NO. COA12-541 FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

*

STATE OF NORTH CAROLINA :
:
v. : From Pasquotank County
: File No. 09-CRS-50937
DENNIS ANTHONY WILLIAMS, :
Defendant :

****

*

DEFENDANT-APPELLANT'S BRIEF

****
*

INDEX

TABLE OF CASES AND AUTHORITIES

CASES

State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996) 6

CONSTITUTIONAL PROVISIONS

STATUTES

NO. COA12-541 FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

*

STATE OF NORTH CAROLINA	:	
	:	
v.	:	From Pasquotank County
	:	File No. 09-CRS-50937
DENNIS ANTHONY WILLIAMS,	:	
Defendant	:	

****

*

DEFENDANT-APPELLANT'S BRIEF

****
*

ISSUES PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY FAILING TO DISMISS THE CRIMINAL PROSECUTION AGAINST THE DEFENDANT BECAUSE CRIMINAL PROSECUTION OF THE DEFENDANT FOR DWI VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY AS DMV'S PREVIOUS SUMMARY DISQUALIFICATION OF THE DEFENDANT'S CDL PER N.C.G.S. § 20-17.4(a)(7) EFFECTIVELY CONSTITUTED A CRIMINAL PUNISHMENT?

II. DID DMV'S FAILURE TO PROVIDE NOTICE AND AN OPPORTUNITY FOR A HEARING PRIOR TO SUMMARILY DISQUALIFYING THE DEFENDANT FROM POSSESSESSING A CDL PER N.C.G.S. § 20-17.4(a)(7) VIOLATE THE DEFENDANT'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS?

STATEMENT OF THE CASE

After being convicted of Driving While Impaired in Pasquotank County Criminal District Court, the defendant filed an appeal *de novo* in Pasquotank County Criminal District Court. The defendant filed a Pre-Trial *Motion to Dismiss (Double Jeopardy)* (R.p. 14) in Superior Court on March 7, 2011, and that motion was heard in Pasquotank County Criminal Superior Court on March 24, 2011 by the Honorable Walter H. Godwin, Jr., Superior Court Judge presiding. The defendant's *Motion to Dismiss (Double Jeopardy)* also raised a Due Process issue. (R.p. 16, Par. 10). Following that hearing, the parties ordered a transcript of the hearing, and same was duly delivered to the parties. Thereafter the parties presented written Memorandums of Law to Judge Godwin, who later contacted the parties and announced that he denied the defendant's Motion to Dismiss. The case was then set for trial. Judge Godwin's Order denying the Motion to Dismiss was eventually entered on March 20, 2012, and in that Order Judge Godwin denied the defendant's Motion as to both the Double Jeopardy and the Due Process grounds. (R.p. 28, Par. 6).

The trial was heard in Pasquotank County Superior Court at the March 19, 2012 Criminal Superior Court session of that

Court. His Honor, Walter H. Godwin, Jr., Superior Court Judge, duly commissioned, was present and presiding. Assistant District Attorney Kimberly Pellini was present and prosecuting for the State. The trial commenced on Monday, March 19, 2012 and on Tuesday, March 20, 2012 the jury returned a verdict of guilty. The defendant gave notice of appeal in open court to this Court at the time of the entry of Judgment on March 20, 2012.

The Record on Appeal was timely filed and docketed in this Court on May 7, 2012. The Record was then mailed to the parties on May 8, 2012. The defendant's timely Motion to Extend Time to File Brief was allowed in part by this Court on May 29, 2012, and the defendant's brief is due to be filed on or before June 22, 2012.

STATEMENT OF THE GROUNDS OF APPELLATE REVIEW

The ground for appellate review is pursuant to N.C.G.S. 7A-27(b) and 15A-1444 and the appeal arises from an Order Denying the defendant's Motion to Dismiss and a subsequent final criminal Judgment of the Pasquotank County Superior Court following a conviction by jury, all occurring on March 20, 2012.

STATEMENT OF THE FACTS

The defendant was charged with driving while impaired (DWI)

on May 23, 2009. The defendant's DWI did not involve a commercial vehicle for which a CDL would be necessary. Instead, the defendant was driving his personal 2001 Ford pickup truck, for which no CDL is required. (T.p. 8). In connection with his DWI arrest, the defendant was given a chemical analysis test per N.C.G.S. § 20-16.2(a). A copy of the standard rights form (DHHS 4081) was read to and signed by the defendant in connection with that chemical analysis test. (R.p. 3). Those rights included rights relating to a "one-year refusal revocation" and a "thirty-day revocation". Those rights did not include any notice to the defendant that he would be disqualified from possessing a Commercial Drivers License (CDL) for one year if the defendant refused or registered a .08 or more on the chemical analysis test.

The defendant registered a .17 on the chemical analysis test. As a result of the defendant's chemical analysis test results, the Magistrate entered a Revocation Order, revoking the defendant's driving privilege for 30 days. (R.p.6). The Revocation Order did **not** include any notice to or provision that the defendant would, in addition to the 30 day revocation, be disqualified from possessing a CDL for one year. The defendant then served his 30 day driving privilege revocation as ordered.

