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STATE OF NORTH CAROLINA
COUNTY OF MACON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 10 CRS 050329

STATE OF NORTH CAROLINA)	PARTIAL TRIAL TRANSCRIPT
VS.)	(VOLUME V of V)
ISAAC HUTCHISON BIRCH)	(pgs. 26 - 79)

The above-captioned case coming on for hearing at 9:56 a.m.
at the criminal session of the Superior Court of Macon
County, Franklin, North Carolina, before the Honorable Judge
Mark E. Powell, Judge Presiding, and a jury, and the
following proceedings were had, to wit:

A P P E A R A N C E S

For the State:
ASHLEY HORNSBY WELCH, Assistant District Attorney
5 West Main Street
Franklin, NC 28734

For the Defendant:
Pro se

September 30, 2010

Reported by:
Diane L. Thommes, CSR, RPR
Certified Realtime Reporter

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I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Matthew Breedlove	39			
Tony Ashe	(Not Transcribed)			

E x h i b i t s

<u>Marked</u>	<u>Description</u>	<u>Identified</u>	<u>Admitted</u>
State's 1	DHHS 4081 form	53	56
State's 2	Chemical analyst permit	57	57
State's 3	Test ticket	57	59

1 THE COURT: Mr. Birch, come on down, please.

2 Mr. Birch, are you ready to proceed?

3 MR. BIRCH: Sir, there needs to be a correction in
4 the court. This action is not ready for trial. I am here
5 by special appearance to challenge jurisdiction. And the
6 district attorney's office has had the opportunity since
7 April 5th to answer that challenge, and they have not done
8 so. They haven't given anything at all. So there is no
9 action until lawful, provable jurisdiction is established,
10 and I believe that I have presented evidence that is
11 substantial enough to challenge that jurisdiction.

12 THE COURT: Sir, I have heard no evidence.

13 MR. BIRCH: The memorandum of the law has been
14 submitted to you, and also the notice of prearraignment
15 jurisdiction or -- excuse me, prearraignment special
16 appearance to challenge jurisdiction.

17 THE COURT: Sir, what you put in the court file is
18 not evidence.

19 MR. BIRCH: Okay.

20 THE COURT: If you wish to proceed on some motion,
21 you may do so now.

22 MR. BIRCH: Well, I would consider it a plea in
23 bar, sir, to challenge jurisdiction based upon the
24 constitutionality of the Reconstruction Acts. And,
25 basically, the Reconstruction Acts are what established the

1 jurisdiction of this state, and it's in contravention to
2 Article IV, Section III of the United States Constitution.

3 THE COURT: Any other argument?

4 MR. BIRCH: That is the argument, sir.

5 THE COURT: Sir, your motion is denied.

6 Do you have any other motions?

7 MR. BIRCH: It's not a motion, sir. It's a plea at
8 bar. And due process of law requires lawful, provable
9 jurisdiction to be established. I'm not waiving my special
10 appearance.

11 THE COURT: Sir, we're going to start a trial in a
12 few moments. You will have a chance to select a jury.

13 MR. BIRCH: I have no intention of proceeding
14 without due process being followed.

15 THE COURT: Yes, sir. I'm not going to be your
16 attorney. I'll tell you what needs to be done like such as
17 ask the jurors questions if you wish to do so. If you don't
18 want to do so, that's fine.

19 MR. BIRCH: Due process of law has to be
20 established, and I am here by special appearance to
21 challenge jurisdiction.

22 THE COURT: Do you have any other motions?

23 MR. BIRCH: I'm here to challenge jurisdiction.

24 THE COURT: All right. I think we're ready for the
25 jury.

1 Anything for the State, I should say?

2 MS. HORNSBY WELCH: No.

3 (Whereupon, the jury pool entered the courtroom.)

4 THE COURT: Members of the jury pool, I appreciate
5 you being back here today. It's certainly a pleasant
6 morning outside.

7 The case that's being called for trial at this time
8 is the State versus Isaac Birch. You may refer to Mr. Birch
9 as the defendant. That's just a label. As I said in the
10 earlier case when you were here, it's not anything good or
11 anything bad. It's just a label. Sir, are you able to hear
12 me? I'll talk louder then. Is that better? Okay.

13 The State is calling the case for trial of State
14 versus Isaac Birch. You may refer to Mr. Birch as the
15 defendant. That's just a label. It's nothing good or
16 nothing bad, just a label. He is accused of the crime of
17 driving while impaired and not having his headlights
18 operating. This event is alleged to have occurred in March
19 of this year.

20 The fact that he's been charged is no evidence of
21 guilt. Under our system, a defendant is not required to
22 prove innocence, but he is presumed to be innocent. The
23 State must prove guilt beyond a reasonable doubt. If the
24 State does prove guilt beyond a reasonable doubt, it's the
25 jury's duty to find the defendant guilty. But if the State

1 does not prove guilt beyond a reasonable doubt, it's the
2 jury's duty to find the defendant not guilty.

3 (Jury voir dire was conducted by the State only.)

4 (Whereupon, a jury was impaneled.)

5 THE COURT: For those members of the jury pool who
6 were not chosen to be in this jury, thank you for being here
7 this week. Your jury service is complete.

8 - - -

9 THE COURT: Members of the jury, I have to give you
10 a few instructions. We have to do something outside of your
11 presence which may take a few minutes, and we need to take a
12 morning break anyway.

13 Buy, anyway, it's very important you follow these
14 rules so whatever your decision is at the end of this case,
15 both sides -- well, if they wish to believe so, they believe
16 they got a fair trial, the State and the defense.

17 First, you must not talk about this case among
18 yourselves. The only place this case may be talked about is
19 in the jury room, and then only after I tell you it's time
20 to begin your deliberations.

21 Second, you must not talk about this case with
22 anyone else, including members of your families, or allow
23 anyone else to talk with you or say anything in your
24 presence about this case. If anyone communicates or
25 attempts to communicate with you or in your presence about

1 this case, you must tell us about that immediately.

2 While you are a juror in this case, you are not to
3 form an opinion about the guilt or innocence of the
4 defendant, nor are you to express to anyone any opinion
5 about the case until I tell you it's time to begin your
6 deliberations.

7 You must not talk or communicate in any way with
8 any of the parties in this case, any of the attorneys or any
9 of the witnesses. This rule applies inside as well as
10 outside the courtroom, and it prohibits any type of
11 conversation, whether about the evidence in the case or
12 about the weather, or just to pass the time of day.

13 So if you are in this courthouse, or if you are in
14 the parking lot or elevator and you see one of the
15 attorneys, you see Mr. Birch, you see one of these officers,
16 you see Ms. Hornsby Welch, don't say anything to them. They
17 shouldn't say anything to you because folks aren't supposed
18 to have contact with jurors. They're not being rude if they
19 turn away and walk off.

20 I don't believe there will be any media coverage of
21 this case, but if there is, you are to pay no attention to
22 it. You are not to conduct any independent inquiry or
23 investigation about this matter. You need to make sure when
24 you come back into the courtroom after each break that your
25 cell phones are turned off. And if you have a pager, make

1 sure it's turned off. And you cannot send or receive text
2 messages during the trial. Enough said about that. It's
3 just common sense. It's real important that you follow
4 these rules.

