

A Primer on DWI Vehicle Seizures/Forfeitures in North Carolina
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A significant practical problem confronting DWI defendants, and their attorneys, involves the State's seizure of vehicles in a DWI case. This is because the vehicle seizure is often the most pressing issue in the client's mind, but there is very little even the best DWI attorney can do about it. Further, a seizure can drastically speed up and/or complicate the regular process of defending a DWI client. The purpose of this paper is to clarify the confusing statutes that allow the State - in certain circumstances - to seize and often keep your client's vehicle upon his arrest for a DWI and/or other offense(s) involving impaired driving.

The AOC forms that presently exist related to DWI seizures and are contained as hyperlinks to the AOC website forms throughout the paper.

BASIC TERMINOLOGY

"Seizure" is the **temporary taking** of the vehicle by the State pending the resolution of the case in court. Initially, it is the vehicle that is seized, but in some cases that evolves into a possessory interest in insurance proceeds following a wreck or auction sale proceeds following a sale of the vehicle.

“**Forfeiture**” occurs through an “Order of Forfeiture”, by which the Court **permanently** terminates the rights to and ownership interest in the motor vehicle and/or any insurance proceeds following a wreck or auction sale proceeds following a sale of the seized vehicle. G.S. 20-28.2(a1)(4); (b); (b1). This occurs only **after** a conviction on the underlying DWI, or at a hearing at least 60 days after the defendant fails to appear for the scheduled trial date. G.S. 20-28.2(b1).

“**Registered Owner**” is a person in whose name a registration card for a motor vehicle is issued at the time of the seizure. G.S. 20-28.2(a1)(6).

“**Motor Vehicle Owner**” is either the Registered Owner or a person in whose name a certificate of title for a motor vehicle is issued at the time of seizure. G.S. 20-28.2(a1)(3a).

“**Lienholder**” is a person who holds a perfected security interest in a motor vehicle at the time of seizure. G.S. 2-28.2(a1)(3).

WHEN CAN THE VEHICLE BE SEIZED?

Per G.S. 20-28.3(a), the vehicle involved in the underlying DWI is subject to seizure if:

- the motor vehicle is driven by a person charged with an *offense involving impaired driving* (defined in 20-4.01(24(a))* **AND**

- if at the time of the violation his/her drivers license was revoked as a result of a prior *impaired driving license revocation* as defined by 20-28.2(a)**

OR

- that person did not have a valid driver’s license **and** did not have liability insurance

BUT – If G.S. 20-35 applies, then the defendant shall be deemed to have had a valid license at the time of the arrest for purposes of the seizure/forfeiture issue

"Offense involving impaired driving" is defined in G.S. 20-4.01(24a) as **any of the following** offenses:

- Impaired driving under G.S. **20-138.1**.
- Death by vehicle under G.S. **20-141.4** when conviction is based upon impaired driving or a substantially similar offense under previous law.
- First or second degree murder under G.S. **14-17** or involuntary manslaughter under 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
- An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
- A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. **20-138** or G.S. **20-139**.
- Impaired driving in a commercial motor vehicle under G.S. **20-138.2**, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
- Habitual impaired driving under G.S. **20-138.5**.
- A conviction under former G.S. 20-140(c) is not an offense involving impaired driving.

"Impaired Driving License Revocation" is defined in G.S. 20-28.2(a) as a revocation pursuant to **any of the following** statutes:

G.S. **20-13.2**¹, which includes the following:

- (a) Conviction of G.S. **20-138.3** – driving with alcohol in system while under 21 years of age;
- (b) DWI conviction if defendant was under 21 years of age;

¹ Presumably the reference to G.S. 20-13.2 only applies to G.S. 20-13.2(a), (b), and (c), as these are the only subsections of that statute that relate to alcohol and driving by provisional licensees.

(c) Under 21 years of age and willful refusal of chemical analysis pursuant to **20-16.2**.

20-16(a)(8b) *Certain*² administrative military revocations of driving privileges on military base for violating military installation regulation prohibiting conduct substantially similar to impaired driving under G.S. **20-138.1**

G.S. **20-16.2** - One-year refusal revocation.

G.S. **20-16.5** - 30-day post-arrest revocation for

- (a) Willfully refusing to submit to the chemical analysis;
- (b) Chemical analysis result of 0.08 or more;
- (c) Chemical analysis result of 0.04 or more while driving a commercial motor vehicle; or
- (d) Any alcohol concentration if under 21 years of age

G.S. **20-17(a)(2)** – Impaired driving convictions

G.S. 20-17(a)(12) - Second or subsequent conviction of transporting an open container of alcoholic beverage under G.S. **20-138.7**³

G.S. **20-17.2** –DMV revocation coinciding with court-ordered period of non-operation as condition of probation

G.S. **20-138.5** - Habitual Impaired Driving conviction

G.S. **20-16(a)(7)** –Impaired driving conviction in another state

G.S. **20-17(a)(1)** – Manslaughter conviction if involving impaired driving

G.S. **20-17(a)(3)** – Any felony conviction involving a motor vehicle and impaired driving

G.S. **20-17(a)(9)** – Conviction of death by vehicle if impaired driving is

involved

G.S. **20-17(a)(11)** – Conviction of assault with a motor vehicle if impaired driving is involved

² The revocation must result from an administrative hearing authorized by the commanding officer of the installation and that commanding officer must have general court martial jurisdiction.

³ In reading 20-138.7 in its entirety, and considering that subsection (h) only applies to subsection (a), it would appear that this revocation only applies to subsection (a), which prohibits driving with alcohol in driver's system with an open container in the passenger area.

Revocation based upon a conviction of the law(s) of another state if the offense for which the person's license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed in any of the above.