On April 9, 2010, almost 11 months after the defendant's

arrest, after the defendant's initial 30 day revocation ended, and while the defendant's DWI case was still pending, N.C. DMV sent to the defendant a letter indicating that DMV was disqualifying the defendant's CDL for one year based solely upon the fact of the entry of the initial 30-day Revocation Order entered at the time of the defendant's DWI arrest on May 23, 2009. (R.p. 21). DMV's letter also indicated that the defendant was **not** entitled to a hearing on that revocation. Since there is no type of limited driving privilege available for a CDL, DMV's disqualification of the defendant's CDL was an absolute revocation of that CDL. As a result, the defendant's CDL was revoked and disqualified between April 19, 2010 and April 19, 2011. (T.p. 9-10).

The defendant is 42 years old, is married and financially supports his wife, his nineteen-year-old daughter and her two-year-old son, the defendant's grandson. (T.p. 6-7). The defendant's only employment at the time of this DWI arrest was as a long-distance hauler, which required him to have a CDL. (T.p. 7-8). Following DMV's disqualifying the defendant from possessing a CDL in April 2010, the defendant's employer reduced the defendant's pay by more than 25% directly as a result of the defendant's loss of his CDL and the defendant not being able to drive a long-distance truck. (T.p. 10-11). Defendant's employer

then changed the defendant's duties from long-distance hauling to pouring concrete and delivering portable concrete pouring units. (T.p. 11). After seven months of reduced pay and more laborious work duties, the defendant's employer terminated his employment because the defendant could not possess a CDL. (T.p. 12, 15). As a result, the defendant's only source of income between November 2010 and the date of this hearing was unemployment benefits. (T.p. 15-18).

ARGUMENT

I. STANDARD OF REVIEW

The defendant's Motion to Dismiss was based on substantial violations of the Double Jeopardy and Due Process clauses of the United States and North Carolina Constitutions, and the Trial Court denied the motion on both grounds. As such, the standard of review on both issues is *de novo*. State v. Thorne, 173 N. C. App. 393, 396, 618 S. E. 2d 790, 793 (2005).

II. AFTER DMV SUMMARILY DISQUALIFIED THE DEFENDANT'S CDL PER N.C.G.S. § 20-17.4(A)(7), THE DOUBLE JEOPARDY CLAUSE PROHIBITED CRIMINAL PROSECUTION OF THE DEFENDANT FOR DRIVING WHILE IMPAIRED

The Double Jeopardy Clause prohibits "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." Dep't of Revenue v. Kurth Ranch, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). *See* 5th Amendment, U.S. Constitution. "The Law of the Land Clause incorporates similar protections under the North Carolina Constitution." State v. Oliver, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996). *See* N.C. Const. Art. I, § 19.

In Hudson v. United States, 522 U.S. 93 (1997), the United States Supreme Court clarified the protections provided by the Double Jeopardy Clause. According to Hudson, "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment." Id. at 98-99 (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 549, 63 S.Ct. 379, 87 L.Ed. 443 (1943)). Instead, it "protects only against the imposition of multiple criminal punishments for the same offense." Id. at 99. A "criminal punishment" results when a "measure of recovery",

i.e., the summary one-year disqualification of a CDL per N.C.G.S. § 20-17.4(a)(7), is "unreasonable or excessive". Rex Trailer Co. v. United States, 350 U.S. 148, 154, 76 S. Ct. 219, 100 L. Ed. 149 (1956).

Using a two-part inquiry articulated in Hudson and explained by State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2001), this Court must determine whether the DMV's summary disqualification of the defendant's CDL for one year, without any hearing, adjudication or notice, constituted the equivalent of a criminal punishment. If that was a criminal punishment, then the Trial Court erred in denying the defendant's Motion to Dismiss (Double Jeopardy), as the Double Jeopardy Clause barred a subsequent criminal prosecution after the "criminal punishment" had already been imposed for the same conduct. State v. Gardner, 340 S.E.2d 701, 315 N.C. 444 (1986) citing Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

A. Disqualification is analogous to revocation for purposes of decision methodology.

This is a case of first impression. However, the cases involving "revocation" or "suspension" are instructive as to the methodology to use in making this decision.

N.C.G.S. § 20-17.4(a)(7) "Disqualification to drive a

commercial vehicle" states in relevant part:

> (a) One Year. – Any of the following disqualifies a person from driving a commercial motor vehicle for one year if committed by a person holding a commercial drivers license:
> …
> (7) A civil license revocation under N.C.G.S. § 20-16.5 ... arising out of a charge that occurred while the person was either operating a commercial motor vehicle or while the person was holding a commercial drivers license.

A disqualification is the "withdrawal of the privilege to drive a commercial motor vehicle." N.C.G.S. § 20-4.01(5b). A "revocation or suspension" is defined as the "termination of a licensee's ... privilege to drive." N.C.G.S. § 20-4.01(36). Accordingly, a disqualification is analogous to a revocation or suspension, and the methodology for determining whether a CDL "disqualification" implicates Double Jeopardy principles should follow the same methodology as in license revocation cases.

B. The purpose of N.C. Gen. Stat. § 20-17.4(a) (7) is punitive.

The first part of the Hudson/Evans double jeopardy analysis requires this Court to determine the purpose of N.C.G.S. § 20-17.4(a)(7). If this Court determines its purpose is punitive, the analysis is over, double jeopardy prohibited the DWI prosecution, and the Trial Court erred in denying the defendant's Motion to Dismiss.

Determining the purpose of N.C.G.S. § 20-17.4(a)(7) is initially a matter of statutory construction. *See* Evans, 145 N.C. App. at 327. As such, the Court must first ask whether the legislature either "expressly or impliedly" indicated whether the measure was to be intended to be a criminal or civil sanction. Id. However, the "substance of a law and not just the label given to it by the legislature is determinative as to its validity." Henry v. Edmisten, 315 N.C. 474, 495, 340 S.E.2d 720, 734 (1986).