5 We're going to take a break. It's going to be at
6 least 15 minutes. And follow the directions of our court
7 officer. She will tell you where to be back in 15 minutes.
8 Remember, don't discuss the case.

9 (Whereupon, the jury exited the courtroom.)

10 THE COURT: If you expect any jurors to be walking
11 out that door, if you do, please tell me.

12 THE BAILIFF: Okay.

13 THE COURT: Mr. Birch, I understand your decision
14 not to ask the jury pool questions, and I understand your
15 concern about waiving your jurisdictional challenge if you
16 do participate.

17 What I'm going to do is when the jury comes back
18 in, when we start back up after our recess is instruct them
19 that you have challenged the jurisdiction of this Court, and
20 that you, because you are maybe concerned about waiving that
21 challenge, you may not participate as fully as some other
22 people may participate, and the jury is to make no
23 assumption about that. That's not something that needs to
24 concern them.

25 MR. BIRCH: I don't understand the Court's

1 position, to be honest, and especially in considering North
2 Carolina State Supreme Court, *State vs. Batdorf*. Once
3 jurisdiction has been challenged, I mean it has to be put on
4 the record the obligation, the burden of proof is on the
5 State. I haven't received anything in that, and I feel like
6 this is a violation of due process. And I will be appealing
7 this decision. I may take other recourse and remedy as well
8 because honestly, sir, I want this conflict in law resolved.
9 If I err in my understanding, I want to be corrected.

10 I'm not trying to impede justice or get in the way
11 of anyone else's remedy or recourse at law. But I just
12 don't understand how this Court can proceed when the State
13 has had ample time to put on the record and prove their
14 jurisdiction in contradiction to my memorandum of law which
15 supports my jurisdictional challenge and it just makes no
16 sense to me, sir. I don't understand it.

17 THE COURT: All right, sir. If you happen to be
18 convicted, you can appeal. It doesn't make any difference
19 to me. I have been upheld on appeal and overturned on
20 appeal. Appellate court, sometimes they've said, "You're
21 wrong," and sometimes they've said, "You're right." Doesn't
22 make any difference to me.

23 I can't be your attorney, but I will say this much.
24 I will quote from your own document, *State vs. Batdorf*. I
25 hope I'm pronouncing it correctly. I think I'm pronouncing

1 it as you did. "Once jurisdiction is challenged which
2 substantial evidence contrary to the presumed conclusion
3 that the State has jurisdiction, the burden of proof is on
4 the State to prove that the state courts have jurisdiction."
5 I think you would agree with that since you put it in your
6 document.

7 MR. BIRCH: Yes.

8 THE COURT: Let me just turn it back around a
9 little bit. The State is presumed to have jurisdiction
10 unless and until I hear evidence to the contrary. Your
11 memorandum of law is not evidence. I gave you a chance to
12 present evidence, sir, and you didn't. Filing a document
13 and putting it in the court file is not evidence.

14 MR. BIRCH: Well, if you want evidence in
15 accordance with Civil Rules of Procedure, I am more than
16 willing to provide all the stuff from the archives that I
17 can. I did present the Court with a certified copy from the
18 state archives in regard to the letter of surrender. If it
19 pleases the Court, I will go get certified copies of the
20 Reconstruction Acts, *Ex Parte vs. McCardle*, *Ex Parte vs.*
21 *Yerger*, *Georgia vs. Stanton* because time and time again this
22 conflict in law has been evaded and obstructed. And there
23 is evidence for me to prove it. And if the Court would give
24 me time to do it, I will go and get all that documentation
25 and submit it to the Court so you can make an appropriate

1 decision.

2 THE COURT: Sir, if you're convicted -- and I don't
3 know if that's going to happen. I haven't heard any
4 evidence. If you are convicted, you can raise that issue in
5 the appellate courts.

6 I have looked at what happened in district court
7 just when I went through the file. I'll even say this. As
8 a general matter, someone in your type of situation, if they
9 are convicted, if they appeal, they're not going to be put
10 in prison or jail pending appeal. You'll be out walking
11 around. I'm not trying to give anybody a hard time. I'm
12 just following the rules as I know them.

13 If you are convicted, you will have time to present
14 whatever documents you wish to the Court of Appeals. I
15 would suggest you speak to an attorney to know the proper
16 way to do it. I'm not saying your argument is correct or
17 incorrect.

18 Even if you had the most correct argument, if you
19 don't present it according to the appellate rules of
20 procedure, it will not be considered. Just as if you don't
21 present your evidence here correctly, I'm not going to
22 consider it. And I'm not going to be your attorney and say,
23 "Go do this. I need to see this." No. I would be sitting
24 at that table -- I need to slow down. I would be sitting at
25 that table if I were going to do that, if I said,

1 "Mr. Birch, that is what you need to do." No. That's not
2 my job. That's an attorney's job.

3 MR. BIRCH: Sir, I have a copy of your oath of
4 office here. "I will endeavor to support and maintain the
5 Constitution of the United States of America." And I
6 understand the Civil Rules of Procedure, and I believe that
7 function over form is of greater precedence. You
8 understand -- I mean, it's very clear, all somebody has to
9 do is go to the archive and look all this stuff up. It's
10 not like it's some big secret. It was done in the open. I
11 feel you have an obligation to move appropriately because
12 jurisdiction has not been established.

13 THE COURT: Sir, I have ruled against you on that
14 issue, and you can participate in the trial or you can
15 choose not to. That's your decision.

16 MR. BIRCH: I just don't want to waste the jurors'
17 time, you know. And to be honest, I don't see a point in
18 the jury trial because they can't hear the merits of the
19 case anyway. And it's wasting their time. It's wasting
20 money in fact of the State of North Carolina, which I don't
21 see the point in it, sir.

22 And I appreciate your consideration and your
23 actually speaking with me. Actually I was expecting you to
24 be much more adversarial. But I think that you should --
25 have you read the memorandum in its entirety?

1 THE COURT: Sir, I have looked through it. I won't
2 say I have read every page of it. But I have looked through
3 it. I did not know which case was going to be called for
4 trial -- I heard your case was one that may be called for
5 trial. But we didn't know until this morning. There were
6 two others that were mentioned.

7 MR. BIRCH: Yes, I'm aware of that.

8 THE COURT: And I think possession of firearm by
9 felon was one of the ones that might have been called for
10 trial.

11 We're going to take a break now, and you can
12 participate or not participate. I'm going to tell the jury
13 you're challenging the jurisdiction of the Court, and that's
14 not to be held against you in any way.

15 Anything from the State?

16 MS. HORNSBY WELCH: No, sir.

17 THE COURT: We'll be in recess for ten minutes.

18 (Whereupon, a recess was taken.)

19 THE COURT: We're ready for the jury.

20 (Whereupon, the jury entered the courtroom.)

21 THE COURT: Members of the jury, before we start
22 hearing opening statements or evidence, I need to go over
23 one particular point.