HOW IS THE VEHICLE SEIZED?

G.S. 20-28.3 (b) (b1) (b2) (c)

CHARGING / SEIZING OFFICER'S ROLE

If the charging officer has *probable cause* to believe that a motor vehicle driven by the defendant may be subject to forfeiture under this section, the officer seizes the motor vehicle and has it impounded by a local towing service. Probable cause may be based on the officer's personal knowledge, reliable information conveyed by another officer, records of the Division, or other reliable source.

Even if the statutory grounds for seizure exist, **THE VEHICLE MAY NOT BE SEIZED IF:**

The officer determines *prior to* seizure that the motor vehicle had been *reported stolen*,

OR

The officer determines prior to seizure that the motor vehicle was a *rental vehicle driven by a person not listed as an authorized driver on the rental contract*. In this case the officer must make a reasonable effort to notify the owner of the rental vehicle that the vehicle was stopped and that the driver of the vehicle was not listed as an authorized driver on the rental contract.

Upon determining that there is probable cause for seizing a motor vehicle, the seizing officer presents to a magistrate an Affidavit for Seizure or Impoundment ([AOC-CR-324](#)), setting forth the basis upon which the motor vehicle has been or will be seized.

The seizing officer is then required by statute to report the seizure to DMV as soon as practical, but no later than 24 hours after seizure of the motor vehicle.

MAGISTRATE’S ROLE

G.S. 20-28.3(c)

Upon receiving the officer’s affidavit, the magistrate must review the affidavit of impoundment; may request additional information; and may hear from the defendant if the defendant is present. If the magistrate determines the requirements of this section have been met, whether or not requested by the arresting officer, the magistrate is to order the motor vehicle seized and is to provide a copy of the order of seizure to the Clerk of Court.

If the magistrate determines the requirements of this section have not been met, the magistrate is to order the motor vehicle released to the motor vehicle owner upon payment of towing and storage fees by the owner.

CLERK’S ROLE

The Clerk provides copies of the order of seizure to the district attorney **and the attorney for the county board of education**. G.S. 20-28.3(c)

Pursuant to G.S. 20-28.8, the Clerk also provides various electronic reports to DMV throughout the seizure process, including reporting the execution of an acknowledgment as defined in G.S. 20-28.2(a1)(1), the entry of an order of forfeiture as defined in G.S. 20-28.2(a1)(4), and the entry of an order of release as defined in G.S. 20-28.3 and G.S. 20-28.4.

The Clerk also acts as “the Court” in a number of instances in which “the Court” enters an Order releasing the motor vehicle to an owner or releasing a wrecked motor

vehicle to an insurance company upon its payment of applicable insurance proceeds to the Clerk.

DMV'S ROLE

Within 48 hours of receipt of the notice of seizure⁴, DMV is to issue written notification of impoundment to 1) *any lienholder of record*, and 2) *any motor vehicle owner who was not operating the motor vehicle at the time of the offense*⁵. This written notification states that the motor vehicle has been seized; states the reason for the seizure; and states the procedure for requesting release of the motor vehicle. G.S. 20-28.3(b1).

Additionally, within eight hours of receipt of the notice of seizure, DMV is to notify by facsimile any lienholder of record. The facsimile notification of impoundment states that the vehicle has been seized, states the reason for the seizure, and notifies the lienholder of the written notification to be sent later (as discussed above). G.S. 20-28.3(b2). However, you and your client should not rely upon this notice by DMV. If it is in your client's best interest to immediately surrender the vehicle to the lienholder (in order to stop the daily storage costs, or for other good reasons), you or your client should notify the lienholder – in writing – immediately.

Additionally, if the motor vehicle was damaged while the defendant was committing an offense involving impaired driving, or if it was damaged incident to the seizure, DMV issues written notification of the seizure to the owner's insurance company of record and to any other insurance companies that may be insuring other motor vehicles involved in the accident. G.S. 20-28.3(b1). However, you and your client should not

⁴ A notice of seizure received outside regular business hours shall be considered to have been received at the start of the next business day.

⁵ The notice is to be sent to the most recent address on file with DMV. If the motor vehicle is registered in another state, notice is sent to the address shown on the records of the state where the motor vehicle is registered.

rely upon this notice by DMV. You or your client should notify the insurance company – in writing – immediately.

Once it receives notification of the seizure, DMV will not permit title to a seized motor vehicle to be transferred by a motor vehicle owner unless authorized by court order. G.S. 20-28.3(b1).

ACTUAL SEIZURE G.S. 20-28.3 (c1)

First, a magistrate must issue an order of seizure following a hearing as set forth in 20-28.3(c). ([AOC-CR-323](#))

An order of seizure is valid anywhere in the State.

Any officer with territorial jurisdiction and who has subject matter jurisdiction for violations of Chapter 20 may use such force as may be reasonable to seize the motor vehicle and to enter upon the property of the defendant to accomplish the seizure.

An officer who has probable cause to believe the motor vehicle subject to the Seizure Order is concealed or stored on private property of a person other than the defendant may **obtain a search warrant** to enter upon that property for the purpose of seizing the motor vehicle.

PERSONAL ITEMS IN THE CAR

G.S. 20-28.3(j) **requires** that the storage facility allow the owner of the motor vehicle, or the owner of personal property *not affixed to the motor vehicle*, to retrieve personal items from the vehicle at reasonable times. The owner must provide to the storage entity satisfactory proof of ownership for the applicable property. *There is no*

condition in the statute that any towing or storage fees be paid prior to retrieving personal items.

