



A T T O R N E Y S

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Driving While Impaired 2006

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SR&S

THE RALPH PAGE

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New DWI Law Commentary

I BEGIN

On December 1, 2006, the amendments to the state statutes concerning driving while impaired and other implied-consent offenses will be amended. This will be a detailed memo focused narrowly on DWI itself, and you should read it closely, and keep it for reference. When you attend the 2007 Legal Update, your trainer will provide you with a discussion of all the amendments to the law.

I MISS REECE TRIMMER

I miss Reece Trimmer.

SPECIAL NOTE

What you read here applies word-for-word to GS 20-138.2, Impaired driving in a commercial vehicle, except, of course the blood-alcohol concentration for a CDL is .04 and not .08, and the vehicle has to be commercial.

THE DWI LAW AS AMENDED IN THE MOTOR VEHICLE DRIVER PROTECTION ACT OF 2006

The underlined parts are new, but I will go into detail on each element.

GS 20 138.1. Impaired driving.

(a) **Offense.** - A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) **While under the influence of an impairing substance; or**

(2) **After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or**

(3) **With any amount of a Schedule I controlled substance, as listed in G.S. 90 89, or its metabolites in his blood or urine.**

(a1) **A person who has submitted to a chemical analysis of a blood sample, pursuant to G.S. 20 139.1(d), may use the result in rebuttal as evidence that the person did not have, at a relevant time after driving, an alcohol concentration of 0.08 or more.**

- (b) **Defense Precluded.** - The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.
- (b1) **Defense Allowed.** - Nothing in this section shall preclude a person from asserting that a chemical analysis result is inadmissible pursuant to G.S. 20 139.1(b2).
- (c) **Pleading.** - In any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance.
- (d) **Sentencing Hearing and Punishment.** - Impaired driving as defined in this section is a misdemeanor. Upon conviction of a defendant of impaired driving, the presiding judge must shall hold a sentencing hearing and impose punishment in accordance with G.S. 20 179.
- (e) **Exception.** - Notwithstanding the definition of "vehicle" pursuant to G.S. 20 4.01(49), for purposes of this section the word "vehicle" does not include a horse, bicycle, or lawnmower.horse."

Here we go:

First: "A person commits the offense of impaired driving if he *drives* ... "

Drives means operates, and a driver is an operator. GS 20-4.01(25) defines an operator as a person in actual physical control of a vehicle in motion or which has the engine running. This means a person is driving a vehicle (operating a vehicle) if he is behind the steering wheel with the motor running even though the car is parked, and the transmission is in the park position. It also means a person is driving if he is behind the steering wheel and the vehicle is moving even if the motor is not on. So, in a sense, the State of North Carolina outlaws DWI coasting and DWI parking.

Of course, the vast majority of cases occur when an impaired person is operating a vehicle by driving a vehicle that is moving with the motor running on a street or highway.

Secondly, "A person commits the offense of impaired driving if he drives any *vehicle*"

Note: GS 20-4.01 (49) describes vehicle as follows:

(49) **Vehicle.** - 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 the 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. This term shall not include a device which is designed for and intended to be used as a means of transportation for a person with a mobility impairment, or who uses the device for mobility enhancement, is suitable for use both inside and outside a building, including on sidewalks, and is limited by design to 15 miles per hour when the device is being operated by a person with a mobility impairment, or who uses the device for mobility enhancement. This term shall not include an electric personal assistive mobility device as defined in G.S. 20 4.01(7a).

Careful! On December 1, 2006, GS 20-138.1(e) takes effect and reads as follows:

(e) **Exception.** - Notwithstanding the definition of "vehicle" pursuant to G.S. 20 4.01(49), for purposes of this section the word "vehicle" does not include a ~~horse, bicycle, or lawnmower~~.horse."

Therefore, until December 1, 2006 people operating a lawnmower or bicycle impaired may not be charged. But on December 1, 2006, people operating a lawnmower or bicycle impaired may certainly be charged. Still, a horse remains excluded from the DWI laws, and I'm sure the cowboys all appreciate that.