24 Mr. Birch, the defendant, has challenged the
25 jurisdiction of this Court over him. And he has a right to

1 Q. Sir, would you please state your name and where you are
2 employed.

3 A. My name is Matthew Breedlove. I'm employed with the
4 Franklin Police Department, Town of Franklin.

5 Q. How long have you been employed with the police
6 department?

7 A. With the police department I've been since November of
8 2005.

9 Q. Do you have any prior law enforcement experience
10 previous to your current employment?

11 A. I do. I served some time with Macon County Sheriff's
12 Department before that.

13 Q. And how long with the sheriff's office?

14 A. Approximately a year and a half to two years.

15 Q. And were you employed with the Franklin Police
16 Department on March 26th of 2010?

17 A. I was.

18 Q. What were your duties on that day?

19 A. I was on night shift as a patrol officer.

20 Q. And when you say "patrol officer," what do you mean by
21 that?

22 A. Taking calls, 911 calls, working traffic, just duties
23 of a patrol officer.

24 Q. Can you tell the Court, did you have any interaction
25 with Mr. Isaac Birch that evening or day?

1 A. Mr. Birch sitting here, yes, I came in contact through
2 a traffic stop.

3 Q. And can you tell the Court what time of day or night
4 that was?

5 A. Yes, I can. I'm looking at my arrest report. It was
6 on March 26, 2010, at 2:30 a.m.

7 Q. And where is it that you first came in contact with
8 him?

9 A. In the area of West Main Street and Harrison Avenue.

10 Q. Where is that located?

11 A. The courthouse here is West Main Street. Once you pass
12 it and you're looking at the next traffic light, that's the
13 intersection.

14 Q. Is that a public street or highway that's located
15 within the state of North Carolina?

16 A. Yes, it is.

17 Q. Is that street also located within the city limits of
18 Franklin?

19 A. That's correct as well.

20 Q. Tell the Court what, if anything, drew your attention
21 to Mr. Birch.

22 A. Mr. Birch, I was sitting stationary in between the
23 Macon County tax office and the law office next door in the
24 one-way alley. At that time, Mr. Birch passed me, heading
25 west on West Main Street. At the time that he passed me, he

1 was driving with no lights on his vehicle, and that drew my
2 attention to him.

3 Q. Once you noticed that he had no lights on in the
4 vehicle, by lights, do you mean the back lights or the
5 headlights?

6 A. The headlights, taillights, none of the vehicle's
7 lights were operating at the time.

8 Q. Once you noticed that, what did you do?

9 A. I then followed in behind the vehicle, made a right
10 turn onto Harrison Avenue.

11 Q. What did you observe this vehicle do?

12 A. At the time of turning onto Harrison Avenue, my
13 intention was to perform a traffic stop for driving without
14 headlights and vehicle lights during the dark. In the area
15 of the Bryant-Grant Funeral Home on Harrison Avenue, I
16 activated my blue lights to stop the vehicle.

17 Q. Once you activated your blue lights, what happened?

18 A. The vehicle then proceeded to go as normal. Didn't
19 show no intentions of stopping any time immediate. In my
20 consideration, it took a long time for the vehicle to stop
21 for the blue lights.

22 Q. Did the vehicle eventually stop?

23 A. Yes, ma'am, it did.

24 Q. Where did it stop?

25 A. The vehicle come to a stop just beyond Bidwell Street

1 in the front parking area of the Sunset Restaurant.

2 Q. How far is it approximately from the time that you
3 activated your blue lights to the parking lot of the Sunset
4 Restaurant? Is it a mile or less?

5 A. Less. Less. I would say half to three quarters of a
6 mile.

7 Q. And how long did it take y'all to get from the funeral
8 home to the Sunset, if you can remember?

9 A. I don't have exact. It was nothing fast. Normal
10 driving conditions as far as speed-wise.

11 Q. Were you able to tell whether Mr. Birch ever turned on
12 his headlights?

13 A. No, he did not.

14 Q. And from the time that you activated your blue lights
15 until the time that he stopped, were there other areas in
16 which to pull off safely?

17 A. Yes, ma'am. Once you pass the funeral home, you pass
18 Church Street, you pass a church there that has a parking
19 lot on the back side of it, you pass Courtney Lane, which is
20 another street that he could pull off on. That's just on
21 the right-hand side. If he chose to go to the left, there's
22 plenty more opportunities as well.

23 Q. And did you ever activate your siren?

24 A. I have nothing noted that I activated my siren.

25 Q. Were you in a marked patrol car?

1 A. Yes, ma'am.

2 Q. Were you able to tell when you were behind this vehicle
3 how many occupants were in it?

4 A. Yes, ma'am. It was occupied by Mr. Birch, and that was
5 the only occupant.

6 Q. What kind of vehicle was this?

7 A. 1983 Ford F-150 truck.

8 Q. What happened once this vehicle stopped at the Sunset?

9 A. At that time, I approached the vehicle on the driver's
10 side. I made contact with Mr. Birch and asked him for his
11 driver's license and his vehicle registration card.

12 Q. Was he able to produce his driver's license?

13 A. Yes, he did produce the items that I had asked for.

14 Q. And at that time was there anybody else in the vehicle?

15 A. No, ma'am, there was not.

16 Q. And do you see the individual in the courtroom today
17 who was operating that vehicle?

18 A. Yes, he's the defendant sitting at the table next to --

19 Q. After he produced his driver's license for you, did you
20 explain to him why you had stopped him?

21 A. Yes. At that time, I informed the driver -- or
22 actually, what's in my notes is I asked the driver why it
23 took him such a longer period of time to stop the vehicle
24 was my next contact with him.

25 Q. Did he respond to you?

1 A. Yes, he did.

2 Q. What did he tell you?

3 A. The driver replied that the street was narrow.

4 Q. Did you ever discuss with him all of the places that he
5 had passed where he would have been able to stop?

6 A. I informed my opinion to the driver that he had
7 opportunity to stop. I never gave him instructions where he
8 should have stopped, but did inform him of my opinion that
9 he did have opportunity to stop.

10 Q. And what was his response, if you remember?

11 A. I don't remember if he replied to that or not.

12 Q. What, if anything, did you notice about Mr. Birch's
13 demeanor or appearance?

14 A. Well, at that time, I asked the driver, I advised him
15 that he had been driving with no headlights, and it was at
16 that time that the driver advised me that he was aware of
17 that.

18 Q. Did he explain to you why?

19 A. I believe he stated it was his right to drive without
20 headlights.

21 Q. And at 2:30 in the morning, was it dark?

22 A. Yes, ma'am.

23 Q. What else did you notice about Mr. Birch's demeanor
24 that drew your attention to him, if anything?

25 A. During the time that I was talking with the driver, I

1 could smell a very strong odor of alcohol coming from his
2 breath. I asked the driver if he had been drinking at that
3 time.

4 Q. And what was his response?

5 A. The driver replied, "Not a lot since about 10:30."

6 Q. And did you ask him what he meant by "not a lot"?

7 A. It was at that time that I asked the driver to turn off
8 the vehicle and step out of the vehicle for further
9 investigation.