**IF THE VEHICLE IS INVOLVED IN A WRECK
BEFORE TRIAL: 20-28.3(h)**

Following a seizure, DMV is to issue written notification of the seizure to any lienholder, to any owner who was not driving the vehicle, to the owner's insurance company of record, *and* to any other insurance companies that may be insuring other motor vehicles involved in the accident. G.S. 20-28.3(b1). Further, DMV will prohibit title to a seized vehicle from being transferred by an owner unless authorized by Court order. G.S. 20-28.3(b1).

If the vehicle is wrecked in connection with the incident that prompted the arrest and seizure, the county Board of Education, or its authorized designee, is authorized to negotiate the county Board of Education's interest with the insurance company and to compromise and accept settlement of any claim for damages. It is important to note that these negotiations should take place ASAP, so that the salvage can be removed from the storage facility and the daily storage fees stopped. Unfortunately, it may be unclear at that time whether your client will be able to recover his vehicle, or the insurance proceeds, before or following the conclusion of his case. Therefore, it is important to work together with the Board of Education's attorney so that maximum, or at least fair, value is recovered from the insurance company. An affected motor vehicle owner or lienholder who objects to a "school board settlement" may file an independent claim with the applicable insurance company for any additional monies believed owed.

Any money obtained from the insurance company will then be paid directly to the Clerk of Superior Court in the county where the motor vehicle driver was charged. If the motor vehicle is declared a total loss, the Clerk of Superior Court, upon application of the county Board of Education, can enter an order that the motor vehicle be released to the applicable insurance company upon payment into the court of all applicable insurance proceeds for damage to the vehicle remaining, conditioned upon payment of all applicable towing and storage costs and all valid liens. The Clerk of Superior Court will then provide DMV with a certified copy of that Order, and DMV will then transfer title to the insurance company or to such other person or entity as may be designated by the insurance company.

Insurance proceeds paid to the Clerk of Court are subject to forfeiture pursuant to G.S. 20-28.5 and are to be held until, and disbursed pursuant to, further order of the court.

**IF THE VEHICLE IS INVOLVED IN A WRECK
AFTER CONVICTION: 20-28.2(c1)**

Following a conviction, if the damaged vehicle is ordered forfeited at the Forfeiture Hearing, DMV is to notify the applicable property insurance companies to pay the claim for property insurance proceeds⁶ to the Clerk of Superior Court of the county where the defendant was charged, if such has not already been paid. Upon receipt of those insurance proceeds, or if the insurance proceeds were previously paid per 20-28.3(h), the Clerk disburses the proceeds as ordered by the Court.

Upon payment of the claim to the Clerk, the insurance company is immune from suit by the motor vehicle owner for any damages occurring as a result of the seizure. If the insurance company pays the claim to the owner, instead of the Clerk, then the

⁶ “Insurance proceeds” are defined as the proceeds paid under the policy, less any applicable deductible and less *any towing and storage costs incurred after the time of seizure*. G.S. 20-28.2(a1)(2b).

insurance company is not relieved of its obligations under the policy, and the insurance company remains obligated to pay the claim a second time to the Clerk. This is apparently to protect the Board of Education's interest in the vehicle.

TRIAL PRIORITY IN DISTRICT COURT ONLY
G.S. 20-28.3(m)

District court trials of DWI seizure cases must be scheduled on the arresting officer's next court date, or within 30 days of the offense, whichever comes first.

Once scheduled, **the case shall not be continued unless all of the following conditions are met:**

- (1) A written motion for continuance is filed, with notice given to the opposing party prior to the motion being heard. ([AOC-CR-337](#))
- (2) The judge makes a finding of a "compelling reason" for the continuance.
- (3) The motion and finding are attached to the court case record.

There appears to be no priority afforded seizure cases on appeal to Superior Court.

Anecdotally, it appears that most Judges will not dismiss the case for the State's failure to comply with this rule. However, it is not unusual for the Court to strike the Order of Seizure and order the vehicle released to the owner for the State's failure to comply with this scheduling rule, since the defendant is ultimately regardless for the total storage fees **regardless** of the outcome of the case.

Query what recourse the Board of Education has against your client if you proceed on a Motion to Strike the Order of Seizure without proper notice to the Board of Education and an opportunity for it to be heard.

Query what standing the Board of Education has to object to the Court entering such an Order because of the State's, not the Board of Education's, failure to comply with this scheduling rule.

WHAT HAPPENS TO THE VEHICLE WHILE THE CASE IS PENDING?
G.S. 20-28.3(d)

At the time of the seizure, in most places a local towing company is contacted. Once it secures the vehicle, the local towing company then contacts Martin, Edwards & Associates, Inc., i.e., MEA Auctions, (formerly Tarheel Specialties, Inc.) in Linden, N.C., just north of Fayetteville.⁷ MEA then retrieves the vehicle within one week of the seizure, although it has up to 10 days to do so. Throughout this process the seized motor vehicle is in the constructive possession of the county Board of Education for the county in which the defendant is charged. Except for gross negligence or intentional misconduct, the county Board of Education, or any of its employees, will not be liable to the owner or lienholder for any damage to or loss of the motor vehicle or its contents, or to the owner of personal property in a seized vehicle, during the time the motor vehicle is being towed or stored by MEA.

MEA then transports the vehicle to its lot in Linden, N.C., where the vehicle is typically held until the Court enters an appropriate forfeiture and disposition Order later in the process, or the vehicle is sold before trial per 20-28(i).