Our legislature did not specify whether this CDL disqualification was a criminal or civil sanction. But even had our legislature stated that this is a "civil penalty" or "administrative sanction", the U.S. Supreme Court in Hudson v. United States, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) directed that (e)ven in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." In doing so, this Court will be examining the "substance" of the law, as required in Henry v. Edmisten.

At the Trial Court level, the State offered no evidence or

argument as to the purpose of the statute, other than to repeatedly argue that it was a "civil revocation" with a remedial purpose. (T.pp. 21-26). However, after closely examining N.C.G.S. § 20-17.4(a)(7), this Court must conclude that this statute's purpose is punitive, regardless of any labels the State wishes to attach to the legislation.

1. The N.C.G.S. § 20-17.4(a)(7) one-year CDL disqualification is completely different than temporary license revocations following a DWI arrest.

A careful analysis of the distinctions between this one-year disqualification/revocation/punishment and the temporary civil license revocations following a DWI arrest that have previously been examined by this Court reveal that this disqualification cannot be categorized the same as those temporary revocations.

In Henry v. Edmisten, the Court held "the summary revocation procedure of § 16.5 is not a punishment but a highway safety measure" reflecting the General Assembly's intent "for the revocation provision to be a remedial measure." Henry, 315 N.C. at 495 (discussing the N.C.G.S. § 20-16.5 revocation immediately following a DWI charge). The Court noted the purpose of a license revocation "is not to punish the offender, but to remove from the highway one who is a potential hazard to himself and others." Id. at 495.

Ten years later in State v. Oliver, the North Carolina Supreme Court again examined N.C.G.S. § 20-16.5. Expanding on the legislative purpose articulated in Henry, the Oliver court noted "an impaired driver presents an immediate, emergency situation, and swift action is required to remove the unfit driver from the highways in order to protect the public." Oliver, 343 N.C. at 209.

When the purpose of N.C.G.S. § 20-16.5 was revisited by State v. Evans in 2001, the difference was that the revocation period had been increased from 10 to 30 days. Evans described the purpose of N.C.G.S. § 20-16.5 as follows:

> The function and intent of the statute is to remove from our highways drivers who either cannot or will not operate a motor vehicle safely and soberly. The purpose of license revocation in N.C.G.S. § 20-16.5 is clearly to prevent unsafe and unfit drivers from operating vehicles and endangering the citizens of North Carolina.

Evans, 145 N.C. App. at 331-332. Henry, Oliver, and Evans focused on the necessity of taking immediate action for an abbreviated time using measures logically connected to a remedial purpose. Those courts held N.C.G.S. § 20-16.5 was a highway safety measure because the offense, action in response to the offense, and length of time imposed to effectuate the

remedial goals all had a rational connection to the conduct, i.e., driving while impaired.

The analyses that led the Henry, Oliver, and Evans courts to determine that the temporary N.C.G.S. § 20-16.5 revocation was a remedial highway safety measure does not apply in this case. This disqualification involves a one-year CDL disqualification, preventing the defendant from providing for his family, despite the fact that the defendant's DWI charge arose from driving a personal, non-commercial vehicle during personal, non-working hours. Unlike N.C.G.S. § 20-16.5, the offense, type of punishment imposed, and length of punishment imposed by N.C.G.S. § 20-17.4(a)(7) have no rational remedial connection. Immediately disqualifying a CDL for one year for unadjudicated conduct in a noncommercial vehicle does nothing to remedy "an immediate, emergency situation." The defendant's ability to safely operate a commercial motor vehicle during working hours was not in question at the time of his DWI charge, yet the punishment imposed by N.C.G.S. § 20-17.4(a)(7) only targets the defendant's ability to perform that unrelated conduct.

2. Unlike the N.C.G.S. § 20-16.5 revocation, the N.C.G.S. § 20-17.4(a)(7) one-year CDL disqualification is punitive.

The immediate finality and excessive length of the CDL disqualification can only be described as criminally punitive. The temporary N.C.G.S. § 20-16.5 revocation has always provided notice of, and allowed for, a hearing to contest the validity of that revocation. However, the N.C.G.S. § 20-17.4(a)(7) CDL disqualification at issue here provides for no type of hearing to contest its validity. Further, whereas the punitive components of N.C.G.S. § 20-16.5 can be mitigated by allowing a person to obtain a limited driving privilege after 10 days, the punishment imposed by N.C.G.S. § 20-17.4(a)(7) cannot be mitigated, as no limited privilege is authorized at any point during this disqualification. Given the complete disconnect between the conduct, i.e., the act of driving a personal vehicle while impaired during personal hours, versus the one-year disqualification of driving a commercial vehicle during working hours in order to provide for one's family, there can be no remedial purpose to N.C.G.S. § 20-17.4(a)(7).

3. The Kennedy factors require a conclusion that the CDL disqualification constitutes a criminal penalty.

In order to determine whether this law was "so punitive either in purpose or effect" so as to constitute a criminal penalty" per Hudson and Evans, this Court should apply seven factors listed in

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963):

> (1) "whether the sanction involves an affirmative disability or restraint";
> (2) "whether it has historically been regarded as a punishment";
> (3) "whether it comes into play only on a finding of *scienter*";
> (4) "whether its operation will promote the traditional aims of punishment - retribution and deterrence;
> (5) "whether the behavior to which it applies is already a crime";
> (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and
> (7) "whether it appears excessive in relation to the alternative purpose assigned."

