DISTRICT COURT CRIMINAL LAW UPDATE

2007 FALL CONFERENCE

Marty McGee

Limited Driving Privileges

- G.S. 20-21.1 – LDP for DWLR & for committing moving violation while revoked
  - Revoked only under G.S 20-28(a) or G.S. 20-28.1
  - DWI not the revoking moving violation
  - Eligible 1x every 3 years
  - Complied with revocation period
    - 1 year — 90 days
    - 2 years — 1 year
    - Permanent — 2 years

Improper Equipment & PJCs

- G.S. 141(o) – Improper Equipment
  - IE recorded on driving record
  - IE not lesser included offense of speeding in excess of 25 MPH over speed limit

– G.S. 20-141 (p) – PJC
  - NO PJC if speeding in excess of 25 mph over speed limit

Gavels and Guns

- G.S. 14-269.4 – Effective 21 August 2007
  - New law allows Superior and District Court judges to possess a concealed handgun in a building housing a court

IF

  - Judge is performing official duties

AND

-Has a concealed handgun permit or is valid under G.S. 14-415.24 (Reciprocity; out-of-state permits)

PVA Clarified

- G.S. 20-4.01(32)c – Clarifies that public vehicular area is a road used by vehicular traffic within or leading to a gated or non-gated subdivision or community, whether or not the subdivision or community roads have been offered for dedication to the public.

DWI Changes

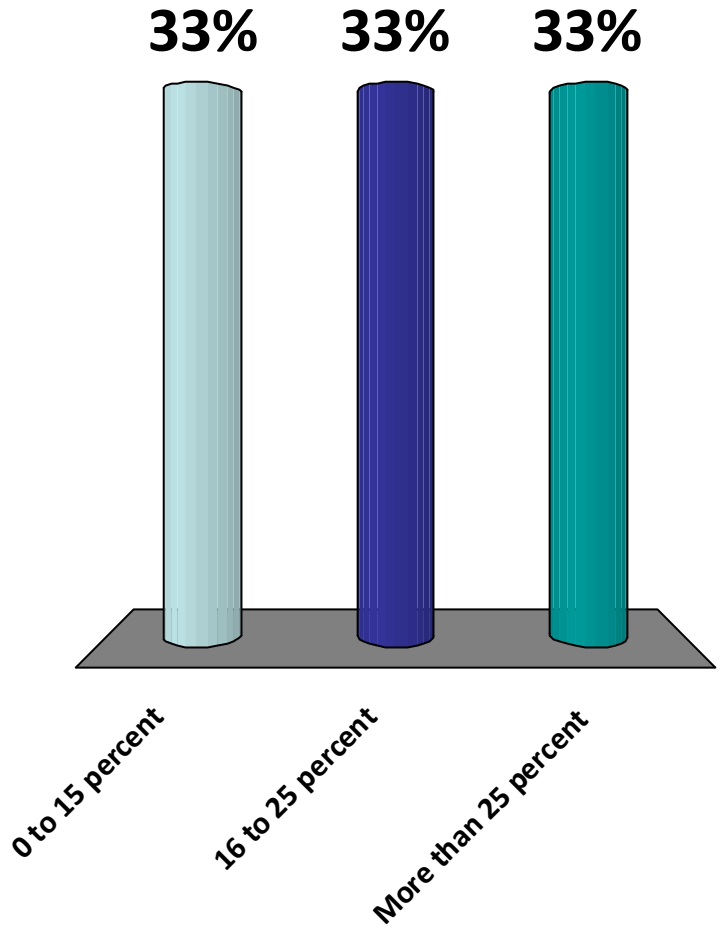
- Sentencing
- .15 threshold for interlock and as aggravating factor
- G.S. 20-179.3(c1) – “high risk drivers” – Add additional restrictions for LDP including: 45 day waiting period
- Secure custody for Juvenile DWI and driving after consuming

No-Contact Orders

- G.S. 50C-1 – Definitions of “Stalking” and “unlawful conduct” were amended
  - Stalking – “On more than one occasion” . . ..
  - Unlawful conduct – “by a person 16 years of age or older”

What percentage of your protective orders are 50Cs?

