and the actual procedures for administering the breath test will be discussed. One should keep in mind, however, that the preliminary requirements of admissibility such as arrest and probable cause must be complied with. Otherwise, there would be no reason to be concerned with the chemical test itself.

A. Pre-test Procedures

1. Who must take the test?

North Carolina's implied consent law makes it a condition to driving on the roads in North Carolina that any driver is deemed to have consented to take a chemical test if arrested for an offense "arising out of acts alleged

to have been committed while the person was driving . . . a motor vehicle while under the influence of intoxicating liquor." G.S. 20-16.2(a). No one who is deemed to have given consent must take the test. In most instances, however, refusal will result in a six-month suspension of his driver's license.

G.S. 20-16.2(b) states that persons unconscious or incapable of refusing a request to take a chemical test are deemed not to have withdrawn consent. Thus, an unconscious person may be given a chemical test even though the required chemical test warnings are not read. But can an unconscious person be said to be under arrest? In State v. Stewardson, 32 N.C. App. 344 (1977), the defendant was injured in a wreck and there was evidence that he had been arrested before being given the breath test. On appeal, he argued that because of his physical condition he could not intelligently consent to take the test. The court dismissed this argument as being without merit because of G.S. 20-16.2(b). If the defendant did not have to be capable of consenting to take the breath test because of that statute, a court might apply a similar argument to hold that he need not be capable of understanding his arrest rights to be arrested. Thus, if that portion of the arrest procedure is not required when the defendant is unconscious or incapable of understanding, the other requirements of the arrest law can be complied with either then (taking the defendant in custody--i.e., insuring that he doesn't leave) or later (taking the defendant to a magistrate), and the defendant can be said to be under arrest as the term is used in G.S. 20-16.2(a).

2. Who is qualified to administer the chemical test?

On many occasions, attorneys in North Carolina have attacked the admissibility of chemical test results on the grounds that the qualifications of the operator did not appear on the record or were inadequate. Much of the confusion about who may administer the test, however, has now been dispelled. The State need only show that the operator possessed a valid permit to conduct the test from the Department of Human Resources at the time of the test to satisfy that requirement for admissibility G.S. 20-139.1(b); State v. Hurley, 28 N.C. App. 478 (1976). This requirement may be met in one of three ways: (1) by stipulation between defendant and the State that the individual who administered the test possesses a valid permit issued by the Department of Human Resources; (2) by offering the permit of the individual into evidence; or (3) by presenting any other evidence which shows that the individual who administered the test possessed a valid permit issued by the Department. State v. Powell, 10 N.C. App. 726 (1971); State v. Mullis, 38 N.C. App. 40, 41 (1978). It should be noted that this requirement will not be satisfied by merely stating that the operator had a valid permit to administer the breath test in North Carolina. There must be a specific showing that the permit was issued by the Department of Human Resources.

For blood tests, only a physician or registered nurse or other qualified person may withdraw blood for the purposes of determining alcoholic content. G.S. 20-139.1(c). An "other qualified person" is one who has the training and experience to withdraw blood safely from another, and who is acting under the supervision of a doctor. Opinion of Attorney General to Dr. Jacob Koomen, 40 N.C.A.G. 429 (1970). The person who analyzes the blood must possess a valid permit from the Department of Human Resources. G.S. 20-139.1(b). Methods of presenting the person's qualifications to analyze blood are the same as those for breath test operators.

G.S. 20-139.1(b) provides that in no case shall the arresting officer or officers administer the chemical test. Even if an officer holds a valid permit from the Department of Human Resources to administer breath tests, he is automatically disqualified if he is an arresting officer. Failure to observe this provision will render the chemical test results inadmissible. State v. Stauffer, 266 N.C. 358 (1965).