As emphasized in Kennedy, "no one factor should be considered controlling as they 'may often point in differing directions.'" Hudson, at 522 U.S. at 101, quoting Kennedy, 372 U.S. at 169.

The Defendant concedes the first three Kennedy factors do not support a finding of criminal punishment. This is consistent with the findings made by Evans analyzing N.C.G.S. § 20-16.5. However, when considering the application of N.C.G.S. § 20-17.4(a)(7) to persons who were not operating a commercial vehicle, as well as the length of this disqualification period, the remaining four Kennedy factors suggest a very different result than in Evans.

a. The one-year CDL disqualification promotes the

traditional aims of punishment: retribution and deterrence.

When considering the fourth Kennedy factor, the Evans Court concluded any deterrent effect of G. S. § 20-16.5 was incidental to the overriding purpose of protecting the public's safety; accordingly, the factor did not weigh in defendant's favor. In the case at bar, the analysis is much different. According to N.C.G.S. § 20-17.4(a) (7), the holder of a CDL is disqualified from possessing a CDL or operating a commercial vehicle for one year for conduct that occurred in a noncommercial vehicle without first being convicted by either an administrative or criminal tribunal. A civil license revocation triggering a one-year CDL disqualification based on conduct in a noncommercial vehicle has no rational remedial correlation, as previously discussed. The lack of a remedial correlation makes this sanction much less about deterrence and much more about retribution. The purpose and effect of N.C.G.S. § 20-17.4(a) (7) is to punish without process, which is clearly a traditional aim of punishment.

The very nature of the disqualification authorized by N.C.G.S. § 20-17.4(a) (7) promotes the traditional goals of punishment. This disqualification period is the exact same length as the disqualification and suspension periods imposed

for a DWI conviction. A pretrial civil license revocation and a DWI conviction are not equal offenses; consequently, there are no remedial reasons for imposing equal punishments. Moreover, even if someone is found not guilty of DWI, and/or even if the defendant later proves that the chemical analysis was flawed, the CDL will still be disqualified for one year by N.C.G.S. § 2017.4(a)(7). For those defendants, despite being found not guilty of DWI, nothing other than the passing of time will allow them to obtain their CDL. This disqualification is nothing more than an attempt by the General Assembly to punish people charged with impaired driving without being burdened by having to prosecute or convict them.

The deterrent effect a driver's license revocation may have upon the impaired driver is not merely incidental to the overriding purpose of protecting the public's safety. Oliver, 343 N.C. at 209-10. Here, the holder of a CDL is punished for an act that had nothing to do with his ability to operate a commercial vehicle during working hours. The defendant's ability to safely operate a commercial vehicle was not at issue when he received the N.C.G.S. § 20-16.5 civil revocation. If those similarly situated to the defendant presented such a public safety risk, all driving privileges - commercial and

noncommercial - ought to be revoked for the same amount of time; however, they are not. To disqualify someone's CDL for conduct in a noncommercial vehicle without either an administrative or a criminal conviction cannot be considered a remedial highway safety measure. Its sole purpose is retribution and deterrence; as such, the fourth Kennedy factor weighs heavily in the defendant's favor.

b. The behavior punished by N.C. Gen. Stat. § 20-17.4(a)(7) is already a crime.

The fifth Kennedy factor asks whether the behavior to which this statute applies is already a crime. Violating the implied consent offense of driving with an alcohol concentration of 0.08 or more is a crime under N.C. Gen. Stat. § 20-138.1. Evans, 145 N.C. App. at 334. This conduct leads automatically to the N.C.G.S. § 20-16.5 thirty-day revocation, and that thirty-day revocation triggers the automatic one-year CDL revocation. Just as in Evans, this fourth fifth factor weighs exclusively in the defendant's favor.

c. There is not an alternative purpose which is rationally connected assignable to N.C. Gen. Stat. § 20-17.4(a) (7).

The sixth Kennedy factor is basically a rational balancing test. In the Trial Court, the only argument advanced by the State was that this disqualification as applied to this

defendant was necessary to, in summary, protect the public. (T.pp. 23-27). However, that argument assumed that the defendant was guilty of some unsafe conduct relative to driving a commercial vehicle. Not only had the defendant not been convicted of the underlying DWI, but the defendant had not been accused of any misconduct relative to a commercial vehicle or relative to the use of his CDL.

Further, it would be irrational for the State to argue that a one-year automatic disqualification of a CDL, without any type of hearing and before any finding of guilt, is necessary to deal with the "immediate, emergency situation [where] swift action is required to remove the unfit driver from the highways in order to protect the public", which is the rational behind the N.C.G.S. § 20-16.5 immediate revocation. Evans, 145 N.C.App. at 331 (citing Oliver, 343 N.C at 207). First, the N.C.G.S. § 20-16.5 revocation is immediate, but this CDL disqualification was not. In this case, the defendant was charged with DWI and received the N.C.G.S. § 20-16.5 revocation on May 23, 2009. (R.pp. 2, 6). However, DMV did not disqualify the defendant's CDL until April 9, 2010, over 10 months after the arrest. (R.p. 21). Certainly any emergency situation arising from the DWI arrest had ended by then. Second, as has been discussed at length, the danger created at the time of the DWI was driving a personal vehicle at 9:00 p.m. while on his way to get something to eat. (R.p. 2; T.p. 8). However, DMV only disqualified the

defendant's ability to do his job, i.e., operate a commercial vehicle using a CDL. Accordingly, because there is no rational, alternative purpose in the context of this CDL disqualification as applied to this defendant, this factor weighs heavily in the defendant's favor.

d. The one-year disqualification under N.C. Gen. Stat. § 20-17.4(a)(7) for conduct in a non-commercial vehicle is excessive.