10 Q. And why did you ask him to do that?

11 A. To determine his level of impairment.

12 Q. Did he step out of the vehicle?

13 A. With hesitation.

14 Q. And what do you mean by that?

15 A. Rebelling against my order, stating that he didn't
16 understand why.

17 Q. Did he eventually step outside the vehicle?

18 A. Yes, he did.

19 Q. And once he stepped outside of the vehicle, what, if
20 anything, did you notice about this odor of alcohol?

21 A. Once he stepped out, the driver made the comment to me
22 that I might as well go ahead and give him the ticket
23 because he was not blowing. At that time I still smelled
24 the odor of alcohol about his breath outside of the vehicle.

25 Q. Previous to the defendant saying to you, "You might as

1 well go ahead and give me a ticket because I'm not blowing,"
2 had you explained to him that you were going to administer
3 any sort of test or what you were investigating or anything
4 of that nature?

5 A. When I asked him to step out of the vehicle, with his
6 hesitation of asking why he needed to exit the vehicle, I
7 informed him that I needed to determine a level of his
8 impairment, and it was for asking him to step out for
9 investigation, for those purposes.

10 Q. And describe the odor of alcohol once he stepped out of
11 the vehicle.

12 A. Very strong.

13 Q. And could you tell where it was coming from?

14 A. His breath.

15 Q. And when you stop somebody and you approach their
16 vehicle and smell the odor of alcohol, what do you normally
17 do?

18 A. Perform a series of testing to help me determine their
19 level of impairment.

20 Q. And what kinds of tests do you normally ask people to
21 perform?

22 A. I have a tool called the Alco-Sensor. It collects a
23 breath sample, gives me a positive or negative reading,
24 whether they have alcohol on their breath. I also do some
25 field sobriety testing to determine their physical abilities

1 and standing, balance, and their mental capacity as well.

2 Q. And what kind of test -- when you say "field sobriety
3 test," what do you mean?

4 A. Use a one-legged stand test, a walk-and-turn test, and
5 a finger-counting test.

6 Q. And did you ever ask Mr. Birch to do any of those?

7 A. I gave Mr. Birch the opportunity to complete these
8 tests, and he refused all testing.

9 Q. Explain to the Court, if you would, what exactly you
10 said to Mr. Birch.

11 A. I informed the driver that I was performing an
12 investigation for his level of impairment for the purpose of
13 driving while impaired. At that time, the driver stepped
14 out of the vehicle and stated I might as well go ahead and
15 give him the ticket because he's not blowing. At that time,
16 I asked the driver to submit to an Alco-Sensor breath test,
17 and he refused. I then asked the driver to submit to field
18 sobriety testing, and he also refused all tests.

19 Q. How long were you there on the side of the road with
20 him?

21 A. If you will give me just a minute, I'm going to look at
22 the logs from my dispatch center. They keep my times when I
23 stop the vehicle, when I arrive to the detention center or
24 any activity that I do.

25 What I have noted, the vehicle was stopped at 2:27,

1 and I was at the detention center by 3:13.

2 Q. And how long does it take you to get to the Macon
3 County Detention Facility from the Sunset Restaurant?

4 A. Approximately five to seven minutes, depending on
5 traffic. This time of morning, I would say five minutes or
6 less.

7 Q. And other than the strong odor of alcohol and
8 Mr. Birch's refusal to perform any field sobriety tests, was
9 there anything else about his demeanor or his appearance or
10 his affect that drew your attention to him?

11 A. Once again, I'm going to refer to notes that I have in
12 my file here.

13 I would bring back to your attention it took him a
14 very long time to stop once the blue lights were activated.
15 He was driving with no headlights on. That is all signs of
16 impaired driver at nighttime according to the training I
17 have received in law enforcement.

18 Once in contact with Mr. Birch, I feel that he was
19 rebelling against orders, and his voluntary statements that
20 he had not had a lot since 10:30 that night to drink.

21 Q. Did he ever explain to you what it was that he was
22 talking about when he said he hadn't had a lot since 10:30
23 to drink?

24 A. No, ma'am, he did not.

25 Q. Did he ever explain to you where he was coming from or

1 where he was going to?

2 A. I have no recollection of that.

3 Q. And anything else about his driving other than the
4 driving without the headlights and him taking a long period
5 of time to stop for you?

6 A. No, ma'am.

7 Q. During that time period that you had to observe
8 Mr. Birch there on the side of the road, did you have an
9 opportunity to form an opinion satisfactory to yourself as
10 to whether or not the defendant had consumed a sufficient
11 amount of some impairing substance so as to appreciably
12 impair his mental or physical faculties or both?

13 A. I did.

14 Q. And what was your opinion?

15 A. I informed the opinion that the defendant had consumed
16 a sufficient amount of impairing substance which I was under
17 the opinion that it was alcohol to appreciably impair his
18 physical and mental abilities.

19 Q. And explain to the jury how you formed that opinion.

20 A. I informed that opinion by the strong odor of alcohol,
21 by his driving with no headlights, being affected mentally,
22 and then his refusing of my testing obviously helped inform
23 my opinion.

24 Q. Once you formed that opinion, what did you do with
25 Mr. Birch?

1 A. Mr. Birch at that time was placed under arrest for
2 driving while impaired and transported to the Macon County
3 Detention Center. At that time he was also given
4 opportunity for a further test.

5 Q. Okay. And when you place anybody under arrest for
6 driving while impaired, do you always take them to the Macon
7 County Detention Facility?

8 A. That is correct.

9 Q. Why do you do that?

10 A. The State maintains the test that is located at that
11 site. It's a testing site. And that test is the Intox
12 ER/IC II breath test.

13 Q. And do you hold a permit to perform that test?

14 A. I do.

15 Q. And is that valid?

16 A. It is.

17 Q. Was it valid on March 26th of this year?

18 A. It was.

19 Q. What kind of training do you have to go through in
20 order to be certified to operate the Intoximeter?

21 A. Go through a class held by the Department of Health and
22 Human Services, and the alcohol forensics branch helps teach
23 that. It is near a week-long course that teaches you how to
24 use that instrument and gives you certification for
25 operating that.

1 Q. Once you got Mr. Birch to the detention facility,
2 explain what you did with him. In other words, how does he
3 get into the detention facility, and where do you take him?

4 A. Okay. Upon arriving at the Macon County Detention
5 Center, I went through the area called the sally port, which
6 is a secured area where we come in contact with a detention
7 officer. They come out to my patrol vehicle, received
8 Mr. Birch, and then they escort him inside the detention
9 center to start the booking process.

10 Once they do that, they take him to the front
11 booking desk, and they do a search of his person for any
12 contraband or weapons, and then he is turned back over to me
13 for the testing.

14 Q. How long does the booking process take?

15 A. Five to ten minutes.

16 Q. And did it take five to ten minutes for Mr. Birch?

17 A. Yes.

18 Q. And once he's turned back over to you, what is the
19 purpose of that?

20 A. For the purpose of going to the testing site there in
21 the detention center. Like I said, with the Intox ER/IC II
22 device.