⁷ As of the time of this paper the Department of Public Instruction's contractor and agent for the storage, processing, maintenance and sale of all DWI seized vehicles, as contemplated by G.S. 20-28.9 and 20-28.3(d), is **Martin, Edwards & Associates, Inc. 10335 Ramsey Street, Linden, N.C.; P. O. Box 35, Erwin, NC 28339; Tel: (910) 694-2058, or 910-892-6133; <http://www.meaauctions.com>.**

All towing/storage facilities involved in this process are authorized by statute to charge a reasonable towing fee, and MEA is limited to charging a storage fee of \$10.00 per day. G.S. 20-28.9(b). The local towing/storage facilities are free to charge whatever they want for towing and storage. Each towing/storage facility involved in the process must be paid in full for all towing and storage fees at the time the vehicle is transferred from it to **any** other person or entity. As a result, MEA is forced to pay the local towing/storage facility whatever that facility charges, and this cost is then built in to MEA's cost in the vehicle.

PRETRIAL SALE OF THE VEHICLE

G.S. 20-28.3(i)

This is a tool that most DWI attorneys do not use frequently enough. Remember that your client is ultimately responsible for payment of all towing and storage fees, **regardless** of the outcome of his case. That's right – even if the defendant is acquitted or even if the charge is dismissed, the defendant still owes the storage fees, no matter how many thousands of dollars that equals. If your client owns the vehicle, and the vehicle is not worth keeping, or not worth fighting over, or its worth will be depreciated away by the accruing storage fees over the life of the case, or you have reason to believe that the vehicle will definitely be ordered forfeited later, you should consider instructing your client to authorize a quick sale of the vehicle in order to minimize the storage fees. If your client is not the owner, you need to instruct your client to have the owner or lienholder get the vehicle out of storage as soon as possible, as the storage expenses will ultimately be your client's responsibility.

If the seized vehicle has a fair market value of one thousand five hundred dollars (\$1,500) or less, MEA is authorized to sell the vehicle after 90 days from the date of seizure have elapsed. The vehicle may also be sold, regardless of the fair market value, any time the outstanding towing and storage costs exceed eighty-five percent (85%) of its fair market value. Additionally, **the vehicle may be sold at any time with the consent of all the motor vehicle owners.** In order to accomplish this, the owner must send a notarized letter and a copy of the title, if possible, to MEA authorizing the sale.

Any pretrial sale of the vehicle must be conducted in accordance with the provisions of G.S. 20-28.5(a)⁸. MEA conducts this sale at least the first Friday of every month and sometimes more often than that. The net proceeds of the sale, after the payment of the sale expenses, all outstanding towing and storage costs, and reimbursement of towing and storage costs paid by a person other than the defendant, are deposited with the Clerk of Superior Court. If the court enters an order of forfeiture, the court must order the proceeds held by the Clerk to be disbursed as provided in G.S. 20-28.5(b). If the court determines that the motor vehicle is not subject to forfeiture, the court must order the money held by the Clerk to pay outstanding liens on the motor vehicle, and the balance to be paid to the motor vehicle owner(s).

WHO CAN GET THE VEHICLE BACK, AND WHEN?

There are a number of different scenarios in which a seized vehicle may be released to someone other than the defendant. Some are permanent, and others are temporary. Some involve a bond, and others do not. However, ALL orders releasing the

⁸ G.S. 20-28.5(a) references N.C.G.S. Chapter 160A, Article 12, applicable to sales authorized pursuant to G.S. 160A-266(a)(2), (3), or (4), except that the notice requirements of 20-28.5(a) govern the required notice.

motor vehicle REQUIRE the payment of all towing and storage charges incurred as a result of the seizure and impoundment of the motor vehicle, and the statutes prohibit the waiver of that requirement. G.S. 20-28.2(h); G.S. 20-28.3(n); G.S. 20-28.4(a).

Under no circumstances can a DWI defendant obtain the release of a seized motor vehicle if that defendant was the owner of the vehicle if the defendant's license/insurance status otherwise qualified the defendant for vehicle seizure.

There are numerous scenarios in which various owners/lienholders/insurance companies can obtain a seized vehicle before trial. Some of those scenarios require the execution of an "Acknowledgment" In all cases in which the owner (someone other than the defendant) must sign an acknowledgment, the following applies:

G.S. 20-28.2(a1)(1) ACKNOWLEDGMENT - A portion of the Petition for Release of Seized Motor Vehicle ([AOC-CR-330](#)) acknowledging that:

- a. The motor vehicle was operated by a person charged with an offense involving impaired driving, and:
 1. That person's drivers license was revoked as a result of a prior impaired drivers license revocation; or
 2. That person did not have a valid drivers license, and did not have liability insurance.

- b. If the motor vehicle is again operated by this particular person, and the person is charged with an offense involving impaired driving, then the vehicle is subject to impoundment and forfeiture if (i) the offense occurs while that person's drivers license is revoked, or (ii) the offense occurs while the person has no valid drivers license, and has no liability insurance; and

- c. A lack of knowledge or consent to the operation will not be a defense in the future, unless the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery, any unauthorized use to the appropriate law enforcement agency.

PRETRIAL RELEASE

PERMANENT RETURNS

Permanent, pre-trial return to DEFENDANT-OWNER - G.S. 20-28.3(e2)

A DWI defendant who owns the vehicle may only get his vehicle back if the defendant's license was 1) not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a), or 2) if the defendant did have a valid driver's license **and/or** did have liability insurance.

If applicable, the defendant files Defendant Owner's Petition for Release of Seized Motor Vehicle ([AOC-CR-333](#)) with the Clerk of Court seeking a pretrial determination that the defendant's license was not revoked pursuant to an impaired driving license revocation as defined in G.S. 20-28.2(a).

Upon the filing of the Petition, the Clerk must schedule a hearing to be held within 10 business days, or as soon thereafter as may be feasible, before a judge of the division in which the underlying criminal charge is pending. Notice of the hearing shall be given to the defendant, the district attorney, and the attorney for the county Board of Education.