The final Kennedy factor asks even if there was a remedial purpose behind the statute whether it is excessive in relation to any remedial purposes. The Evans court specifically cautioned against excessive suspension periods noting:

> Although we find no punitive purpose on the face of N.C.G.S. § 20-16.5, we are aware that, at some point, a further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

Evans, 145 N.C. App. at 332 (emphasis added). We have reached the point described above by the Court in Evans. The defendant's CDL disqualification was not for two or three months, which was the possible timeframe warned against in Evans. Instead, his disqualification was for an entire year, twelve-times greater

than the N.C.G.S. § 20-16.5 revocations upheld by prior North Carolina appellate decisions. The one-year disqualification period authorized by N.C.G.S. § 20-17.4(a) (7) is clearly excessive, per the rational of Evans.

C. Double Jeopardy Conclusion

Having considered the purpose of the statute in light of the seven Kennedy factors, this Court must conclude N.C.G.S. § 20-17.4(a) (7) one-year CDL revocation arising over 10 months after receiving a DWI in a personal vehicle, during personal hours, without any type of hearing or adjudication, is so punitive either in purpose or effect that it constitutes a criminal penalty as applied to this defendant. Therefore, because **this** defendant was already subjected to criminal punishment through the operation of N.C.G.S. § 20-17.4(a)(7), the Trial Court erred in denying this defendant's Motion to Dismiss because further prosecution of the defendant for DWI violated his right to be free from double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. This Court should reverse the Trial Court's denial of the Motion to Dismiss.

III. DMV'S SUMMARY DISQUALIFICATION OF THE DEFENDANT'S CDL PER N.C.G.S. § 20-17(A)(7) WITHOUT NOTICE AND WITHOUT AN OPPORTUNITY FOR A HEARING VIOLATED THE DEFENDANT'S

SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS

The defendant's Motion to Dismiss (Double Jeopardy) also raised a Due Process issue. (R.p. 16, Par. 10). Following that hearing, the parties ordered a transcript of the hearing, and same was duly delivered to the parties. Thereafter the parties presented written Memorandums of Law to Judge Godwin, who later contacted the parties and announced that he denied the defendant's Motion to Dismiss. Judge Godwin's Order denied the defendant's Motion as to both the Double Jeopardy and the Due Process grounds. (R.p. 28, Par. 6). Therefore, this issue is properly before this Court.

A. N.C.G.S. § 20-17.4(A)(7) IS UNCONSTITUTIONAL BECAUSE IT MANDATES THE DENIAL OF A PROTECTED PROPERTY INTEREST WITHOUT DUE PROCESS OF LAW.

Under N.C.G.S. § 20-17.4(a)(7), a defendant is disqualified from driving a commercial motor vehicle for one year if the defendant holds a CDL and receives a civil revocation pursuant to N.C.G.S. § 20-16.5 in connection with an implied consent offense. Unlike every other revocation and/or disqualification provision enumerated under N.C.G.S. § 20-17.4(a), the subpart in question, i.e., (a)(7) fails to provide *any* "opportunity to be heard" - whether pre-or post-disqualification - to the affected license holder. This subpart is draconian when compared not only to the

other provisions within the same statute, but also when compared to other statutes that seek to revoke or disqualify drivers license for implied consent offenses. As the statute takes from the defendant a protected property interest but provides absolutely no process or opportunity to object to, contest, or have reviewed that taking, and since it occurs before any hearing or adjudication, the statute is unconstitutional in that it violates the defendant's right to due process of law.

1. A CDL is a protected property interest.

It is undisputed that a license is a protected property interest. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986). Indeed, as the U.S. Supreme Court has held: "Once licenses are issued ... their continued possession may become essential in the pursuit of a livelihood." Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). This is especially true when dealing with CDL's, as here.

2. Disqualifying a Duly Issued License Holder Requires Due Process

When a person has an interest in life, liberty, or property that is protected by law, process is due before official action can deprive him of it. *See* Henry, 315 N.C. at 480. Accordingly, when the government suspends or, as here, disqualifies an issued

license, it must afford due process as required by the 14th Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution.

North Carolina courts have clearly held that "[t]he fundamental premise of procedural due process protection is notice and the opportunity to be heard." Peace v. Emp. Sec. Comm 'n of N.C., 349 N.C. 315, 322, 507 S.E.2d 272,278 (1998) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, 506 (1985). "Moreover, the opportunity to be heard must be 'at a meaningful time and in a meaningful manner.' " Id. (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

3. N.C. Gen. Stat. § 20-17.4(a)(7) grossly fails to comply with the minimum standards of constitutional due process.

Having already established the defendant possesses a protected property interest in his CDL, this Court must determine if the disqualification procedure of N.C.G.S. § 20-17.4(a)(7) comports with the minimum standards of constitutional due process. Applied in North Carolina by Henry, Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) established the following three part balancing test to resolve a due process issue:

First, the private interest that will be affected by the

> official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Henry, 315 N.C. at 480.