1. 0 to 15 percent
2. 16 to 25 percent
3. More than 25 percent



My Favorite New Laws

- G.S. 20-137.4 – Cannot now operate a cell phone while driving a school bus.
- G.S. 135.4 – No seatbelt requirement for defendant in custody in back of officer's vehicle.
- Feeding Alligators outside of captivity
  - Now covered by two laws

Alligator Feeding Laws

- New Law: G.S. 113-291.11 – State law now forbids feeding alligators outside of captivity
  - Maximum penalty: 60 days in jail
- Old law: Darwin's Theory of Natural Selection
  - Maximum Penalty: Removal from gene pool

Search and Seizure

- Did the officer seize the defendant?
- Did the officer have grounds for the seizure?
- Did the officer act within the scope of seizure?
- Did the officer have grounds to arrest or search?
- Did the officer act within scope of arrest or search?

The first step

- Did the officer seize the defendant?
  - Voluntary encounter, chase, seizure, arrest
    - Free to leave – Passive acquiescence
    - A person is seized by the police . . . when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied. *Brendlin v. California*, 127 U.S. 2400 (2007) (citations omitted)

Step Two

- Did the officer have grounds for the seizure?
  - Reasonable Suspicion
  - Probable Cause

Remaining Steps

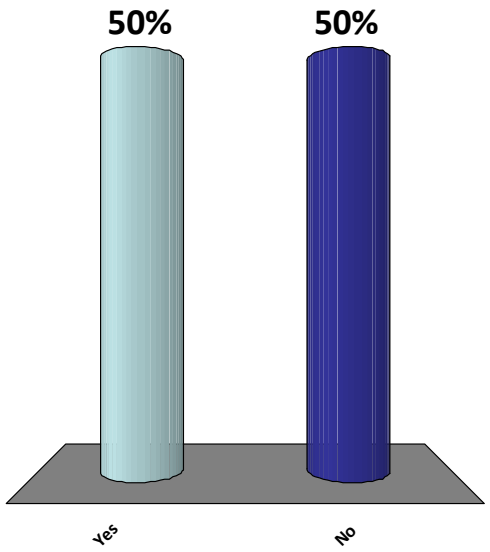
- Did the officer act within the scope of seizure?
    - Officer's conduct after stop: frisk, exit vehicle, stay in vehicle, vehicle frisk, duration
- Did the officer have grounds for arrest or search?
    - Did officer develop PC for search of person/vehicle or get consent to search
- Did the Officer act within the scope of the arrest or search?
  - If PC to arrest, can search person/car?

Brendlin v. Calif., 127 U.S. 2400

- Facts:
  - Officer stopped car without reason to believe it was being operated illegally
  - Defendant in this case was passenger
  - Search of driver, Defendant, and vehicle resulted in Defendant being charged with possession and manufacture of methamphetamine among other charges

Issue:
Is a passenger in a car seized for Fourth Amendment purposes when the police conduct a traffic stop?

1. Yes
2. No



Held

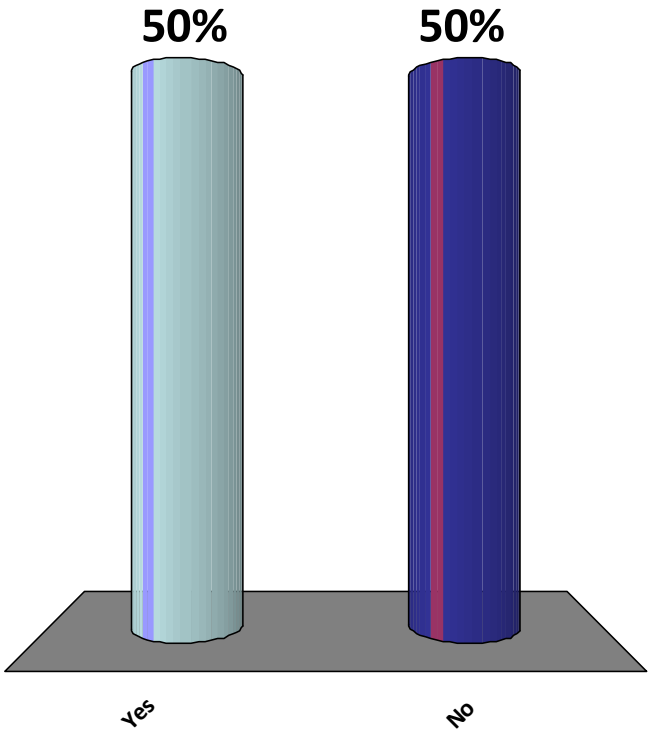
- Yes. When the police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and may so challenge the stop's constitutionality. (9-0)
  - Defendant was seized from the moment the car came to a halt on the side of the road
  - "a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing."