23 Q. And explain what this device is.

24 A. It's an instrument that collects a breath sample to
25 give you results of the alcohol in the breath.

1 Q. Is this a machine that you use every time you arrest
2 somebody for driving while impaired?

3 A. That is correct.

4 Q. Before you went over the process of submitting to this
5 test with Mr. Birch, did you go over his rights with him?

6 A. Yes. I went over his rights to -- I've actually got a
7 form that he has refused to sign that all defendants in a
8 driving while impaired case receive, and it's the rights of
9 a person when requested to submit to a chemical analysis.

10 Q. Did you go over that with Mr. Birch?

11 A. I did.

12 MS. HORNSBY WELCH: Your Honor, if I may approach.

13 THE COURT: Yes, ma'am.

14 BY MS. HORNSBY WELCH:

15 Q. Sir, I'm going to show you what I've marked as State's
16 Exhibit 1, and if you will tell the Court if you recognize
17 this, and if you do, what it is.

18 A. This is the form I was referring to. It is called the
19 DHHS 4081 form. As you will see, there's multiple copies of
20 it. And I fill that out before the defendant is requested
21 to submit to a breath analysis and he's had the opportunity
22 to sign that and to read it himself.

23 Q. Do you read that form to the person?

24 A. I do read that and also give him a copy.

25 Q. Did you read it to Mr. Birch?

1 A. I did.

2 Q. Could you please tell the Court, and just go ahead and
3 read what those rights are, and read it in the way that you
4 read it to Mr. Birch.

5 A. Okay. I draw your attention to this. It is the rights
6 of a person requested to submit to a chemical analysis to
7 determine alcohol concentration or presence of impairing
8 substance under North Carolina General Statute 20-16.2
9 Subsection A, starting at No. 1:

10 You have been charged with an implied consent
11 offense. Under the implied consent law, you can refuse any
12 test, but your driver's license will be revoked for one
13 year. You could be revoked for a longer period of time
14 under certain circumstances, and an officer can compel you
15 to be tested under other laws.

16 No. 2, the test results or the fact of your refusal
17 will be admissible in evidence at trial.

18 No. 3, your driving privilege will be revoked
19 immediately for at least 30 days if you refuse any test or
20 the test result is 0.08 or more; 0.04 or more if you are
21 driving a commercial vehicle; or 0.01 or more if you are
22 under the age of 21.

23 No. 4, after you are released, you may seek your
24 own test in addition to this test.

25 No. 5, you may call an attorney for advice and

1 select a witness to view the testing procedures, remaining
2 after the witness arrives, but the testing may not be
3 delayed for these purposes longer than 30 minutes from the
4 time you're notified of these rights. You must take the
5 test at the end of 30 minutes even if you have not contacted
6 an attorney or your witness has not arrived.

7 Q. And did you go over all of those with Mr. Birch?

8 A. That is correct. I completed that on March 26, 2010,
9 at 2:55 a.m.

10 Q. How do you know the exact time that you completed that?

11 A. That is filled in on this form at the bottom.

12 Q. And is there a place for Mr. Birch to sign?

13 A. That is correct. Right here I placed an X there and
14 asked Mr. Birch to sign at the X, and he refused to sign, so
15 I, at that time, filled in "refused to sign."

16 Q. And while you were reading the rights out loud to him,
17 did you also provide Mr. Birch a copy?

18 A. Yes, it is actually posted on the wall and a copy in
19 the test site, which is a room, a small room.

20 Q. Did he appear to follow along with what you were
21 saying?

22 A. Yes.

23 Q. Is there a place for you to sign on the bottom of that?

24 A. There is.

25 Q. Did you sign that?

1 A. I have.

2 MS. HORNSBY WELCH: Your Honor, at this time I'd
3 move to admit State's Exhibit 1.

4 THE COURT: It will be received into evidence.

5 BY MS. HORNSBY WELCH:

6 Q. After you went over these rights with Mr. Birch, what
7 did you do next?

8 A. I waited a time period to observe Mr. Birch. And the
9 reason for that is to observe him and make sure that he does
10 not do certain things that would impede the testing
11 procedures, and that time period is 15 minutes.

12 Q. And did Mr. Birch ever ask to call a witness or ask to
13 have somebody present or anything of that nature?

14 A. No, ma'am, he did not. At 3:15 he refused the test.

15 Q. During this time period that you're in this room with
16 Mr. Birch, did the odor of alcohol that you testified about
17 before coming from his breath ever go away?

18 A. No. That was a constant, very strong odor of alcohol.

19 Q. Did your opinion as to his level of impairment ever
20 change?

21 A. No, ma'am, it did not.

22 MS. HORNSBY WELCH: If I may approach again.

23 THE COURT: Yes, ma'am.

24 BY MS. HORNSBY WELCH:

25 Q. Sir, I'm going to approach with what I've marked as

1 State's Exhibit 2. If you will tell the Court what this
2 document is.

3 A. This is a permit to perform a chemical analysis of
4 breath. It's the copy of my permit where I gained
5 certification to operate the Intox ER/IC II device.

6 Q. Who was that permit issued by?

7 A. The permit is issued by the North Carolina Department
8 of Health and Human Services.

9 Q. And what are the valid dates of that permit?

10 A. The effective date was December 1st of 2009. The
11 expiration date is December 1st of 2011.

12 MS. HORNSBY WELCH: Your Honor, at this time I move
13 to admit State's Exhibit 2.

14 THE COURT: It will be received into evidence.

15 BY MS. HORNSBY WELCH:

16 Q. Now, I'm going to show you State's Exhibit 3, and if
17 you will tell the Court if you recognize what this is.

18 A. Yes, ma'am. This is a document I call the test ticket.
19 It's the results of the test that the device prints out
20 there at the test site.

21 Q. And is that the ticket that was printed out in
22 Mr. Birch's case?

23 A. That is correct.

24 Q. And can you explain to the Court, there is a few
25 numbers on that ticket. What are those -- what do those

1 numbers mean?

2 A. There is a series of numbers here. There is the air
3 blank testing, which is where the device tests itself.
4 There is the accuracy test, where the device checks itself.
5 It's got to pass a series of testing before it will do the
6 actual test. So it calibrated itself, checked, and shows it
7 was ready to test the defendant.

8 Then here at the bottom it shows the subject test,
9 which would be the test results from the defendant. As it
10 indicated here, he refused to test. It also gets the time
11 for each check and each refusal.

12 Q. There is a spot on here that says "accuracy check .07."
13 Can you tell the Court what that means?

14 A. Yes. The accuracy check is, like I referred to
15 earlier, the instrument checks its accuracy. It checks at a
16 .07 to make sure that it's under the .08, being the legal
17 limit in North Carolina, to give the benefit of doubt, to
18 take all doubt away.

19 Q. Did Mr. Birch ever blow into the Intoximeter?

20 A. No, ma'am, he did not. He refused that test.

21 Q. And did you explain to him what would happen if he
22 refused?

23 A. Yes, ma'am. I gave him instructions in the process of
24 reading the rights of the person that's been requested to
25 submit to a chemical analysis.