Who is the arresting officer? This question might be best answered by examining the purpose of the provision which exludes him from administering the test. The principle that underlies the purpose is that "in the interest of fairness as well as the appearance of fairness, an officer, whose judgment in selecting a defendant for arrest or in making the arrest may be at issue at trial, should not administer the chemical test that will either confirm or refute the soundness of his earlier judgment in causing the arrest." State v. Jordan, 35 N.C. App. 652, 654 (1978). If an officer has anything at all to do with a defendant's arrest, he is deemed to have the same interest in the outcome of the test that he would if he had made the arrest himself. For example, in State v. Stauffer, 266 N.C. 358 (1965), the officer who administered the breath test originally observed the defendant's suspicious driving, but was present at the scene of the arrest only to assist if necessary and did not take part in the actual arrest. Nevertheless, the court held that since the officer was present at the scene of arrest he could not administer a fair and impartial test; therefore, he was considered an arresting officer within the context of G.S. 20-139(b).

On the other hand, an officer is not disqualified as an operator merely because he has observed the defendant at a time prior to arrest. State v. Green, 27 N.C. App. 491 (1975). Nor is he disqualified when he stops to assist in moving the defendant's car after the arrest. State v. Dail, 25 N.C. App. 552 (1975). Furthermore, even an officer who had two hours earlier arrested the same defendant for driving under the influence may administer a breath test for a second offense, as long as he did not in any way participate in the second arrest. State v. Jordan, 35 N.C. App. 352 (1978).

3. The arresting officer shall take the defendant before a person authorized to administer a chemical test.

G.S. 20-16.2(a) requires that after arresting the driver, the law enforcement officer shall take him forthwith before a person who can administer the chemical test the officer designates. How soon is forthwith? Since the degree of intoxication at the time of driving is the fact to be proved, the sooner the test is made the more accurately it will reflect the driver's blood-alcohol concentration at the time he was driving. Donigan, Chemical Tests and the Law, 45 (2d. Ed., 1966). Therefore, the test should be timely made. State v. Cooke, 270 N.C. 644, 651 (1967).

It should be noted, however, that reasonable delays for reasonable purposes will be allowed. For example, if the defendant needs medical treatment, he should receive that first. If no chemical test operator is immediately available, it is reasonable to wait for the operator. Delays of up to four hours between arrest and administration of the test have been sanctioned. State v. Alexander, 16 N.C. App. 95. After all, delays should benefit the defendant and not the State.

Once the arresting officer has brought the defendant before a chemical test operator, he should inform the operator that he has arrested the defendant and brought him forthwith to the operator for the purpose of requesting that the operator administer a chemical test to the defendant. He should then inform the operator of the offense or offenses the defendant has been charged with committing.

4. Requests that defendant take the test must be made before it is administered.

Under the provisions of G.S. 20-16.2, there are two sections dealing with requests which must be made by an officer before a breath test can be administered. G.S. 20-16.2(a) states that "The test or tests shall be administered at the request of a law enforcement officer having reasonable grounds to believe the person to have been driving or operating a motor vehicle on a highway or public vehicular area while under the influence of intoxicating liquor." G.S. 20-16.2(c) provides that "the arresting officer, in the presence of the person authorized to administer a chemical test, shall request that the person arrested submit to a test described in subsection (a)."

The request by the law enforcement officer referred to in subsection (a) has been construed to mean the request by the officer with custody of the defendant asking the chemical test operator to administer the test. State v. Randolph, 273 N.C. 120 (1968). The request directed to the defendant is controlled by subsection (c). See State v. Stewardson, 32 N.C. App. 344 (1977). It is apparent from the statute that the request under subsection (a) directed to the chemical test operator should be made before the operator reads the defendant his statutory rights. However, the second request under subsection (c) directed to the defendant should not be made until after the chemical test operator has informed defendant of his rights.

G.S. 20-16.2(c) indicates the request directed to the defendant should be made only by the arresting officer. However, in Oldham v. Miller, 38 N.C. App. 178 (1978), the Court of Appeals held that subsection (c) does not provide that the arresting officer is the sole person authorized to request a defendant to submit to a chemical test. Rather, the court said, the phrase "arresting officer" was inserted in subsection (c) only as a means of distinguishing between the law enforcement officer involved in the arrest and the law enforcement officer who is to administer the test. The purpose of making this distinction, the Court said, was to assure the defendant that the test will not be administered unless the officer making the request has reasonable grounds to believe defendant was driving under the influence of alcohol.