State v. Hess, COA (8/21/07)

- Facts:
  - 9:32 p.m., officer pulls behind Pontiac – could not determine the sex, race, or ethnicity of driver or how many people were in car
  - Ran registration plate – got owner's name
  - Ran owner's license – revoked
  - Officer stopped car

Issue:
Did the officer have reasonable articulable suspicion to stop the vehicle?

1. Yes
2. No



Held

- Yes. After surveying other jurisdictions, the Court determined that it was reasonable for the officer, in the absence of evidence to the contrary, to infer that the Defendant (owner of the vehicle) was driving the automobile.

State v. McLand, COA (9/18/07)

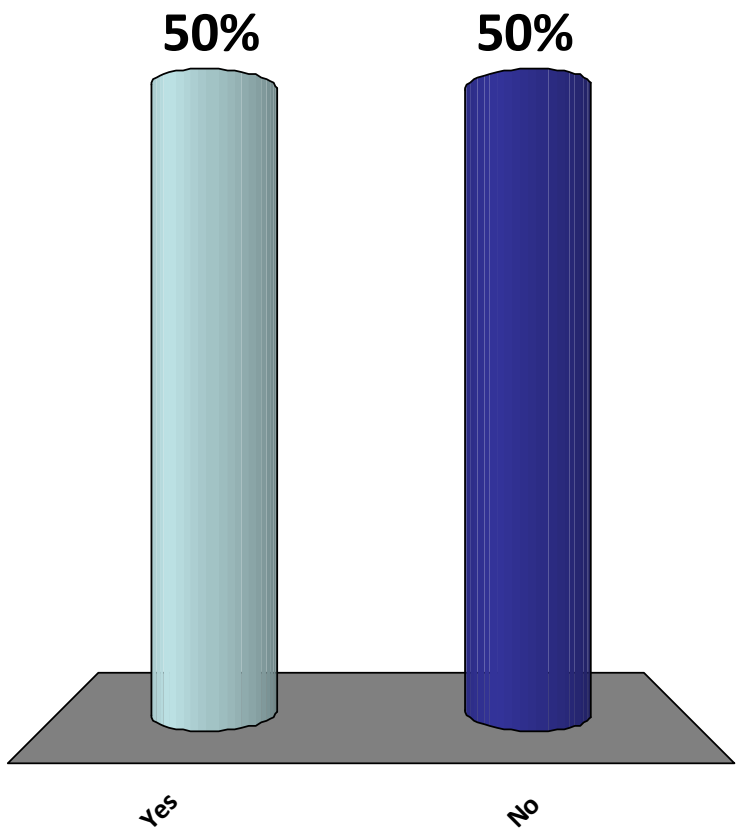
- Facts: Officer stopped vehicle going 30 MPH. Officer mistakenly believed speed limit was 55 mph. Defendant got warning ticket for speeding, and was charged with DWI.
- Issue: Can the officer's mistaken belief as to the law provide P.C. to stop vehicle?
- Held: No. Justification for stop must be objectively reasonable – subjectively reasonable is irrelevant.

State v. Barnard, COA (6/19/07)

- Facts: Officer spots Defendant's car at 12:15 AM "in a high crime area of downtown Ashville where a number of bars are located." Light turns green, 30 seconds later the car turns left.

Issue:
Was there reasonable articulable suspicion for the stop?

1. Yes
2. No



Held

- Yes. (2-1 decision) Officer testified that based on his experience, delayed reaction is an indicia of impaired driving. A thirty second delay goes well beyond the delay caused by a motorist's routine distractions, such as changing a radio station, glancing at a map or looking in a rear view mirror.
- Dissent: Case like Roberson – 8 to 10 seconds – not enough

State v. Burroughs, COA (8/21/07)

- DWI checkpoint. Defendant stopped with glossy and bloodshot eyes and his breath had a strong odor of alcohol. Trial court based its understanding of State v. Rose, understood it was required to make findings of fact regarding "primary programmatic purpose." Trial court found no proper documentation of purpose.