The first prong of the Henry balancing test weighs heavily in the defendant's favor. The private interest affected in the present case is obviously the defendant's CDL. The Court in Henry noted the following factors affect the weight of the private interest in licensing: (1) the maximum revocation period and "the longer the suspension period the greater the private interest in being licensed," (2) the timeliness of post-suspension review, and (3) the existence or absence of hardship relief by way of a limited license. Id. at 482-483. Here, because the disqualification period was for an entire year, the defendant had a substantial interest in the deprivation at issue. In fact, the disqualification was for so long that his employer, who tried to work with the defendant, ended up having to terminate the defendant due to the loss of his CDL. As to the second factor, there is no post-suspension review authorized by either N.C.G.S. § 20-17.4 or any other section under Chapter 20. Lastly, regarding

the third factor, there is no limited driving privilege or other means to obtain commercial driving privileges before the one-year disqualification period expires. Each of the above factors weighs heavily towards the defendant's interest.

The second prong of the Henry balancing test requires weighing the risk of erroneous deprivation of the private interest as a result of the procedures used and the probable value of additional procedural safeguards. Here, based on the complete lack of procedural safeguards, the risk of erroneous deprivation is great. Not only that, but there is absolutely no way to know whether the deprivation was erroneous. Prior to the disqualification being implemented, N.C.G.S. § 20-17.4(a)(7) provides no notice of a pending disqualification nor means to challenge it. Not only is there no pre-deprivation notice nor opportunity to be heard, there is no method to challenge the disqualification after it is issued through any type of hearing in any forum. Based on the complete lack of pre-deprivation and post-deprivation procedures provided by N.C.G.S. § 20-17.4(a)(7), there is a legitimate risk of erroneous deprivation; consequently, the probable value of additional procedural safeguards can only be described as substantial. Accordingly, this second prong also weighs heavily in the defendant's favor.

The third and final prong requires weighing the State's interest served by the summary procedure used, including the state function involved and the fiscal and administrative burdens that would result from additional procedures. The interest served by the summary procedure is to impose a criminal penalty without notice or hearing, as discussed above. This is not a compelling state interest.

However, because DMV already has an internal administrative hearing process in place to contest license revocations and other administrative actions taken by DMV, at a minimum, those same procedural protections can be easily provided to drivers disqualified by N.C.G.S. § 20-17.4(a)(7) without adding any new significant fiscal or administrative burdens. Moreover, the procedural protections provided by N.C.G.S. § 20-16.5 make the lack of process provided by N.C.G.S. § 20-17.4(a)(7) all the more glaring. It is illogical to provide more procedural protections for someone whose license is revoked for only 30 days than for someone whose CDL is disqualified for one year, and therefore his job is lost, when the DWI was in a personal vehicle after work hours. When counterbalanced by the great personal interest a CDL holder has in maintaining his commercial license, and his job, the government's lack of a compelling need for such a summary

disqualification procedure and the ease with which the State could implement additional procedures to provide due process, this prong also weighs heavily in favor of the Defendant.

After balancing the three prongs in Henry, it is clear N.C.G.S. § 20-17.4(a)(7) is completely void of the procedural safeguards required to comply with the constitutionally mandated due process. As a result, the defendant's due process rights under the United States and North Carolina Constitutions have been substantially violated.

B. North Carolina Courts Have Not Addressed N.C.G.S. § 20-17.4(a)(7).

Although North Carolina courts have upheld the constitutionality of a civil revocation following an arrest for impaired driving, Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986), as well as the prohibition against issuing a "limited driving privilege" to the holder of a commercial drivers license during the 30-day civil revocation period, State v. Reid, 148 N.C. App. 548, 559 S.E.2d 561 (2002), these holdings do not sanction the automatic and unreviewable disqualification of a commercial drivers license for 12 months following a mere accusation of being an impaired driver and blowing a .08 or refusing a chemical analysis, as permitted under N.C.G.S. § 20-17.4(a)(7).

1. N.C.G.S. § 20-17.4(a)(7) Is Like No Other Statute.

Once the other CDL disqualifying provisions are considered, it becomes clear that this statutory provision is truly an unconstitutional outlier.

By statute, a person is disqualified from driving a commercial motor vehicle for one year under N.C.G.S. § 20-17.4(a) if one of the following provisions applies:

> 1. A first conviction of N.C.G.S. § 20-138.1, driving while impaired, for a holder of a commercial drivers license that occurred while the person was driving a motor vehicle that is not a commercial motor vehicle.
>
> 2. A first conviction of N.C.G.S. § 20-138.2, driving a commercial motor vehicle while impaired.
>
> 3. A first conviction of N.C.G.S. § 20-166, hit and run.
>
> 4. A first conviction of a felony in the commission of which a commercial motor vehicle was used or the first conviction of· a felony in which any motor vehicle is used by a holder of a commercial drivers license.
>
> 5. Refusal to submit to a chemical test when charged with an implied-consent offense, as defined in N.C.G.S. § 20-16.2.
>
> 6. A second or subsequent conviction, as defined in N.C.G.S. § 20-138.2A(d), of driving a commercial motor vehicle after consuming alcohol under N.C.G.S. § 20-138.2A.
>
> 7. A civil license revocation under N.C.G.S. § 20-16.5, or a substantially similar revocation obtained in another jurisdiction, arising out of a charge that occurred while the person was either operating a commercial motor vehicle or while the person was holding

> a commercial drivers license.
>
> 8. A first conviction of vehicular homicide under N.C.G.S. § 20-141.4 or vehicular manslaughter under N.C.G.S. § 14-18 occurring while the person was operating a commercial motor vehicle.
>
> 9. Driving a commercial motor vehicle during a period when the person's commercial drivers license is revoked, suspended, cancelled, or the driver is otherwise disqualified from operating a commercial motor vehicle.