In effect, the Oldham court's reasoning allows any law enforcement officer except the chemical test operator to make the request that defendant submit to a test. This is because an officer may rely on information given him by another officer to find reasonable grounds or probable cause. See State v. Matthews, 40 N.C. App. 41 (1979). Thus, the arresting officer need only supply a second officer with enough information to constitute reasonable grounds; the second officer may then rely on that information in making his request that defendant take the test, and he will be considered the "arresting officer" under G.S. 20-16.2(c). This situation probably arises quite often. An officer who is on patrol will arrest a person for driving under the influence and take him to the nearest police station with a chemical breath testing instrument.

The officer, not wishing to wait at the station any longer than necessary, will place the person in the custody of an officer on duty at the station and return to his patrol car. Using the Oldham court's interpretation of G.S. 20-16.2, it is perfectly legal for the on-duty officer to make both the request directed to the chemical test operator under subsection (a) and the request directed to defendant under subsection (c).

Does this mean that the on-duty officer may also sign the report to the Department of Motor Vehicles indicating that defendant willfully refused to take the test? The court did not answer this question, but presumably it would allow the on-duty officer to do so.

5. Statutory rights of the defendant relating to administration of a chemical test.

After the officer has designated the kind of test to be taken and has made his request that the operator administer it, the operator must warn the defendant, both in writing and orally, of his statutory rights. He must also give the defendant a signed document listing those rights. In practice the operator satisfies this requirement by giving the defendant a signed copy of the form used by his department to inform the defendant of his rights.

The requirement that the operator warn the defendant orally and in writing is usually satisfied when the operator reads the form to the defendant and gives him the signed copy of the form. The operator is not required to make the defendant read the information placed before him. State v. Carpenter, 34 N.C. App. 742 (1977).

When advising defendant of his statutory rights, Miranda warnings do not have to be given before the chemical test because a breath sample is not evidence of a testimonial or communicative nature protected by the Fifth Amendment privilege against self-incrimination. State v. Randolph, 273 N.C. 120 (1968). If interrogation of any other form is to take place, however, the Miranda warnings should be given beforehand.

The statutory rights established by G.S. 20-16.2 are in addition to the rights due to any criminal suspect. Denial of or failure to warn of any of these statutory rights may lead to the inadmissibility of the chemical test results. The warnings under G.S. 20-16.2(a) which the operator must give the defendant are:

1. That he has a right to refuse to take the test;
2. That refusal to take the test will result in revocation of his driving privilege for six months;
3. That he may have a physician, qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of the law enforcement officer; and
4. That he has the right to call an attorney and select a witness to view for him the testing procedures; but that the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights.

In order to clarify the scope of a defendant's chemical test rights, each warning under subsection (a) and other related rights will be discussed in detail below.

a. the right to refuse and its effect

The defendant does not have to take a breath test when arrested. If he "willfully refuses" to submit to a test after being requested to do so, no test is given. "However, upon the receipt of a sworn report of the arresting officer and the person authorized to administer a chemical test that the person arrested, after being advised of his rights. . .willfully refused to submit to the test upon the request of the officer, the Division shall revoke the driving privilege of the person arrested for six months." G.S. 20-16.2(c). Furthermore, evidence of the refusal is admissible in the trial of the crime for which the defendant was arrested. G.S. 20-139.1.

In order for the license revocation to apply the defendant must "willfully refuse" to take the test. Generally speaking, a willful refusal is a rejection of a request or a command as the result of a positive intention to disobey. Joyner v. Garrett, 279 N.C. 226, 233 (1971). But there are also ways a person can willfully refuse a test despite the fact that he does not have a "positive intention to disobey." For example, in Seders v. Powell, 39 N.C. App. 491 (1979), the arrestee argued that his refusal to take the test could not be considered willful because it resulted not from any intentional act on his part but rather as a result of his accidentally allowing the 30-minute limit under G.S. 20-16.2(a) to elapse while waiting for his attorney to contact him. The Court of Appeals disagreed, citing Creech v. Alexander, 32 N.C. App. 139 (1977) for the rule that a delay on the part of the defendant of over 30 minutes after being informed of his statutory rights will constitute a willful refusal. The Court concluded that it is not essential for the State to show that the arrestee was made aware of the passage of time in order for his refusal to be considered "willful."

