

## ACQUITTALS

## the lowest-convicting judges

## Mecklenburg from 8A

he acquitted in one day over four years.

Six of the defendants had tested over the alcohol limit, which N.C. law says is enough to be convicted for drunken driving. The other refused to take the alcohol test.

In each case there was more evidence, according to police affidavits in court files. Suspects who drove erratically. Walked unsteadily. Performed poorly on field sobriety tests.

One made a U-turn in front of oncoming traffic. When he was stopped, he couldn't recite the alphabet.

Leonard found all seven not guilty.

Down the hall in Courtroom 2207, Judge Tom Moore handled Mecklenburg's only other DWI trial that day. He found the defendant guilty.

DWI conviction rates in Mecklenburg vary dramatically, ranging from 40 percent for Leonard to 86 percent for Moore.

Defense lawyers often seek postponements, trying to get their cases in front of judges like Leonard. They try to avoid judges like Moore. It's a practice known as judge shopping.

The four Mecklenburg judges with the lowest conviction rates presided over the most DWI trials during the 14-month period. Leonard alone handled more trials than the three toughest judges combined.

Veteran defense lawyer George Laughrun, who wins more DWI acquittals than any other attorney in Charlotte, defends the practice, likening it to jury selection. "It would be a disservice to my clients if I didn't know who the jury is," he said. "In a DWI trial, the judge is the jury."

Statistics suggest defense lawyers have succeeded in steering cases to the judges with low conviction rates.

More than a dozen District Court judges heard DWI cases in Charlotte during the period the Observer analyzed. Four - Leonard, Proctor, Howerton and Mercer - handled about 60 percent of the trials. They acquitted 285 defendants - three quarters of the county's not guilty verdicts.

"From my days as a prosecutor, I know defense lawyers are strenuously avoiding the courtrooms of judges with high conviction rates," Proctor said. "They chew off their legs to get out of those courtrooms."

## Skeptical of Intoxilyzer

Defense lawyers say Leonard, Howerton, Proctor and Mercer work hard to guard defendants' rights.

"They are among the best-equipped, most experienced, smartest judges we have," defense attorney Eben Rawls said. "Thank God we have a few judges who still protect civil liberties."

Defense lawyer Tony Scheer argues that it is wrong to assume that everyone who tests just above the limit is guilty. He described the Intoxilyzer as "a piece of crap sitting on a table" and said no machine is infallible.

"The machine isn't judge and jury," Scheer said. "If it is, we might as well have the machine print out their sentences and send them to prison."

The Intoxilyzer 5000, used in North Carolina and 32 other states, meets federal accuracy requirements and has safeguards to ensure it's working properly. Before each use, it tests a 0.08 alcohol sample. If it reads anything other than 0.08 or 0.07 - an indication that it may be malfunctioning - it shuts down.

Suspects blow into the instrument twice and the lower of the readings is used. Results are rounded down.

Still, some Mecklenburg judges say they're occasionally skeptical of the Intoxilyzer, particularly when the readings are 0.08 or 0.09.

Howerton, 68, convicted 48 percent



JEFF SINER - STAFF PHOTO

Mecklenburg Deputy Sheriff J. Nall administers an Intoxilyzer to Monroe police officer Javier Villarreal during a controlled drinking class. Villarreal was under the legal limit after drinking a half bottle of tequila.

## What it takes to reach 0.08

BY AMES ALEXANDER  
Staff Writer

In an hour and 15 minutes, Javier Villarreal downed a half bottle of tequila - roughly the same amount of alcohol in nine beers.

"I am wasted," said the 280-pound Monroe police officer, after trying unsuccessfully to read fine print on a document. "I would have an accident right now."

But when Villarreal blew into an Intoxilyzer, it showed his blood alcohol content was 0.07 percent - below the 0.08 limit at which people are deemed legally too impaired to drive.

Villarreal was attending a class to learn how to operate the Intoxilyzer. He and other officers were given the chance to drink large amounts of alcohol and then blow into the instrument, partly so they could get a better idea how much alcohol people must drink to reach 0.08.

Typically, the heavier the person, the more alcohol it

## Facts About 0.08

■ A typical 135-pound woman would reach 0.08 by drinking about three beers in one hour on an empty stomach.

■ Every state has passed laws setting 0.08 as the legal limit.

■ Virtually all drivers are impaired at 0.08, studies show.

takes to exceed the limit. When officers take the course, offered by the N.C. Department of Health and Human Services, they're usually surprised how much alcohol it takes to reach 0.08, instructors say.

After his third beer, state Trooper J.L. Saucier said he was in no condition to drive. He drank seven beers during the hour and fifteen minutes and registered 0.10.

Mecklenburg Sheriff's Deputy Lori Kimpel, who weighs 140 pounds, drank 6 1/2 ounces of vodka - the equivalent of more than four mixed drinks - and registered 0.12.