Notably, subparts (1)-(6) and (8) render a CDL holder disqualified only upon *conviction* for an enumerated offense (a requirement that necessarily affords the CDL holder process through the criminal courts. Subpart (9) disqualifies an *already* revoked, suspended, cancelled, or otherwise disqualified driver. Only subpart (7), in question here, disqualifies an otherwise validly-CDL holder, without any requirement of a showing of proof in court or other type of judicial hearing.

Even when compared with other license-revoking aspects of implied-consent offenses that can impact licensees pre-trial, the statute in question is uniquely unavailing in terms of the lack of any process provided. For example, a driver who refuses to submit to a chemical test in connection with an implied-consent offense has robust post-deprivation remedies available. As the federal court emphasized in Montgomery v. North Carolina Dept. of Motor Vehicles, 455 F.Supp. 338 (W.D.N.C.1978), *aff'd*, 599 F.2d 1048

(4th Cir. 1979), where a revoked-licensee "requested and received an administrative hearing, a trial de novo in Superior Court, and consideration of his appeals of the Superior Court's decision by both the North Carolina Court of Appeals and the North Carolina Supreme Court," that person "was not deprived of any property right without procedural due process." Montgomery, 455 F.Supp. at 341. In stark contrast, a disqualified-licensee is afforded *no* such remedial avenues to challenge the loss of a commercial drivers license.

2. Henry and Its Progeny Do Not Resolve this Constitutional Issue.

In Henry, the N.C. Supreme Court upheld North Carolina's statutory provision whereby a licensee could have his license revoked for 10 days following an arrest for impaired driving. The Court held that an immediate but temporary civil revocation "provides immediate protection against the probably impaired driver and serves as an interim highway safety measure until after a person is afford a trial." 315 N.C at 494,340 S.E.2d at 733. Critically, the Court in Henry found that a civil revocation under N.C.G.S. § 20-16.5 allowed for "prompt post-deprivation review." Id. at 484,340 S.E.2d at 727-728. Accordingly, the Supreme Court held that the statute in question did not violate due process.

In State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996), the Supreme Court, interpreting the same version of N.C.G.S. § 20-16.5 as the Court in Henry, held that the 10 day revocation did not constitute punishment for purposes of double jeopardy.

In State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2001), this Court examined whether an increased revocation period of 30 days under N.C.G.S. § 20-16.5 changed the Oliver analysis by rendering the statute punitive and, thus, unconstitutional under principles of double jeopardy. While holding that the increase of the revocation period from 10 to 30 days did not render the statute punitive for much the same reasons as expressed in Henry, this Court did, however, issue a clear warning:

> Although we find no punitive purpose on the face of N.C.G.S. § 20-16.5, we are aware that, at some point, a further increase in the revocation period by the General Assembly becomes excessive, even when considered in light of the well-established goals of N.C.G.S. § 20-16.5. Whether it is a further doubling or tripling of the revocation period, there is a point at which the length of time can no longer serve a legitimate remedial purpose, and the revocation provision could indeed violate the Double Jeopardy Clause.

Evans, 145 N.C. App. at 332,550 S.E.2d at 859.

As set out above, it is clear that, following Evans, this one-year CDL disqualification violates constitutional Double Jeopardy principles, due to the more than quadrupling of the

"doubling or tripling" warning of Evans. However, it should also be clear that a revocation (or disqualification) that, unlike N.C.G.S. § 20-16.5, does not allow for "prompt post-deprivation review," Henry, 315 N.C. at 484, 340 S.E.2d at 727-728, violates of due process guarantees, although no appellate court has squarely addressed the issue.

C. N.C.G.S. § 20-17.4(a)(7) Has No Remedial Mechanism.

This defendant had no means to challenge the disqualification of his CDL under N.C.G.S. § 20-17.4(a)(7). The plain language of the statute does not contemplate or provide for any such challenge. Further, the State cannot argue the procedures in place to contest a civil revocation issued pursuant to N.C.G.S. § 20-16.5 are a sufficient means to challenge a disqualification issued pursuant to N.C.G.S. § 20-17.4(a)(7).

First, neither the chemical analysis rights (R.p. 5), nor the Revocation Order *(R.p. 6-7)*, nor the magistrate who issued the Revocation Order gave this defendant any notice of a N.C.G.S. § 20-17.4(a)(7) CDL disqualification. Therefore, not only was the defendant never given an opportunity for a hearing, but this CDL disqualification was never even mentioned until DMV had already taken the disqualification action.