Another example of a willful refusal without a positive intention to disobey is the failure or inability of the defendant to cooperate. In Poag v. Powell, 39 N.C. App. 363 (1979), the chemical test operator explained to the arrestee what was required of him physically in taking the test and the arrestee placed his mouth on the mouthpiece but no air sample sufficient for a reading appeared. Throughout this period, the arrestee insisted that he wanted to take the test. Nevertheless, the court found that he had willfully refused, noting that the instrument had been tested and found to be working properly immediately before the test was administered. In Bell v. Powell, 41 N.C. App. 131 (1979), a case with facts similar to those of Poag, the Court of Appeals stated that part of the requirement of G.S. 20-16.2 is that a person to be tested must follow the instructions of the test operator. A failure to follow such instructions, the court said, will provide an adequate basis for the trial court to conclude that the arrestee willfully refused to take a breath test.

It should be noted that unless a person has refused to submit to a chemical test after being taken before a chemical test operator or other medically qualified person, there is no valid willfull refusal. The procedural requirement of making the request that defendant submit to the test in the presence of the operator must be complied with. See Opinion of Attorney General to Dr. Arthur J. McBay, 42 N.C.A.G. 326, 329 (1973).

b. the right to additional tests

If the defendant wants someone of his own choosing to administer an additional test, G.S. 20-16.2(a)(3) provides that he has a right to have a qualified person of his own choosing do so. Such a test is, however, "in addition to

any administered at the direction of the law enforcement officer." G.S. 20-16.2(a)(3). This means that the defendant may not substitute a test of his own choosing for the test requested by the law enforcement officer. Although a defendant has a right at any time to request an additional test of his own choosing, he cannot delay the officer's test for that purpose. If he refuses to take the test requested by the officer, his license may be revoked for six months, regardless of whether or not he sought a test of his own choosing.

As a complimentary provision to G.S. 20-16.2(a)(3), G.S. 20-139.1(d) requires any officer in charge of the defendant to assist the defendant in contacting a qualified person for the purpose of administering an additional test. Presumably, this means that either the arresting officer or the chemical test operator could be required to assist the defendant in contacting a qualified person. However, the failure or inability of the person tested to obtain an additional test will not preclude admission of the test given at the direction of the officer. G.S. 20-139.1(d).

What is the extent of the duty of an officer in assisting a defendant in contacting a qualified person? The word "contacting" appears to mean "establishing communication with." In most cases this will involve assisting the defendant in telephoning the person selected. See Opinion of Attorney General to Howard O. Cole, 40 N.C.A.G. 401. In State v. Bunton, 27 N.C. App. 704 (1975), the Court of Appeals held that G.S. 20-139.1(d) does not require that an officer transport a defendant to a doctor's officer or hospital. It should also be noted that a defendant is solely responsible for paying the costs of an additional test. It seems likely that the extent of an officer's required efforts lies somewhere between allowing defendant to make a single phone call and driving him to a hospital. The extent to which an officer assists a defendant beyond allowing him use of the phone depends on the policy of his department as well as the other duties he has to complete. The cases and statutes do not indicate whether a defendant should be given a right to take an additional test before or after he is taken to the magistrate; unless the magistrate is close by and can complete his duties in the case promptly, it seems best to allow the defendant to exercise his right to an additional test before taking him to the magistrate, in order to insure that the additional test is taken as soon as possible.

Is the additional test admissible at trial? It seems clear that it would be admissible if the defendant wishes to present it at trial. But if the State tried to offer the additional test over defendant's objection it could be argued that such use of the results would violate the doctor-patient privilege. However, the State could overcome that privilege by obtaining a court order to allow the admissibility of the test.

c. the right to call an attorney and/or select a witness--the 30-minute rule

A further requirement under G.S. 20-16.2(a) is that before a test is given the defendant must be permitted both to call an attorney and select a witness to view the testing procedures. However, "the test shall not be delayed for this purpose for a period in excess of 30 minutes from the time he is notified of his rights." G.S. 20-16.2(a)(4).