Villarreal failed to touch his finger to his nose during one sobriety test - the sort officers like him use on impaired-driving suspects.

"I wouldn't get out of the parking lot," he says. "I'm buzzing. I'm really amazed that someone could be over a .08 and drive."

of those tried before him. He said he looks at all the evidence - not just the Intoxilyzer reading. He's especially interested in how the suspects performed on sobriety tests.

In cases where he acquits people who register 0.08 or 0.09, the judge said, "I'm basically saying I don't believe the Intoxilyzer."

Proctor convicted 49 percent of the DWI defendants tried before him. Most of those acquitted tested over the legal limit.

"If we wanted to avoid controversy, we could just ignore the law and find everyone guilty," Proctor, 48, said. "I'm not letting guilty people off the hook. I'm doing my job and acquitting people I think ought to be acquitted."

Some judges and defense lawyers note that it's not always possible to know exactly what happened at DWI trials based solely on court documents. In District Court, there are no transcripts of trial proceedings. Intoxilyzer readings or police evidence may not have been introduced at trial.

Sometimes, judges say, court documents will show a not guilty verdict when in fact a judge had dismissed the charge because there were insufficient reasons to stop or arrest the suspect.

Mercer acquitted 31 of 62 defendants tried in his courtroom. He says he tries to think like a jury.

"If the state has a .08, but the defen-

dant had good driving and good field sobriety tests, I think there might be someone on the jury who said, 'I don't think he was impaired. I don't care what the machine said,'" said Mercer, 61, Mecklenburg's former public defender.

N.C. Supreme Court Chief Justice I. Beverly Lake Jr. expressed concern about the disparity in conviction rates among judges across the state. He said unless defense lawyers have evidence that the Intoxilyzer malfunctioned, judges should consider it accurate.

"That (the Intoxilyzer reading) is what the evidence is," Lake said.

## To introduce alcohol level or not?

In front of judges with low conviction rates, prosecutors and defense lawyers sometimes find themselves in a strange reversal of roles.

Prosecutors occasionally don't introduce Intoxilyzer readings of 0.08 as court evidence, figuring it will only hurt their chances of getting a conviction. Defense lawyers, meanwhile, fight to get the alcohol evidence before the judge, hoping for an acquittal.

Defense lawyer Laughrun has represented hundreds of clients who registered at 0.08, just above the limit. Not once did Laughrun enter a guilty plea for them, he said. He knows some judges require more evidence than an Intoxilyzer reading before convicting.

"If it's a .08, my eyes light up," Laughrun said. "That's a triable case. I don't care if you've thrown up on yourself."

"It's not a numbers game. A .08 doesn't equal conviction. The police have to have more than that."

North Carolina's drunken driving law states that motorists commit the offense if they operate a vehicle "while under the influence of an impairing substance," or if they have an alcohol concentration of 0.08 or more.

Judge Tom Moore, whose 86 percent conviction rate is the highest among Mecklenburg judges, says the law is clear.

"The law says .08 or more, you're guilty," Moore, 62, said. "I don't need to go into any detailed analysis. It's plain English to me."

Two other Mecklenburg judges - Hugh Campbell and Hugh Lewis - also have conviction rates exceeding 80 percent.

"When they blow .08 or more, I'm highly likely to find them guilty," said Campbell, who has an 81 percent conviction rate. "They shouldn't be driving a car."

Campbell, a 67-year-old former state legislator and Court of Appeals judge, said DWI suspects who register 0.08 are presumed to be impaired.

"I'm convinced that the intent of the legislature was that driving with a

blood alcohol level of .08 is driving while impaired," he said.

"I've read the statute to defense lawyers and told them, 'Unless you overcome that presumption, I'm going to find your client guilty.'"

## 0.09 - and not guilty

In a crowded courtroom one day in March, Judge Leonard tried 10 people charged with drunken driving. He convicted three and let seven go.

In one trial, a Charlotte-Mecklenburg police officer testified that he smelled alcohol on the suspect's breath after stopping him for speeding on Billy Graham Parkway. The suspect, who had three prior DWI convictions, took an Intoxilyzer test that indicated his alcohol level was 0.09.

The defendant refused to do some sobriety tests, saying ill-fitting cowboy boots would make it hard to perform them.

Under questioning by Laughrun, the defense attorney, the officer acknowledged that the suspect pulled over properly and had no trouble walking or providing his license.

Leonard's verdict: not guilty.

Pineville officer Bill Wright walked quickly out of the courtroom after the morning session. He had testified in the trials of five DWI defendants. The judge convicted only one.

"It honestly gets frustrating," Wright said. "I've been at the point in this courtroom where I thought I was going to get locked up for contempt."

Mecklenburg Assistant District Attorney David Maloney said, "We're trying cases we can tell you in advance we're going to lose because of the judge."