The Clerk then forwards a copy of the petition to the District Attorney for the District Attorney's review. If, based on available information, the District Attorney determines that the defendant's motor vehicle is not subject to seizure/forfeiture, the District Attorney may note the **State's consent** to the release of the motor vehicle on the petition and return the petition to the Clerk of Court who shall enter an order - without a hearing - releasing the motor vehicle if the defendant *pays all towing and storage*

charges; shows satisfactory proof of being a motor vehicle owner; and shows the existence of automobile insurance. The Clerk is to then send a copy of the order of release to the attorney for the county Board of Education.

If the District Attorney does not consent, the hearing will be held. The burden of proof is on the defendant-owner to establish by the greater weight of the evidence⁹ that the defendant does not qualify to have the vehicle seized. In this hearing, the court is only required to determine the existence of an impaired driving license revocation; the Court is not required to determine any issues involving the underlying offense of impaired driving.

The Clerk's Order releasing the vehicle to the defendant is contained on the same AOC form as the defendant owner's petition – ([AOC-CR-333](#)).

An order finding that the defendant failed to establish that the defendant did not qualify for vehicle seizure/forfeiture may be reconsidered by the court as part of the Forfeiture Hearing after the conclusion of the DWI case.

Permanent, pre-trial return to INNOCENT OWNER – G.S. 20-28.3(e1)

A non-defendant vehicle owner may file a Petition for Release of Seized Motor Vehicle ([AOC-CR-330](#)) with the Clerk of Court seeking a pretrial determination from the Clerk of Court that the petitioner is an “innocent owner.” The **advantages** of obtaining Innocent Owner status are that the return of the vehicle is permanent and no bond is required to be posted.

⁹ The last sentence of G.S. 20-28(e2) places the burden of proof on the defendant owner. While the actual burden is not described, all other burdens of proof established in these statutes is “by the greater weight of the evidence” and it is assumed that the same burden of proof would apply here.

The non-defendant owner has the burden of proving to the Clerk by the greater weight of the evidence¹⁰ that he/she is an “innocent owner”, which is defined in G.S. 20-28.2(a1)(2) as a motor vehicle owner:

(a) Who did not know and had no reason to know that (i) the defendant's drivers license was revoked; or (ii) that the defendant did not have a valid drivers license **and** that the defendant had no liability insurance

(b) Who knew that (i) the defendant's license was revoked, or (ii) that the defendant had no valid drivers license and that the defendant had no liability insurance, but the defendant drove the vehicle without the person's expressed or implied permission, and the owner files a police report for unauthorized use of the motor vehicle and agrees to prosecute the unauthorized operator of the motor vehicle¹¹; or

(c) Whose vehicle was reported stolen; or

...

(e) Who is in the business of renting vehicles, and the vehicle was driven by a person who is not listed as an authorized driver on the rental contract; or

(f) Who is in the business of leasing motor vehicles, who holds legal title to the motor vehicle as a lessor at the time of seizure, and who has no actual knowledge of the revocation of the lessee's drivers license at the time the lease is entered.

The Clerk’s hearing and determination should take place as soon as feasible. The Clerk only determines whether the applicant qualifies as an “innocent owner,” and does not address any issues involving the actual seizure/forfeiture of the vehicle.

If the Clerk determines that the petitioner is an innocent owner, the Clerk will enter an Order ([AOC-CR-332](#) – **Section II**) releasing the vehicle to the innocent owner subject to the following conditions:

¹⁰ While there is no burden of proof set out in G.S. 20-28.3(e1) for the Clerk’s hearing, the innocent owner’s burden of proof for a Judge’s hearing on the same issue is established in G.S. 20-28.2(e) as “by the greater weight of the evidence” and would presumably also apply to the Clerk’s hearing.

¹¹ This requirement about further prosecution of the defendant for unauthorized use of the motor vehicle commonly causes a conflict of interest in the DWI attorney assisting the innocent owner, who is often a relative of the defendant, seeking to obtain the seized vehicle.

- *Payment of all towing and storage charges* incurred as a result of seizure and impoundment of the motor vehicle;
- Proof of automobile insurance for the vehicle; and
- The execution of the Acknowledgment
- If the non-defendant owner is a *lessor*, the release shall also be conditioned upon the lessor agreeing not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or any person acting on the defendant's behalf. The lessor shall not be liable for damages arising out of that refusal.

If the Clerk determines that the petitioner failed to establish that he/she is an “innocent owner”, the issue may be reconsidered by the court as part of the Forfeiture Hearing conducted pursuant to G.S. 20-28.2(d).

The Clerk then sends a copy of the order authorizing or denying release of the vehicle to the district attorney and the attorney for the county Board of Education.

Permanent, pretrial release to LIENHOLDER – G.S. 20-28.3(e3)¹²

This is another tool that most DWI attorneys do not use frequently enough. In order for your client to stop and save storage fees, you should consider surrendering the vehicle to the lienholder or lessor, who can then obtain the vehicle, pursuant to Court Order, and stop the storage fees. Of course, there are then additional logistical issues that you will have to work out with the lienholder regarding default, sale, etc., but usually those same issues will eventually arise, even if you don't contact the lienholder/lessor immediately; however, your client will owe much more in storage fees that he/she might otherwise owe had the lienholder/lessor been contacted earlier.

¹² If the defendant is the owner, often it will be in the defendant's financial interest to contact the lienholder and have the lienholder obtain the vehicle, so that extended storage charges are avoided. Whether the lienholder sells the car immediately, or holds it pending the outcome of the case, will have to be evaluated within the context of each individual case.