The 30-minute time limitation begins to run only after a defendant has been effectively warned of this statutory rights. In other words, if the defendant

is warned of his rights and then carried some distance in a car where he has no access to a phone, that travel time will not be counted as part of the 30 minutes. See Opinion of Attorney General to Charles B. Pierce, 41 N.C.A.G. 242 (1971).

Although a defendant must be given an adequate opportunity to exercise his rights, the statute does not require that a chemical test operator always wait the full 30 minutes before administering the test. A delay of less than 30 minutes after advising defendant of his rights is permissible where he makes no effort to exercise his rights or expressly waives them. See State v. Lloyd, 33 N.C. App. 370 (1977). However, mere silence on the part of the defendant should not be interpreted by the officer to be a waiver. If the defendant does nothing in the way of exercising his rights for the first 15 minutes after being informed of them but then decides to call an attorney, he still has 15 more minutes to do so. Thus, if an operator wishes to administer the test before the 30-minute period has expired, it would be best to obtain a written waiver of rights form signed by the defendant or a specific oral waiver.

It should be noted that the regulations of the Department of Human Resources require that an operator observe a defendant for 20 minutes before the breath test is administered in order to insure that the defendant does not eat or drink anything or burp, etc. This time period can start from the moment the operator begins observing the defendant rather than after defendant has been advised of his rights, but it must be continuous. If the operator's observation is interrupted for any reason before the 20 minutes is up, the observation period must begin again. Also, the test must be immediately preceded by at least 20 minutes of uninterrupted observation by the operator.

Is the 30-minute limitation in conflict with a defendant's general right to communicate with counsel? G.S. 15A-501(5), discussed previously in this paper, provides that a defendant must be allowed a "reasonable time and reasonable opportunity to communicate with counsel." In Price v. Department of Motor Vehicles, 36 N.C. App. 698 (1978), the court implied that the 30-minute limitation should not apply to the defendant's right to confer with counsel within a "reasonable time." However, this implication was flatly rejected in the recent case of Seders v. Powell, 39 N.C. App. 491 (1979). The court stated that since a defendant has no constitutional right to communicate with counsel prior to taking a breath test, any right to consult with one's attorney is solely a matter of statutory right. G.S. 20-16.2(a)(4) expresses an intent to place a 30 minute limitation on the time that a chemical test may be delayed for any purpose; therefore, the court said, a defendant has no right to delay a test in excess of 30 minutes while trying to contact an attorney, and any such delay will be treated as a willful refusal. 39 N.C. App. at 495. If the defendant is having trouble contacting his attorney, however, an officer in his discretion may allow defendant a few extra minutes to reach him.

6. The effect of failure to advise defendant of his statutory rights

As mentioned previously, it is a requirement of G.S. 20-16.2(a) that a defendant be informed both orally and in writing of his statutory rights; the operator must sign the written document informing the defendant of his rights. Failure on the part of an officer to read any one of these rights or to furnish the signed document will be sufficient error to make the test results inadmissible (see State v. Fuller, 24 N.C. App. 38 (1974)), and will preclude a six-month revocation for willfully refusing the breath test.

What if all four of the rights are read to the defendant but one is read incorrectly? The test for admissibility in this situation will be whether defendant can show he was prejudiced by this mistake. In State v. Green, 27 N.C. App. 491 (1975), defendant was incorrectly told that he had a right to have a qualified person of his own choosing administer the chemical test at the direction of a law enforcement officer. The court held that this was not prejudicial error because had the defendant availed himself of this right, the officer would have gotten the person requested and would have undoubtedly known that the actual purpose was to have an additional test administered.

7. Defendant must voluntarily submit to the test

The results of a chemical test are properly admitted into evidence only upon a showing that the defendant voluntarily submitted to the test. 2 Strong Index 2d, Crim. Law 264. If there is evidence of coercion by a law enforcement officer in obtaining the defendant's submission, the test results will not be admissible. State v. Mobley, 273 N.C. 471 (1968). What acts of a law enforcement officer should be considered coercive? The key question is whether these acts affect the voluntariness of a defendant's submission to take the test. For example, an illegal arrest, as long as it is unaccompanied by violent or oppressive circumstances, is no more coercive than a legal arrest. State v. Eubanks, 283 N.C. 556 (1973).