Prior DWI convictions aren't admissible evidence. But they do show that some of the same drivers are returning to Mecklenburg courts for the same charge - and beating it.

The Observer found that of the 373 drivers that Mecklenburg County judges acquitted, at least 84 had prior drunken driving convictions. At least 25 had two or more DWI convictions.

District Attorney Gilchrist believes repeat offenders are learning to work the system.

"We're going to have a time when one of these multi-DWI charged guys is going to kill somebody," Gilchrist said. "And the media is going to be on my doorstep asking why we can't convict this guy and keep him off the roads."

"I'm going to say we just can't get them convicted."

Ames Alexander (704) 358-5060;  
aalexander@charlotteobserver.com  
Gary L. Wright (704) 358-5052;  
gwright@charlotteobserver.com

## REPORTING METHOD

## How series was done

To compile information for these stories on Mecklenburg County DWI trials, Observer reporters watched trials, conducted more than a hundred interviews, examined thousands of court documents and analyzed computerized court records and alcohol test results.

The court cases are those that began with a charge of driving while impaired - the state's most common drinking-and-driving charge - and ended with the court taking final action between January 2003 and February 2004.

Basic information on these almost 6,400 cases came from computer files obtained from the N.C. Administrative Office of the Courts.

About 30 percent of those cases are closed before they reach a judge or get a verdict. These include dismissals.

Of the more than 4,400 cases that do end in a verdict, about 81 percent are uncontested, meaning that the defendant pleads guilty.

The DWI trial stories focus on the more than 840 contested cases that are tried before a judge and end with a verdict.

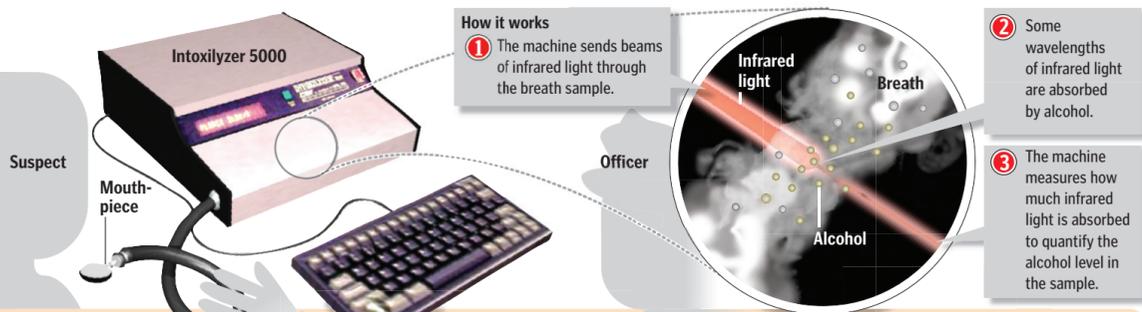
In more than 70 percent of all cases that ended in acquittal, reporters found affidavits from arresting officers and other records documenting signs of impairment. There are no transcripts in such cases. Court files don't reflect the evidence presented during trial.

In about 5 percent of the 373 acquittals in Mecklenburg, judges dismissed the cases during trials, according to court documents. The records don't show why, but judges say that sometimes happens when they find police didn't have cause to stop or arrest the defendant. The Administrative Office of the Courts lists those cases as not guilty verdicts.

Because the trials were under way and the effect was the same as a not guilty, the Observer counted those cases as acquittals.

## The Intoxilyzer 5000

Motorists suspected of drunken driving are asked to blow into an Intoxilyzer to measure their alcohol level. Much about the way the machine is used and tested is designed to give defendants the benefit of the doubt.



## IN THE DEFENDANT'S FAVOR

As a safeguard before testing a defendant, the Intoxilyzer tests a 0.08 percent alcohol sample. It shuts itself down if it reads anything other than 0.07 or 0.08, so that it doesn't overestimate the amount of alcohol in someone's system.

■ Suspects blow twice into the machine. The lower of the two readings is used.

■ Results are always rounded down, so a reading of 0.079 reads as a 0.07.

■ Blood tests usually yield higher blood alcohol results than Intoxilyzer tests on the same individuals, studies show.



The Intoxilyzer, used in 33 states, meets U.S. Department of Transportation requirements and is approved by the state of North Carolina. The Intoxilyzer's manufacturer, CMI Inc., says the device's readings are accurate to within 0.003. Consequently, someone who tests at 0.09 could have an alcohol content between 0.087 and 0.093, the manufacturer says. South Carolina uses the BAC DataMaster, manufactured by National Patent Analytical Systems Inc.

Some defense lawyers and judges question the Intoxilyzer's accuracy. They argue that results are often inflated when defendants burp or wear dentures. But studies have shown that, if proper procedures are used, burps and dentures don't skew the results.