A lienholder may file a petition ([AOC-CR-334](#)) with the Clerk of court requesting the court to order pretrial release of a seized motor vehicle. The lienholder shall serve a copy of the petition on all interested parties, including the registered owner, the titled owner, the District Attorney, and the county Board of Education attorney.

CLERK's permanent, pretrial release to LIENHOLDER – G.S. 20-28.3(e3)(2)

IF all interested parties have, in writing, waived any rights that they may have to notice and a hearing, the Clerk of Superior Court may at any time order the release of a seized vehicle to the lienholder ([AOC-CR-334](#)) *conditioned upon payment of all towing and storage costs.*

In order to recover the vehicle, the lienholder must agree not to sell, give, or otherwise transfer to the defendant-owner possession of the seized vehicle while the motor vehicle is subject to forfeiture or after it is ordered forfeited at the Forfeiture Hearing.

JUDGE'S permanent, pretrial release to LIENHOLDER - G.S. 20-28.3(e3)(1)

If the lienholder does not recover the vehicle by a Clerk's order, the lienholder may notice the matter for a hearing before a judge. The lienholder must provide at least 10 days notice of the hearing to the registered owner, the titled owner, the District Attorney, and the county Board of Education attorney.

The burden of proof at the hearing is on the lienholder to prove by the greater weight of the evidence that:

- 1) default on the obligation secured by the motor vehicle has occurred¹³;
- 2) as a consequence of default, the lienholder is entitled to possession of the motor vehicle; and
- 3) that the seized motor vehicle, while subject to forfeiture as a result of a prior seizure involving the same defendant or motor vehicle owner, had not previously been released to the lienholder.

In order to recover the vehicle, the lienholder must agree not to sell, give, or otherwise transfer possession of the seized vehicle while the vehicle is subject to forfeiture or after it is ordered forfeited.

The lienholder must also agree to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes. Upon sale of the motor vehicle, the lienholder must then pay to the Clerk of court of the county in which the driver was charged all proceeds from the sale, less the amount of the lien in favor of the lienholder, and any towing and storage costs paid by the lienholder.

The Judge's Order releasing the vehicle to the lienholder ([AOC-CR-334](#)) must be conditioned upon *payment of all towing and storage costs* incurred as a result of the seizure and impoundment of the motor vehicle.

TEMPORARY RETURNS

Temporary return to NON-DEFENDANT-OWNER pending trial – G.S. 20-28.3(e)

A non-defendant motor vehicle owner *who does not qualify as an innocent owner* may file a Petition for Release of Seized Motor Vehicle ([AOC-CR-330](#)) apply to the

¹³ This default is normally triggered by the seizure of the vehicle, which is the same as your client losing possession of the vehicle – check the loan or lease documents; default can also be voluntary and accomplished by your client's surrender of the vehicle.

Clerk of Superior Court in the county where the defendant's charges are pending for pretrial release of the motor vehicle. *This procedure should be used only if the non-defendant owner cannot.*

The Clerk will release the motor vehicle to a non-defendant owner if the following conditions are met:

- *Payment of all towing and storage charges* incurred as a result of seizure and impoundment of the motor vehicle;
- The motor vehicle has been seized for 24 hours or more;
- A bond payable to the county school fund in an amount equal to the fair market value of the motor vehicle as defined by G.S. 20-28.2¹⁴ has been secured¹⁵ ([AOC-CR-331](#))
- The owner must return, on the day of any hearing scheduled and noticed by the district attorney under 20-28.2(c), the vehicle in substantially the same condition as it was at the time of seizure and without any new or additional liens or encumbrances,
- The non-defendant owner executes the Acknowledgment.

In the event a non-defendant owner who obtains temporary possession of a seized motor vehicle pursuant to this subsection does not return the motor vehicle on the day of the duly-noticed Forfeiture Hearing, or otherwise violates a condition of pretrial release of the seized motor vehicle, the bond will be ordered forfeited and an order of seizure will be issued by the court. Additionally, a non-defendant motor vehicle owner or lienholder who willfully violates any condition of pretrial release may be held in civil or criminal contempt.

¹⁴ "Fair market value" is defined as "the value of the seized motor vehicle, as determined in accordance with the schedule of values adopted by the Commissioner pursuant to G.S. 105-187.3" **G.S. 20-28.2(a1)(1a)**. The Clerk of Court will tell you this value.

¹⁵ Bond must be secured by 1) a cash deposit in the full amount of the bond, 2) a recordable deed of trust to real property in the full amount of the bond, 3) by a bail bond under G.S. 58-71-1(2), **or** 4) by at least one solvent surety.

RELEASE AFTER TRIAL OR ENTRY OF PLEA

NOT GUILTY / DISMISSAL

Permanent release to owner after trial – G.S. 20-28.4

Assuming the vehicle has not previously been permanently released, if the defendant is *not* convicted of an offense involving impaired driving, the seized motor vehicle is released to the motor vehicle owner *conditioned upon payment of towing and storage costs. The Judge is not allowed to waive the condition of the payment of the towing and storage costs.* G.S. 20-28.4(a). The Court's Order Releasing Seized Motor Vehicle to Defendant ([AOC-CR-336](#)) will inform the owner of an impounded vehicle that the owner has 30 days to make payment of the outstanding towing and storage costs for the motor vehicle and retrieve the motor vehicle, or give notice to Division of Motor Vehicles requesting a judicial hearing on the validity of any mechanic's lien on the motor vehicle for towing and storage costs. If the owner does not pay the fees and retrieve the vehicle, the storage facility may sell the vehicle in order to satisfy the mechanic's lien without any new notice concerning the rights to a hearing being given to the owner, as the notice contained within the court's Order satisfies the notice requirements in G.S. 44A-4(b) - "Enforcement of Lien by Sale."