A misrepresentation of the law will in most cases constitute coercion. In State v. Mobley, 273 N.C. 471 (1968), an officer incorrectly told the defendant that if he refused to take the breath test it would be used as an assumption of guilt against him in court. The Supreme Court held that this statement coerced the defendant to take the test against his will, and it ordered a new trial in which the results of the breath test could not be used.

As long as a statement by an officer is a true representation of the law, it will not amount to coercion. In State v. Coley, 17 N.C. App. 443 (1973), correct statements by an officer to the defendant that his refusal could be used as evidence in court against him and that he had 30 minutes to secure an attorney or a witness were held not to be coercive.

B. Performance of the Chemical Test

After the chemical test operator has advised defendant of his statutory rights and the appropriate waiting periods have passed, the arresting officer must, in the presence of the operator, ask the defendant to take the test. G.S. 20-16.2(c). If the defendant agrees to submit, the testing procedure begins. If he refuses, the time of refusal should be recorded so that it may be used as evidence at trial. Even if the defendant indicated earlier that he would refuse, the request should be made and the refusal recorded to show that the operator was ready and willing to administer the test after advising defendant of his rights. See Durland v. Peters, 42 N.C. App. 26 (1979).

In order for the breath test to be considered valid under G.S. 20-139.1(b), the chemical analysis must be performed according to the methods approved by the Commission for Health Services. The commission also specifically approves the various models and designs of chemical breath test instruments according to accuracy, reliability, and efficiency of operation. The approved methods of performing breath tests on the approved models are set out in Chapter 7B, sections .0300-.0308 of the North Carolina Administrative Code. Each step

must be strictly followed. It is important to remember when following the steps that the Code requires that a defendant first be observed at least 20 minutes before a sample is taken to insure that he has not ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked.

It is crucial that a chemical test operator realize that evidence must be produced in court showing that he complied with the requirements of G.S. 20-139.1(b). It is not enough that the test was in fact performed properly; the evidence must show that it was performed properly. Mere testimony by the operator that he properly performed the test is not sufficient; a foundation must be laid tending to show that a chemical analysis of the defendant's breath was performed according to methods approved by the Commission for Health Services. See State v. Gray, 28 N.C. App. 506 (1976). For this reason, an Operational Checklist for the instrument used is an important evidentiary device. This checklist is a form provided to operators which, if followed, insures that the test was performed in accordance with the regulations of the Commission for Health Services. If it is displayed in court, the completed list will provide a proper foundation for admissibility and the State will have met its burden of proving compliance with G.S. 20-139.1(b).

Proving that the breath test instrument was checked and working properly when the test was performed is another important foundation requirement for the admissibility of test results. Methods and requirements of preventive maintenance are set out in Chapter 7B, sections .0305 and .0306 of the regulations. The operator must show that the instrument had been subjected to maintenance tests at least once a month and that the instrument was checked at the time of the test.

After the breath test has been administered, the statute requires the operator to complete a form listing the defendant's name, the time of arrest and the time and results of the breath test; a copy of the completed form must be furnished to the defendant or his attorney before any trial or proceeding where the results may be used. G.S. 20-139.1(e). There is no requirement that the defendant be furnished a copy of the results at the time of the test itself. However, the defendant or his attorney must be sent a copy if the State intends to use the breath test results as evidence in a criminal trial, and failure to so notify make the test results admissible. Opinion of Attorney General to J. Ray Braswell, N.C.A.G. (19 Oct. 1978). Thus, it is a better practice to give the defendant a copy of the form listing the breath test results, time of test, and time of arrest immediately after administering the test. In practice this information is usually recorded on the same form used by the operator to inform the defendant of his rights under G.S. 20-16.2(a). For blood tests, there is apparently no statutory requirement that the defendant or his attorney be furnished with a copy of the results of the test before trial, but it might be a good idea to send the results anyway as a matter of courtesy and convenience; however, the operator must give the defendant taking the blood test a signed document informing him of his rights under G.S. 20-16.2(a).