1 MS. HORNSBY WELCH: At this time, I would move to
2 admit State's Exhibit 3.

3 THE COURT: It will be received into evidence.

4 BY MS. HORNSBY WELCH:

5 Q. Is there a place for you to sign on that printout from
6 the Intoximeter?

7 A. Yes. It is the very bottom line here. You will see
8 that I've signed twice.

9 Q. And what is the time on that?

10 A. He refused the test at 3:15 a.m., and it was printed
11 out at that time, and I signed at that time.

12 Q. And after this was entered as a refusal, what else did
13 you have to do with Mr. Birch, if anything?

14 A. At that time he is taken back up to the booking desk in
15 the detention center, held in custody. Then both myself and
16 the defendant will see a magistrate judge for bond and
17 conditions of release.

18 Q. And did you do that in this process or in this
19 particular case?

20 A. Yes, ma'am, I did.

21 Q. While you were there in the magistrate's office, how
22 close were you sitting to Mr. Birch?

23 A. I can't testify. The magistrates do it both ways.
24 Sometimes they will bring the defendant in the office and
25 sit down with them. Sometimes they will come back into the

1 booking desk and address the subject there. In this
2 particular case, I can't testify which way that went.

3 Q. And after Mr. Birch saw the magistrate, did you see him
4 again that night?

5 A. I have not seen him again that night, no. After
6 that --

7 Q. Let me stop you there.

8 If you could, if you're able to, Mr. Birch's
9 appearance on the early morning hours of March the 26th, how
10 does that compare with how he appears today?

11 A. His appearance today would be in a normal status. On
12 that evening, it was not normal by the characteristics of a
13 rebelling attitude, a very outspoken, rebellious way.

14 Q. What do you mean by "outspoken"?

15 A. Basically, in my conversations with him, he was very
16 interruptive, very disorderly-type manner.

17 Q. And how does his appearance compare today as opposed to
18 what it was on the early morning hours of March the 26th?

19 A. Other than some difference in his eyes, I would note no
20 difference, besides dress.

21 Q. What do you mean by difference in his eyes?

22 A. At the time of contact at the traffic stop, he did have
23 a glazed look in his eyes.

24 Q. And during the time that you were interacting with
25 Mr. Birch, that early morning, did the odor of alcohol ever

1 disappear?

2 A. Never diminished or went away.

3 Q. Did he ever make any other statements to you about
4 what, if anything, he had to drink that night?

5 A. No, ma'am, he did not.

6 Q. And did you have an opportunity after you asked him to
7 submit to the Intoximeter and he refused, did you ask him
8 any more questions?

9 A. I would like to address another form that I have.

10 MS. HORNSBY WELCH: If I may approach.

11 THE WITNESS: This is just a --

12 MS. HORNSBY WELCH: Hold on one second. Thank you.

13 Q. After you asked Mr. Birch to submit to the Intoximeter,
14 did you attempt at any time to go over a list of questions
15 with him?

16 A. I have a list of questions on that form that you have
17 in your hand that are generally used in a DWI case. And
18 generally the time that I do that is after doing the testing
19 there at the detention center. During this case, there was
20 no questions further answered.

21 Q. And did you attempt to ask him any?

22 A. I can't remember of any time because it's not
23 documented. My thoughts is due to the condition of his
24 attitude, there was probably no further contact.

25 Q. Was there ever another officer with you that evening?

1 A. There was.

2 Q. And who was that?

3 A. The gentleman sitting right behind you is Sergeant Tony
4 Ashe with the Franklin Police Department. He came in
5 contact with me during that night during the traffic stop.

6 Q. When did he show up?

7 A. He showed up as a backup officer after I radioed in the
8 stop. Approximately after I had made contact with the
9 driver, got his driver's license and registration card, I
10 returned to my vehicle and was starting the process of an
11 investigation, I believe is when Sergeant Ashe arrived on
12 the scene.

13 Q. Is that normal protocol for more than one officer to be
14 present during these investigations?

15 A. Normal procedure and protocol that we act and follow is
16 to have more than one officer when you suspect someone is
17 impaired and get them out of the vehicle for officer safety
18 reasons.

19 Q. And how long was Sergeant Ashe present?

20 A. From that time until the time that I placed the
21 defendant under arrest and transported him to the detention
22 center.

23 MS. HORNSBY WELCH: Those are all my questions.

24 Mr. Birch may have some.

25 THE COURT: Mr. Birch, do you wish to participate

1 in the questioning of this witness?

2 MR. BIRCH: No, sir.

3 THE COURT: You can step down.

4 **(Sergeant Tony Ashe was sworn and testified, not**
5 **transcribed.)**

6 MS. HORNSBY WELCH: That would be all, your Honor.
7 The State would rest.

8 THE COURT: All right.

9 Mr. Birch, do you wish to participate in this trial
10 by presenting evidence?

11 MR. BIRCH: I'm just going to recite the Fifth
12 Amendment and not submit any evidence against myself to
13 testify.

14 THE COURT: Thank you.

15 Members of the jury, before we proceed, I need for
16 you to step back into the jury room for just a moment. When
17 you come back, I expect we'll hear -- I will give the
18 parties a chance to give closing arguments, then I'll
19 instruct you as to the law, and then you can begin your
20 deliberations. But there are a few things I have to do
21 first. So please step back into the jury room.

22 (Whereupon, the jury exited the courtroom.)

23 THE COURT: Mr. Birch, at this time, customarily I
24 give the attorneys involved a chance to make special
25 requests for jury instructions. If you want to participate

1 in that, you're welcome. But if you don't want to, that's
2 fine. I'm just going to give the standard instructions,
3 including the one that the jury is not to consider your
4 failure to produce evidence or failure to testify as any
5 evidence against you.

6 Do you wish to respond to what I'm saying?

7 MR. BIRCH: I'd be happy to. I think that's
8 definitely appropriate for the Court, considering the Fifth
9 Article of the Amendment.

10 THE COURT: All right, sir.

11 MR. BIRCH: One other thing just in regard to
12 jurisdictional challenge and I'll let it lie, I feel that I
13 have given statements of commonly known facts which stand as
14 prima facie evidence. And, once again, I would just like to
15 point out that the State has rebutted nothing.

16 THE COURT: Yes, sir, that's correct. You're
17 correct.

18 Do you wish to make an argument to the jury?

19 MR. BIRCH: No, I do not, sir. I'll stand on my
20 special appearance.

21 THE COURT: I understand.

22 Ms. Hornsby Welch, do you wish to give an argument
23 to the jury?

24 MS. HORNSBY WELCH: Extremely brief, your Honor.

25 THE COURT: All right. Give my computer a minute

1 for the instructions to come up to make sure I have -- I
2 think I have the standard instructions from the last trial.
3 We were about to instruct the jury when things stopped.

4 MR. BIRCH: Sir, can we take a short break also for
5 the restroom?

6 THE COURT: Will five minutes be enough?

7 MR. BIRCH: Definitely.

8 THE COURT: We'll take a five-minute break.

9 (Whereupon, a recess was taken.)