GUILTY PLEA / VERDICT

Assuming that the motor vehicle has not already been permanently released¹⁶, the Court will proceed to a Forfeiture Hearing pursuant to G.S. 20-28.2(d). This Forfeiture

¹⁶ To an innocent owner pursuant to G.S. 20-28.3(e1), a defendant owner pursuant to G.S. 20-28.3(e2), or to a lienholder pursuant to G.S. 20-28.3(e3)

Hearing must take place “immediately, or as soon thereafter as feasible”¹⁷ at any of the following times:

- at the sentencing hearing on the underlying offense involving impaired driving;
- at a separate hearing after the conviction of the defendant; or
- at a separate Forfeiture Hearing held not less than 60 days after the defendant failed to appear at the scheduled trial for the underlying offense and the defendant's order of arrest for failing to appear has not been set aside.

In the event of a Forfeiture Hearing following a FTA, the Court must find by the greater weight of the evidence that the defendant is guilty of an “offense involving impaired driving” and that the defendant is otherwise qualified to have the vehicle seized before a Forfeiture Order can be entered. G.S. 20-28.2 (b) and (b1).

At the Forfeiture Hearing the judge must determine whether proper notice of the hearing has been given to all parties by the prosecutor.¹⁸ If the judge determines that proper notice has not been given, the judge shall continue the Forfeiture Hearing until adequate notice has been given. *The continuance of the Forfeiture Hearing cannot delay the sentencing hearing on the underlying charge.*

If proper notice has been given, the judge then determines whether the vehicle is subject to forfeiture by determining whether the defendant was guilty of i) an offense involving impaired driving and whether the defendant’s license was revoked pursuant to an “impaired driving license revocation” (G.S. 20-28.2(b)) **OR** ii) if the underlying offense involved impaired driving and the defendant was driving without a valid drivers license **and** the defendant was not covered by an automobile liability policy. (G.S. 20-28.2(b1)). The standard of proof is by the greater weight of the evidence. G.S. 20-28.2(b)

¹⁷ G.S. 20-28.3(m)

¹⁸ The prosecutor must notify the defendant, each motor vehicle owner, and each lienholder that the motor vehicle may be subject to forfeiture and that each may intervene to protect that person's interest. The notice may be served by any means reasonably likely to provide actual notice, and shall be served at least 10 days before any hearing at which an order of forfeiture may be entered. G.S. 20-28.2(c).

and (b1). If the judge finds the existence of either of these scenarios, the judge orders the motor vehicle forfeited, unless the judge releases it to an “innocent owner” or lienholder, as discussed below.

If the defendant prevails at the Forfeiture Hearing, the Judge enters the Order Releasing Seized Motor Vehicle to Defendant ([AOC-CR-336](#)).

Forfeiture of Vehicle - G.S. 20-28.2(d)

If at the Forfeiture Hearing the vehicle is ordered forfeited ([AOC-CR-335](#)), the judge shall:

- *Allow the county Board of Education to retain the motor vehicle for its own use upon payment of towing and storage costs, pursuant to G.S. 20-28.5(c) or*

If there is a valid lien of record at the time of the initial seizure, it shall be satisfied by the county Board of Education relieving the motor vehicle owner of all liability for the obligation secured by the motor vehicle. Id.;

- *Order the motor vehicle released to a lienholder pursuant to G.S. 20-28.2(f);*

OR

- *Authorize the sale of the motor vehicle at public sale. G.S. 20-28.5. The sale is governed by Article 12 of Chapter 160A of the General Statutes, applicable to sales authorized pursuant to G.S. 160A-266(a)(2), (3), or (4), except that subject to the notice requirements of G.S. 20-28.5(a) apply.*

The sale is conducted by the county Board of Education or a person acting on its behalf, i.e. MEA in Linden, N.C. (<http://www.meaauctions.com>)

Notice of the sale, including the date, time, location, and manner of sale, shall be given by first-class mail and shall be mailed at least 10 days prior to the sale date to all motor vehicle owners of the vehicle to be sold at the address on file with DMV. Written notice shall also be given to all lienholders on file with the Division.

The sales proceeds are first used to pay the towing and storage costs. The balance of the sale proceeds, if any, are used to satisfy any other existing liens of record that were properly recorded prior to the date of initial

seizure of the vehicle. Any remaining balance of the sale proceeds is paid to the county school fund in the county in which the motor vehicle was ordered forfeited. If there is more than one school board in the county, then the net proceeds of the sale are distributed in the same manner as fines and other forfeitures.

The sale of the motor vehicle is deemed to extinguish all existing liens on the motor vehicle, and the motor vehicle is transferred free and clear of any liens.

A *lienholder* may purchase the motor vehicle at the sale by bidding in the amount of its lien, and if that should be the highest bid, the lienholder does not have to tender any additional funds, other than the towing and storage fees.

*The forfeited vehicle **may not be sold, given, or otherwise transferred at the sale to the defendant**, the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the defendant's or motor vehicle owner's behalf.*

In addition, the judge shall:

- Order any proceeds of sale or insurance proceeds held by the Clerk of court to be disbursed to the county Board of Education; **and**
- Order any outstanding insurance claims be assigned to the county Board of Education in the event the motor vehicle has been damaged in an accident incident to the seizure of the motor vehicle.

In addition, the Court shall order the defendant to pay as **restitution** - to the county Board of Education - the motor vehicle owner, or the lienholder –any costs paid or owing for the towing, storage, and sale of the motor vehicle¹⁹, and a **civil judgment** for such amount will be docketed by the Clerk of Court – if the defendant is sentenced to an active term of imprisonment, the judgment becomes effective when the conviction becomes final; if the defendant is placed on probation, the judgment becomes effective in the amount due upon the revocation or termination of the defendant’s probation at a probation revocation hearing. (G.S. 20-28.3(L)).