C. The Blood Test

Although used sparingly in North Carolina, blood tests are authorized under the implied consent statute and an officer may choose to designate a blood test in lieu of the more frequently used breath tests. In fact, the wording

of the statute suggests an officer might be able to request that both a blood test and a breath test be administered because the statute specifically states that a chemical test or tests may be requested. G.S. 20-16.2(a). Whether this is true or not, the designation of which chemical test is to be administered is the officer's choice and not the defendant's. A defendant may request an additional test, but he must submit to the officer's designated test in order to comply with G.S. 20-16.2.

A defendant has the same rights under G.S. 20-16.2 regarding a blood test as he does for a breath test. He must be arrested first by an officer having reasonable grounds to believe he was driving under the influence before he has to submit to the test. He must also be informed (orally and in writing) of his statutory rights by a person authorized to administer a chemical test (normally that is done by a breath test operator; in a few instances, a person authorized by the Commission for Health Services to analyze blood for alcohol content may inform the defendant of his rights--in most places, however, that blood analysis is not done locally): the right to refuse the test, the effect of his refusal, the right to have an additional test administered, and the right to call an attorney and select a witness within 30 minutes. G.S. 20-16.2(a). However, the 20-minute observation period required by the Department of Human Resources before administering a breath test is not required for blood tests.

The analysis of a defendant's blood, like the breath test, must be performed by a person who possesses a valid permit from the Department of Human Resources. When a person submits to a blood test, however, only a physician, nurse or other qualified person may withdraw the blood for the purpose of analysis. As long as that qualified person is not negligent in withdrawing the blood, he will not be subject to any criminal or civil action for assault and battery. G.S. 20-139.1.

D. The Revocation Hearing

If a defendant wilfully refuses to submit to a chemical test as requested by the arresting officer, the chemical test operator and arresting officer must each send a sworn affidavit to the Division of Motor Vehicles stating that a defendant was advised of his rights under G.S. 20-16.2(a) but willfully refused to submit to the test. Upon receipt of this affidavit, the Division revokes the defendant's driver's license for six months. G.S. 20-16.2(c). However, if the defendant within three days of his notice of revocation makes a written request, he receives a hearing before the revocation becomes effective.

The scope of the revocation hearing includes four issues: (1) whether the law enforcement officer had reasonable grounds to believe the defendant had been driving or operating a motor vehicle upon a highway or public vehicular area while under the influence of intoxicating liquor; (2) whether the defendant was placed under arrest; (3) whether the defendant willfully refused to submit to the test upon the request of the officer; and (4) whether the defendant was informed of his rights under G.S. 20-16.2(a). The hearing will be held in the county where the arrest was made, and if the revocation is sustained, the defendant has a right to a hearing do novo in superior court. G.S. 20-16.2(d).

At the revocation hearing, it is not the hearing officer's duty to decide whether a defendant is innocent or guilty of the offense he is charged with. The only evidence raised will be the evidence dealing with the four issues listed above. Revocation hearings, which are civil in nature, and DUI proceedings, which are criminal in nature, are totally independent of each other. In other words, an acquittal resulting from the DUI proceeding will not affect a defendant's revocation proceeding. If a hearing officer finds that defendant was arrested on reasonable grounds to believe a violation occurred, that defendant willfully refused to take a breath test and that all necessary procedures were complied with by the arresting officer and the operator, the defendant's license will be revoked for six months, regardless of the findings of the court in a criminal proceeding.

At the request of the defendant, the hearing officer must subpoena the arresting officer and chemical test operator to appear and give testimony at the hearing. G.S. 20-16.2(d). When testifying at the hearing, it is very important that the arresting officer and operator have a specific recollection of the facts surrounding the arrest and the administration of the breath test. For this reason, both persons should take detailed notes on the day in question to insure that they will be able to give an accurate account of the events if the defendant requests a hearing. In addition to insure that the paperwork is in order, the officer should check the affidavits to insure that the times and dates of arrest and refusal are correct, that the forms are properly and fully completed, and that the affidavit is properly notarized. Finally, the officer should be sure that any handwriting on the form is legible.