10 THE COURT: Are we ready to proceed?

11 MS. HORNSBY WELCH: Yes, sir.

12 THE COURT: Mr. Birch, are you ready?

13 MR. BIRCH: (Nodding.)

14 THE COURT: We're ready for the jury to come back.

15 (Whereupon, the jury entered the courtroom.)

16 THE COURT: Members of the jury, now is the time
17 for arguments. You will hear an argument from the assistant
18 district attorney. And Mr. Birch has, because he's
19 challenging jurisdiction, he's not making closing arguments.
20 You are not to hold that against him in any way.

21 Yes, ma'am.

22 (Closing argument was given by the State.)

23 THE COURT: Members of the jury, I'm going to
24 instruct you as to the law now. It should take ten or
25 fifteen minutes, so please listen carefully.

1 Members of the jury, all the evidence has been
2 presented. It is now your duty to decide from this evidence
3 what the facts are. You must then apply the law which I'm
4 about to give you to those facts. It is absolutely
5 necessary that you understand and apply the law as I give it
6 to you and not as you think it is or as you might like it to
7 be. This is important because justice requires that
8 everyone tried for the same crime be treated in the same way
9 and have the same law applied to him or to her.

10 The defendant has entered a plea of not guilty.
11 The fact that the defendant has been charged is no evidence
12 of guilt. Under our system of justice, when a defendant
13 pleads not guilty, the defendant is not required to prove
14 his innocence. The defendant is presumed to be innocent.
15 The State must prove to you that the defendant is guilty
16 beyond a reasonable doubt.

17 A reasonable doubt is a doubt based on reason and
18 common sense arising out of some or all the evidence that
19 has been presented or lack or insufficiency of the evidence
20 as the case may be. Proof beyond a reasonable doubt is
21 proof that fully satisfies or entirely convinces you of the
22 defendant's guilt.

23 You are the sole judges of the credibility, that is
24 the believability, of each witness. You must decide for
25 yourselves whether to believe the testimony of any witness.

1 You may believe all or any part or none of what a witness
2 has said on the stand. In determining whether to believe
3 any witness, you should apply the same test of truthfulness
4 which you apply in your everyday affairs. These tests may
5 include, among other things, the opportunity of the witness
6 to see, hear, know or remember the facts or occurrences
7 about which he or she testified, the manner and appearance
8 of the witness, any interest, bias or prejudice the witness
9 may have, the apparent understanding and fairness of the
10 witness, whether the testimony is reasonable, and whether
11 the testimony is consistent with other believable evidence
12 in the case.

13 You are the sole judges of the weight to be given
14 any evidence. By this I mean if you decide that certain
15 evidence is believable, you must then determine the
16 importance of that evidence in light of all other believable
17 evidence in the case.

18 The defendant in this case has not testified. The
19 law gives the defendant this privilege. This same law also
20 assures the defendant that this decision not to testify
21 creates no presumption against the defendant. Therefore,
22 the silence of the defendant is not to influence your
23 decision in any way.

24 The defendant has been charged with impaired
25 driving. For you to find the defendant guilty of this

1 offense, the State must prove three things beyond a
2 reasonable doubt. First, that the defendant was driving a
3 vehicle. Second, that the defendant was driving that
4 vehicle upon a highway or street within the State. And
5 third, that at the time the defendant was driving that
6 vehicle, the defendant was under the influence of an
7 impairing substance. Alcohol is an impairing substance.

8 The defendant is under the influence of an
9 impairing substance when the defendant has consumed a
10 sufficient quantity of that impairing substance to cause the
11 defendant to lose the normal control of the defendant's
12 bodily or mental faculties, or both, to such an extent that
13 there is an appreciable impairment of either or both of
14 these faculties.

15 If the evidence tends to show that a chemical test
16 known as an Intoxilyzer or Breathalyzer was offered to the
17 defendant by law enforcement officers and that the defendant
18 refused to take the test, or that the defendant refused to
19 perform a field sobriety test at the request of an officer,
20 you may consider this evidence together with all other
21 evidence in determining whether the defendant was under the
22 influence of an impairing substance at the time the
23 defendant allegedly drove a motor vehicle.

24 If you find from the evidence beyond a reasonable
25 doubt that on or about the alleged date the defendant drove

1 a vehicle on a highway or street in this state, and that
2 when doing so, the defendant was under the influence of an
3 impairing substance, it would be your duty to return a
4 verdict of guilty. If you do not so find or have a
5 reasonable doubt as to one or more of these things, it would
6 be your duty to return a verdict of not guilty.

7 Members of the jury, you have heard the evidence.
8 If your recollection of the evidence differs from that what
9 the district attorney argued to you in her argument, you are
10 to rely solely on your recollection. Your duty is to recall
11 the evidence whether called to your attention or not. You
12 should consider all the evidence and any other contention
13 that arises from the evidence, and using your common sense,
14 you must determine the truth in this case.

15 The law requires the presiding judge to be
16 impartial. You should not assume from any statement I have
17 made that any of the evidence is to be believed or
18 disbelieved, that a fact has been proved or not or what your
19 findings ought to be. Your decision doesn't make any
20 difference to me. It is your duty to find the facts and to
21 render a verdict reflecting the truth.

22 You must be unanimous in your decision. All 12 of
23 you must agree. When you have agreed upon a unanimous
24 verdict, your foreperson may so indicate on the verdict
25 form. The verdict form is really simple. It's got the

1 heading. It says "We, the Jury, unanimously find the
2 Defendant, Isaac Hutchison Birch, as follows," and if the
3 State has proven all the elements beyond a reasonable doubt,
4 then you can check "guilty of driving while impaired." If
5 the State has not proven all the elements beyond a
6 reasonable doubt, then you check "not guilty." Then your
7 foreperson dates and signs it.

8 After I send you back to the jury room, your first
9 order of business is to select your foreperson. You may
10 begin your deliberations when the bailiff delivers this
11 verdict form to you. Your foreperson should lead the
12 deliberations. When you have unanimously agreed upon a
13 verdict and are ready to announce it, your foreperson should
14 record the verdict, sign and date the verdict form and knock
15 on the jury room door, and you will be returned to the
16 courtroom to announce your verdict.

17 You may now go to the jury room and select your
18 foreperson.

19 (Whereupon, the jury exited the courtroom.)

20 THE COURT: I'll now hear any objection to the jury
21 instructions.

22 MS. HORNSBY WELCH: No, sir.

23 THE COURT: Do you wish to participate in that,
24 sir?

25 MR. BIRCH: The only thing I would comment on is I

1 would have been comfortable with you actually citing the
2 Fifth Article of the Amendment of the Constitution of the
3 United States of America.

4 THE COURT: Yes, sir, I understand. Your objection
5 is overruled.

6 I'm going to hand the verdict sheet to our court
7 officer, and it will be delivered to the jurors. And we can
8 be at ease until we hear back from the jurors.

9 (Whereupon, a recess was taken.)

10 - - -

11 THE COURT: Please bring the jury in.

12 Sir, you don't have to stand if you don't want to.

13 (Whereupon, the jury entered the courtroom.)