Thirdly, “A person commits the offense of impaired driving if he drives any vehicle upon any *highway, any street* . . . “ GS 20-4.01(13) defines Highway 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. The terms "highway" and "street" and their cognates (things allied or similar in nature) are synonymous. So street, road or highway is that part of the road from the center of the road over to where the government no longer owns. Thus, it is illegal to drive impaired on the shoulder of the road, or in the ditch, or anywhere else on the right-of-way.

Fourthly, “A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any *public vehicular area* within this State:”

There is a new definition of public vehicular area effective December 1, 2006. Here it is:

(32) Public Vehicular Area. - Any area within the State of North Carolina that meets one or more of the following requirements:

a. The area is ~~generally open to and~~ used by the public for vehicular ~~traffic~~, traffic at any time, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of any of the following:

1. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions.

2. 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~~. whether the business or establishment is open or closed.

3. Any property owned by the United States and subject to the jurisdiction of the State of North Carolina. (The inclusion of property owned by the United States in this definition shall not limit assimilation of North Carolina law when applicable under the provisions of Title 18, United States Code, section 13).

b. The area is a beach area used by the public for vehicular traffic.

c. The area is a road ~~opened to used by~~ vehicular traffic within or leading to a ~~subdivision for use by subdivision residents, their guests, and members of the public~~, subdivision, whether or not the subdivision roads have been offered for dedication to the public.

d. The area is a portion of private property used ~~for~~ by vehicular traffic and designated by the private property owner as a public vehicular area in accordance with G.S. 20 219.4.

Now, you need to read that carefully. Basically it tightens up the definition, makes more areas a “public vehicle area,” and makes it easier to prove in court. I would not, if I were you, attempt to memorize that (I'm not), but I would have the definition where I could find it if necessary.

Fifthly, “A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

(1) *While under the influence of an impairing substance; or”*

GS 20-4.01(14a) defines *Impairing Substance*. - Alcohol, any controlled substance under Chapter 90 of the General Statutes, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances. Gs 20-4.01(48b) defines *Under the Influence of an Impairing Substance*. - The state of a person having his physical or mental faculties, or both, *appreciably* impaired by an impairing substance.

Appreciably: sufficient to be readily perceived or estimated; considerable; possible to estimate, measure, or perceive to a noticeable degree; noticeable. I got the definition right from a basic dictionary.

Sixthly, “A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or”

Think about this: in the first prong of the two prong DWI offense, the State must prove that the defendant is driving while impaired. But, under the second prong, the State does not need to prove the person was impaired; the General Assembly made it a crime to operate a vehicle with a blood alcohol content of .08 or more, whether you were impaired or not! Read the two offenses (1) & (2) directly above and you will see that what I just said was true.

In other words, North Carolina has two different crimes of impaired driving as I write this: one that prohibits driving while impaired, and one that prohibits any one driving with .08 alcohol concentration in their blood, whether or not they are impaired.

AND ON DECEMBER 1, 2006, WE WILL HAVE THREE SEPARATE AND DISTINCT IMPAIRED DRIVING CHARGES! READ ON:

- (a) Offense. - A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
 - (1) While under the influence of an impairing substance; or
 - (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
 - (3) With any amount of a Schedule I controlled substance, as listed in G.S. 90 89, or its metabolites in his blood or urine.

Paragraph (3) indicates that as of December 1, 2006, you may not operate a vehicle with ANY amount of a Schedule I controlled substance or metabolite in your blood. Metabolite means a product of metabolic action, and that means that the body has metabolized (changed) a product introduced into its system into another organic substance. [The word “organic” is found in any dictionary. You could look it up.]

This is, then, the DWI law. December 1, 2006 is the effective date for the new amendments.

The law of North Carolina holds that, as an example of asymmetric set theory, all who are drunk are impaired, but all impaired folks are *not necessarily drunk*. The State need not prove drunkenness, only impairment, and impairment is a lesser, easier to prove standard, than drunkenness.

I am afraid I was prolix.

Word for the Day: Prolix - wordy; tedious.

Boy, I miss Reece Trimmer.