Second, the only hearing whereby this defendant could contest

the 30-day civil revocation is set out in N.C.G.S. § 20-16.5(g). That hearing is limited by statute to only to the following four issues, none of which mention or relate to a CDL disqualification or the statute at issue:

> (1) A law enforcement officer has reasonable grounds to believe that the person has committed an offense subject to the implied-consent provisions of N.C.G.S. § 20-16.2;
> (2) The person is charged with that offense as provided in N.C.G.S. § 20-16.2(a);
> (3) The law enforcement officer and the chemical analyst comply with the procedures of N.C.G.S. § 20-16.2 and N.C.G.S. § 20-139.1 in requiring the person's submission to or procuring a chemical analysis; and
> (4) The person:
> a. Willfully refuses to submit to the chemical analysis;
> b. Has an alcohol concentration of 0.08 or more within a relevant time after the driving;
> c. Has an alcohol concentration of 0.04 or more at any relevant time after the driving of a commercial motor vehicle; or
> d. Has any alcohol concentration at any relevant time after the driving and the person is under 21 years of age.

To be disqualified under N.C.G.S. § 20-17.4(a)(7), it must be determined that:

> (1) a person holding a commercial drivers license;
> (2) received a civil license revocation under N.C.G.S. § 20 16.5; and
> (3) arising out of a charge that occurred while the person was holding a commercial driver’s license.

These three elements are never at issue either in a N.C.G.S. § 20-16.5(g) hearing to contest validity of the 30-day

revocation.

Third, the N.C.G.S. § 20-16.5(g) hearing must occur within 10 days of the 30-day Revocation Order, which in this case would have created a hearing deadline of June 2, 2009. (R.p. 6-7). However, prior to DMV's Official Notice to this defendant dated April 9, 2010 (R.p. 21), over 10 months later, no rights form (R.p. 3), or Revocation Order (R.p. 6-7), nor any other document or person ever mentioned to this defendant the fact that the defendant's CDL would be disqualified.

Thus, the legislature clearly did not "provide by statute an effective administrative remedy," Presnell v. Pell, 298 N.C. 715, 721, 260 S.E.2d 611,615 (1979), to this defendant.

D. The Absence of a Remedial Mechanism Renders N.C.G.S. § 20-17.4(a)(7) Unconstitutional.

The absence of a remedial mechanism under N.C.G.S. § 20-17.4(a)(7), in combination with the length of the disqualification - 12 months - clearly implicates the constitutional concerns that this Court expressed in Evans. While a 30-day civil revocation "provides immediate protection against the probably impaired driver and serves as an interim highway safety measure until after a person is afford a trial," Henry, 315 N.C at 494, 340 S.E.2d at 733, a 12 month disqualification cannot be similarly described or

justified. While a prohibition on issuing a limited driving privilege for commercial drivers license holders during the same 30 day revocation period can be justified as "the exercise of reasonable regulatory authority designed for an appropriate public purpose," State v. Reid, 148 N.C. App. 548, 554, 559 S.E.2d 561, 565 (2002), a blanket, unreviewable, 365-day disqualification period is a consequence of a wholly different quality and magnitude. The Henry Court's analysis of the private interest in maintaining a drivers license lends further support to this position. As the Court acknowledged, "[t]his interest is not insubstantial." Henry, 315 NC at 482, 340 S.E.2d at 726. The Court continued: "The state does not make a driver whole for any personal inconvenience and economic hardship suffered during a delay between erroneous deprivation and post-suspension restoration of driving privileges." Id. While not determinative of the issues of the case, it is important to note that the substantial harm to this defendant including losing large portions of his salary, and eventually his job and livelihood, because his CDL was taken before he ever had any hearing on the merits of anything related to the DWI, including the validity of the breath test.

While recognizing the inescapable and irreparable

inconvenience and hardship that accompanies a temporary revocation, the Court focused on the ameliorative elements of the statute in question, most notably "[t]he prompt post-suspension review ... available." Id. at 484,340 S.E.2d at 727. Here, of course, no such post-suspension review is made available, even though the "economic hardship suffered" is, both in general and in this specific case, much greater for a CDL holder than the non-CDL holders discussed in Henry.

The absence of any such remedial avenue is surely the *sine qua non* of the statutory provision's failing. As the Henry Court emphasized:

> In this case ... *prompt post-suspension review is available.* The presence of such review reduces the need for hardship relief and together with the brevity of the suspension period reduces the actual weight of the private interest in continuous use and possession of one's driver's license pending the outcome of the hearing.

Henry, 315 NC at 484, 340 S.E.2d at 727 (emphasis added).

E. Due Process Conclusion

The Trial Court erred in denying the defendant's Motion to Dismiss. As N.C.G.S. § 20-17.4(a)(7) allows the State to take from the defendant a protected property interest, i.e., his CDL, but provides absolutely no process or opportunity to object to, contest, or have reviewed that taking, and since it occurs before

any hearing or adjudication, the statute is unconstitutional in that it violates the defendant's right to due process of law. Accordingly, this Court should reverse the Trial Court's denial of the Motion to Dismiss.

CONCLUSION

The Trial Court erred in denying the defendant's Motion to Dismiss. This Court should vacate the defendant's conviction and reverse the Trial Court ruling and grant the defendant's Motion to Dismiss.

Respectfully submitted, this the 21st day of June 2012.

BY: _____

Danny Glover, Jr.
State Bar No. 22074
TEAGUE & GLOVER, P.A.
Elizabeth City, N.C. 27907-0785
Telephone:(252) 335-0878
For Defendant-Appellant

CERTIFICATE OF SERVICE

This is to certify that the undersigned this date served this document by email and first class mail to

Mr. Christopher W. Brooks
Assistant Attorney General
N.C. Department of Justice
Motor Vehicle Section
9001 Mail Service Center
Raleigh NC 27699-9001

This the 21st day of June 2012.

BY: _____
Danny Glover, Jr.

For Defendant-Appellant