¹⁹ Only to the extent these costs were not covered by the proceeds from the sale of the motor vehicle.

In addition, the Clerk then notifies DMV electronically of the conviction of the offense involving impaired driving while the person's license is revoked as a result of a prior impaired driving license revocation. G.S. 20-28.8. After receiving the Clerk's notification, ***DMV revokes the registration of ALL motor vehicles registered in the convicted person's name and will not register a motor vehicle in the defendant's name until the defendant's license is restored.*** G.S. 20-54.1. DMV also notifies the defendant to surrender the registration on all motor vehicles registered in the defendant's name within 10 days.

In addition, DMV revokes the registration of the seized motor vehicle, and the owner is not allowed to register the motor vehicle seized until the defendant's drivers license has been restored. DMV may revoke a non-defendant owner's registration *only after* that owner is given an opportunity for a hearing to demonstrate that the owner is an innocent owner as defined in G.S. 20-28.2. DMV cannot revoke the registration if the owner has been determined to be an innocent owner by any Clerk, court or DMV. Upon receipt of notice of revocation of registration from the Division, the owner must surrender the registration on the motor vehicle seized to DMV within 10 days.

Permanent Release to “Innocent Owner” After Trial/Plea – 20-28.2(e)

At a Forfeiture Hearing, if a non-defendant motor vehicle owner establishes by the greater weight of the evidence he/she is an "innocent owner"²⁰, the judge shall order the motor vehicle released ([AOC-CR-336](#)) to that “innocent owner” upon the following conditions:

- *Payment of all towing and storage charges;*

²⁰ G.S. 20-28.2(a1)(2). Note that an “innocent owner” only need be a “motor vehicle owner”, not a “registered owner.” G.S. 20-28.2(a1)(3a) and (6).

- Satisfactory proof of automobile insurance;
- the execution of an Acknowledgment²¹.

However, the judge will not release the vehicle to the “innocent owner” if DMV records indicate that the “innocent owner” previously signed an “acknowledgment” and the same defendant was operating the motor vehicle while that person's license was revoked, unless the “innocent owner” shows by the greater weight of the evidence that the motor vehicle owner has taken all reasonable precautions to prevent the use of the motor vehicle by this particular person and immediately reports, upon discovery of such, any unauthorized use to the appropriate law enforcement agency.

If the “innocent owner” is a **lessor**, the release shall also be conditioned upon the lessor agreeing not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or any person acting on the defendant's behalf. The lessor shall not be liable for damages arising as a result of such refusal.

A determination by the court at the Forfeiture Hearing that the petitioner is not an “innocent owner” is a final judgment and is immediately appealable to the Court of Appeals.

Permanent Release to “Lienholder” After Trial/Plea – 20-28.2(e)

At a Forfeiture Hearing, the judge shall order a forfeited motor vehicle released to the lienholder ([AOC-CR-334](#)) *upon payment of all towing and storage charges incurred* as a result of the seizure of the motor vehicle if the judge determines, by the greater weight of the evidence, that:

²¹ G.S. 20-28.2(a1)(1).

(1) The lienholder's interest has been perfected and appears on the title to the forfeited vehicle;

(2) The lienholder agrees not to sell, give, or otherwise transfer possession of the forfeited motor vehicle to the defendant or to the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, or any person acting on the defendant's or motor vehicle owner's behalf. The lienholder shall not be liable for damages arising as a result of such refusal.

(3) The forfeited motor vehicle has not previously been released to the lienholder;

(4) The owner is in default under the terms of the security instrument evidencing the interest of the lienholder, and as a consequence of the default the lienholder is entitled to possession of the motor vehicle; and

(5) The lienholder agrees to sell the motor vehicle in accordance with the terms of its agreement and pursuant to the provisions of Part 6 of Article 9 of Chapter 25 of the General Statutes and then pay to the Clerk of court of the county in which the vehicle was forfeited all proceeds from the sale, less the amount of its lien and any towing and storage costs paid by the lienholder. The defendant, the motor vehicle owner who owned the motor vehicle immediately prior to forfeiture, and any person acting on the defendant's or motor vehicle owner's behalf are prohibited from purchasing the motor vehicle at any sale conducted by the lienholder.

APPEALS

G.S. 20-28.2(e); G.S. 20-28.3(m); G.S. 20-28.5(e)

Appeal of determination that Petitioner is Not an Innocent Owner

A determination that the petitioner is not an “innocent owner” is a final judgment and is immediately appealable to the Court of Appeals. G.S. 20-28.2(e)

Appeal of order of forfeiture

Appeal from a final order of forfeiture (without an appeal of the underlying conviction) is immediately appealable to the Court of Appeals. G.S. 20-28.5(e).

Appeal of underlying conviction

When the conviction of an offense that initiated the seizure/forfeiture process is appealed from District Court to Superior Court, the Order of Forfeiture is stayed pending the appeal, and the issue of forfeiture shall be heard in Superior Court de novo. G.S. 20-28.5(e). If the motor vehicle was temporarily released to a non-defendant owner before the District Court trial pursuant to 20-28.3(e), the release of the motor vehicle continues, and the terms and conditions of the original bond remain the same pending the resolution of the appeal. A purported “innocent owner” or lienholder who was not previously heard on a petition for pretrial release may be heard pending the appeal. The same rules governing the pretrial release of the vehicle apply to returns of the vehicle ordered while the appeal is pending in Superior Court, as determined by the category of the person seeking the release. G.S. 20-28.3(m).

There appears to be no Superior Court trial priority for seizure cases, as there is in District Court.