Issue

- Issue: Must every trial court make extensive inquiries into the purpose behind every check point?
- Held: No. When the stated purpose for a checkpoint is at odds with the evidence brought forth, the trial court must inquire as to the actual purpose.

Rationale

- Rose's holding was that where contradictory evidence exists as to the actual primary purpose of a checkpoint program, then the trial court must examine the available evidence to determine the actual purpose – because bare assertions of a constitutional purpose cannot be allowed to mask actual purposes that are unconstitutional.

Burroughs

- Burroughs also noted that there are two issues that must be addressed in checkpoint cases:
  - 1. Is the checkpoint constitutional?
  - 2. Whether the checkpoint was conducted in a constitutional manner – that is, whether the individual stop at issue was itself constitutional
  - Case was remanded for 2nd prong inquiry

The Confrontation Clause

- Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

- Crawford v. Washington, 541 U.S. 36 (2004), prohibits "admission of **testimonial statements** of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination."

Testimonional

- Davis v. Washington, 126 S.Ct. 2266 (2006)
  - Testimonial when the circumstances "objectively indica[e] . . . that the primary purpose of the interrogation is to establish or prove completed events potentially relevant to later prosecution"

Nontestimonial

- Davis - Nontestimonial when the circumstances "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

State v. Lewis, N.C. (8/24/2007)

- Officer responded to a call and found victim “sitting in a chair . . . kind of hunched over.” Her face and arms were badly bruised and swollen. State asserted she was injured 5 or 6 hours earlier. Victim described how she was injured and indicated that a neighbor could identify her attacker. After further investigation, she identified the defendant from photo lineup.

State v. Lewis, N.C. (8/24/07)

- The victim died before trial from causes unrelated to this incident.
- At trial, an officer testified that the victim selected the defendant out of a photo lineup as the person who assaulted her.
- Defendant was convicted of assault with a deadly weapon inflicting serious injury, robbery with dangerous weapon, and misdemeanor breaking and entering.

Issue

- Were the statements by the victim made to an officer in her hours after the incident and to a different officer regarding a photo lineup testimonial?

Held

- Held: Yes. Hammon controls and the statements to the officer in victim's home and her photo identification of the defendant to another officer while at the hospital were testimonial and, therefore, must be excluded.

Rationale

- The Court's analysis of the victim's statements to the officer at the crime scene include:
  - (1) the victim did not face an immediate threat to her safety,
  - (2) the officer sought to determine "what happened" rather than "what is happening,
  - (3) the investigation was formal and conducted outside of the defendant's presence.

Rationale

- (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed,
- (5) the questioning occurred some time after the crimes had been committed.

- Also, clear that photo lineup identification was testimonial.

State v. Heinricy, COA (6/5/07)

- Facts: The defendant was convicted of second-degree murder based on his driving recklessly while impaired and killing a tow truck operator. The trial court admitted an affidavit of a chemist containing the defendant's blood alcohol level stemming from his 2001 DWI conviction in South Dakota.

Heinricy

- The Court found that the affidavit was a business record and was not testimonial.
  - Supreme Court in Crawford stated in dicta that: "Most hearsay exceptions covered statements that by their nature were not testimonial-for example, business records or statements in furtherance of a conspiracy.

Pending Petition for Writ of Certiorari in Missouri v. March ask S.Ct. to resolve split

Other Evidence Issues

- State v. Gayton, COA (8/7/07) – Court ruled that trial judge erred by allowing the state to introduce evidence of the defendant's gang membership – it was irrelevant to issues of trafficking by possessing cocaine and carrying a concealed weapon.

Other Evidence Issues

- State v. Brockett, COA (8/7/07) – An officer with training and experience with gangs can explain the meaning of gang terminology in a taped telephone conversation between the defendant and his brother.

Criminal Offenses

- State v. Harris, COA (6/28/07) – Positive test for marijuana is insufficient alone to support conviction of possession of marijuana.
- State v. Freeman, COA (8/21/07) – Experienced officer can offer opinion that seized pills were crack cocaine.
- State v. Smith, COA (9/18/07) – hands + water = deadly weapon.

Probation

- State v. Howell, COA (7/3/07) – When Defendant violated many conditions warranting revocation, imposition of improper probation condition that defendant admit responsibility for offenses was harmless error.