14 THE COURT: Will the foreperson of the jury please
15 stand.

16 Ma'am, for the record, will you please state your
17 name.

18 JUROR NO. 4: Kathryn Crane.

19 THE COURT: Thank you.

20 I'm not asking you what the jury decided, but I am
21 asking you: Has the jury reached a unanimous verdict?

22 JUROR NO. 4: Yes, they have.

23 THE COURT: Please hand that sheet to our court
24 officer.

25 THE CLERK: Will you please stand.

1 Members of the jury, in the case of the State of
2 North Carolina versus Isaac Hutchison Birch, case 10 CRS
3 50329, you have returned the following verdict:

4 We, the Jury, unanimously find the Defendant guilty
5 of driving while impaired.

6 Is this your verdict, so say all of you?

7 THE COURT: Members of the jury, thank you for your
8 service this week, and your service is now complete. I
9 think you need to leave the jurors' tags here, and you are
10 free to go. Thank you.

11 (Whereupon, the jury exited the courtroom.)

12 THE COURT: Does the State have a driving record to
13 present?

14 MS. HORNSBY WELCH: Yes, sir, if I may approach.

15 There are no prior convictions for driving while
16 impaired. It's just speeding tickets.

17 THE COURT: All right.

18 MR. BIRCH: Sir, I have a question, if you would.

19 THE COURT: Yes.

20 MR. BIRCH: I'm not a hundred percent, but under
21 North Carolina General Statute 20-179, I believe there are
22 mitigating factors in regard to the jury's decision and a
23 special appearance to jurisdictional challenge and the Court
24 continuing to proceed without jurisdiction being established
25 on the record. So, to my understanding, the actual -- I

1 guess the conviction hearing would be ten days out; is that
2 correct?

3 THE COURT: I'll go over some of that in a moment.
4 First I want to look at your driving record.

5 I don't see any -- I need to look at it carefully
6 for a moment.

7 I don't see any four-point offenses. It appears
8 you have a safe driving record, which is a mitigating
9 factor.

10 Would you wish to present any other mitigating
11 factors on your behalf, or would you rather not participate
12 in that?

13 MR. BIRCH: I would say the mitigating factor is
14 the State hasn't established jurisdiction on the record.

15 THE COURT: All right. Is there anything else you
16 wish to say before I enter a judgment?

17 MR. BIRCH: Well, I think I'm a little confused as
18 far as the judgment and sentencing. Are these two separate
19 things?

20 THE COURT: In this case they're about the same
21 thing, yes.

22 MR. BIRCH: So isn't the actual judgment a
23 sentencing hearing that's supposed to be ten days out in
24 regards to that?

25 THE COURT: Sometimes they can be on different

1 dates, sir, but, no, sentencing will be right now.

2 MR. BIRCH: Oh, it can be?

3 THE COURT: Yes.

4 MR. BIRCH: I guess I misread what I read.

5 THE COURT: You may have been looking at a ten-day
6 window to appeal in some matters, I don't know.

7 MR. BIRCH: I understand the ten-day window to
8 appeal. What I'm speaking in reference to is 20-179 of the
9 North Carolina General Statutes.

10 THE COURT: Sir, if you would like to read that
11 statute, I'll hear from you.

12 MR. BIRCH: Unfortunately, I don't have it with me,
13 nor do I have a copy of the annotated code. Kind of
14 expensive.

15 THE COURT: I understand.

16 I find there are no grossly aggravating factors.
17 There are no aggravating factors. I find as a mitigating
18 factor that Mr. Birch does have a safe diving record. That
19 would be No. 4 under the mitigating factors.

20 Under determination, this is a Level V offense. It
21 is a No. 4 under the determination. Sir, it's ordered that
22 you be imprisoned for a minimum term of 60 days and a
23 maximum term of 60 days in the custody of the Sheriff of
24 Macon County. This sentence is suspended and you are placed
25 on unsupervised probation for 12 months.

1 You are to pay a fine of \$100 and the court costs
2 and the community service fee. You are to obtain a
3 substance abuse assessment and comply with all recommended
4 education or treatment. Your privilege to drive is now
5 revoked. You are to complete 24 hours of community service
6 within 30 days. I think that's all.

7 Have I missed anything, Madam Clerk? I don't do
8 DWIs much anymore.

9 THE CLERK: No, sir.

10 THE COURT: All right. Anything else from the
11 State?

12 MS. HORNSBY WELCH: No, sir.

13 THE COURT: Sir, do you wish to give notice of
14 appeal?

15 MR. BIRCH: Yes.

16 THE COURT: All right. You can appeal. You can
17 remain on the same bond that you're on now, but I need to go
18 over one more thing, a couple of things.

19 During your appeal, you have the right to be
20 represented by an attorney. If you cannot afford to hire
21 your own attorney, you can apply to have an appellate
22 attorney appointed to represent you. I'm not asking you to
23 sign anything right now, but I need to know your intentions.
24 Things have to be done for the appeal. They aren't done by
25 themselves. The Court of Appeals isn't going to call you up

1 one day and say, "Come down here and argue." The transcript
2 has to be ordered and paid for. The record on appeal has to
3 be prepared.

4 I never did do much appellate work, but I know this
5 much about it. There may be briefs. There may not be
6 briefs. There may be oral argument. There may not be oral
7 argument. It's really complicated.

8 Do you plan to represent yourself, hire an attorney
9 or apply for an appointed attorney?

10 MR. BIRCH: I'm sorry?

11 THE COURT: Do you wish to represent yourself on
12 the appeal?

13 MR. BIRCH: I'll deal with those issues later, sir.

14 THE COURT: So you're not asking to be appointed an
15 appellate attorney?

16 MR. BIRCH: No, I am not.

17 THE COURT: All right.

18 Anything else from the State?

19 MS. HORNSBY WELCH: No, sir.

20 THE COURT: Mr. Birch, anything else?

21 MR. BIRCH: Well, I would really like some further
22 explanation in regard to the Court's decision to ignore due
23 process in regard to the jurisdictional challenge.

24 THE COURT: Sir, I have overruled your objection I
25 think at least three times, maybe four.

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You can argue at the Court of Appeals.

(Whereupon, the proceedings were concluded
at 12:18 p.m.)

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF MACON)

I, DIANE L. THOMMES, the officer before whom the foregoing proceeding was taken, do hereby certify that said proceeding, pages 26 through 77, inclusive, is a true and correct and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

Diane L. Thommes, CSR, RPR
Certified Realtime Reporter
Official Reporter

1 STATE OF NORTH CAROLINA
2 COUNTY OF MACON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 10 CRS 050329

3 -----
4 STATE OF NORTH CAROLINA

CERTIFICATE

5 VS.

OF

6 ISAAC HUTCHISON BIRCH

DELIVERY

7 -----
8 This is to certify that the transcript
9 proceedings held on September 30, 2010 in the above-entitled
10 case was requested on the 28th day of October, 2010, and was
11 delivered and/or mailed to the attorney(s) of record as
12 indicated below on the 26th day of December, 2010.

13
14
15 _____
16 Diane L. Thommes, CSR, RPR
17 Certified Realtime Reporter
18 Official Reporter
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20 Cashiers, North Carolina 28717
21 (828) 743-2925

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