Criminal Procedure

Counsel Issues

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). Because defense counsel admitted the defendant's guilt to assault with a deadly weapon and involuntary manslaughter to the jury without obtaining the defendant's express consent, counsel was per se ineffective under *State v. Harbison*, 315 N.C. 175 (1985). A majority of the panel distinguished the United States Supreme Court's holding in *Florida v. Nixon*, 543 U.S. 175 (2004) (under federal law, when the defendant alleges ineffective assistance due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), on grounds that *Nixon* was a capital case and the case before the court was non-capital. The majority further concluded that post-*Nixon* decisions by the North Carolina Supreme Court and the court of appeals required it to apply the *Harbison* rule.

State v. Covington, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091291-1.pdf). The trial court did not abuse its discretion by denying the defendant's request for substitute counsel where there was no evidence that the defendant's constitutional right to counsel was violated. The defendant waived the right to appointed counsel and retained an attorney. The day after the jury was impaneled for trial the defendant requested substitute counsel, asserting that counsel had not communicated enough with him, that the defendant was unaware the case would be tried that day, and that he had concerns about counsel's strategy, particularly counsel's advice that the defendant not testify. None of these concerns constituted a violation of the defendant's constitutional right to counsel.

Indictment Issues

Possession of Weapons on School Grounds

In Re J.C., __ N.C. App. __, __ S.E. 2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). A juvenile petition sufficiently alleged that the juvenile was delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The petition alleged that the juvenile possessed an "other weapon," specified as a "steel link from chain." The evidence showed that the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed with a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide his fingers through the link so that 3-4 inches of the bar could be held securely across his knuckles and used as a weapon. Finding the petition sufficient the court stated: "the item . . . is sufficiently equivalent to what the General Assembly intended to be recognized as 'metallic knuckles' under [the statute]."

Jury Instructions

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). In a case involving a charge of possession of implements of housebreaking, the trial court erred by instructing the jury that bolt cutters, vice grips, channel lock pliers, flashlights, screwdrivers, a hacksaw, and a ratchet and socket are

implements of housebreaking. The instruction was tantamount to a peremptory instruction that the tools at issue were implements of housebreaking. However, the error was not plain error.

Sentencing

Merger Rule

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court erred by consolidating for judgment convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it had found the defendant guilty of first-degree murder based on premeditation and deliberation or on felony-murder. In this situation, the robbery merged with the murder.

Prior Record Level

State v. Fair, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091381-1.pdf). On appeal, a defendant is bound by his or her stipulation to the existence of a prior conviction. However, even if a defendant has stipulated to his or her prior record level, the defendant still may appeal the propriety of counting a stipulated-to conviction for purposes of calculating prior record level points. In this case, the trial court erred by counting, for prior record level purposes, two convictions in a single week of court in violation of G.S. 15A-1340.14(d).

Active Sentence

State v. Miller, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091193-1.pdf). Under the Structured Sentencing Act a trial judge does not have authority to allow a defendant to serve an active sentence on nonconsecutive days, such as on weekends only.

Restitution

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the restitution award was not supported by competent evidence. Restitution must be supported by evidence adduced at trial or at sentencing; the unsworn statement of the prosecutor is insufficient to support restitution. In this case, the trial court ordered the defendant to pay $8,277.00 in restitution based on an unverified worksheet submitted by the State. However, the evidence at trial showed that the value of the stolen items was $1,200.00 - $1,400.00.

Evidence

Photographs of the Victim's Body

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The

trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

Prior Bad Acts

State v. Blymyer, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091722-1.pdf). In a murder and armed robbery case, the trial court did not commit plain error by admitting 404(b) evidence that the defendant broke into and stole from two houses near the time of the victim's death. The evidence was relevant to illustrate the defendant's motive for stealing from the victim—to support an addiction to prescription pain killers.

Hearsay

State v. McLean, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091602-1.pdf). Information in a police department database linking the defendant's name to her photograph fell within the Rule 803(8) public records hearsay exception. After an undercover officer engaged in a drug buy from the defendant, he selected the defendant's photograph from an array presented to him by a fellow officer. The fellow officer then cross-referenced the photograph in the database and determined that the person identified was the defendant. This evidence was admitted at trial. The court noted that although the Rule 803(8) exception excludes matters observed by officers and other law enforcement personnel regarding a crime scene or apprehension of the accused, it allows for admission of public records of purely ministerial observations, such as fingerprinting and photographing a suspect, and cataloguing a judgment and sentence. The court concluded that the photographs in the police department's database were taken and compiled as a routine procedure following an arrest and were not indicative of anything more than that the person photographed has been arrested. It concluded: "photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation."

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court held that the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Those items were use to establish the value of the motor vehicles stolen.

Opinions

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). It was error to allow officers, who were not proffered as experts in accident reconstruction and who did not witness the car accident in question, to testify to their opinions that the defendant was at fault based on their examination of the accident scene. The court stated: "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." However, the court went on to find that the error did not rise to the level of plain error.

Miscellaneous Evidence Issues

Owner's Testimony of Value of Stolen Items

State v. Dallas, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090644-1.pdf). In a larceny of motor vehicle case, the court rejected the defendant's argument that testimony by the vehicle owners regarding the value of the stolen vehicles invaded the province of the jury as fact-finder, stating: "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner."

Arrest, Search, and Investigation

Miranda Issues

In Re L.I., __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091306-1.pdf). A juvenile's statement, made while in custody, was the product interrogation and not a voluntary, spontaneous statement. The trial court thus erred by denying the juvenile's motion to suppress the statement, since the juvenile had not advised her of her rights under *Miranda* and G.S. 7B-2101(a). The juvenile was a passenger in a vehicle stopped by an officer. When the officer ordered the juvenile out of the vehicle, he asked, "[Where is] the marijuana I know you have[?]" After handcuffing and placing juvenile in the back of the patrol car, the officer told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." The juvenile later told the officer that she had marijuana and that it was in her coat pocket. The court went on to hold that the trial judge did not err by admitting the seized marijuana. Rejecting the juvenile's argument that the contraband must be excluded as fruit of the poisonous tree, the court concluded that because there was no coercion, the exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation. Although the juvenile was in custody at the time of her statement and her *Miranda* rights were violated, the court found no coercion, noting that there was no evidence that the juvenile was deceived, held incommunicado, threatened or intimidated, promised anything, or interrogated for an unreasonable period of time; nor was there evidence that the juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation.

Vehicle Stops

State v. Hopper, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091211-1.pdf). The trial court properly

concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court's conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop.

Criminal Offenses

Assaults

State v. Maready, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/070171-2.pdf). The trial judge committed prejudicial error with respect to its instruction on the intent element for the charges of assault with a deadly weapon, in a case in which a vehicle was the deadly weapon. In order for a jury to convict of assault with a deadly weapon, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. Because the trial court's instruction erroneously could have allowed the jury to convict without a finding of either actual intent or culpable negligence, reversible error occurred.

Burglary and Trespass

State v. Owens, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091441-1.pdf). First-degree trespass is a lesser included offense of felony breaking or entering.

Failure to Appear

State v. Goble, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091192-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of felony failure to appear. To survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence that (1) the defendant was released on bail pursuant to G.S. Article 26 in connection with a felony charge or, pursuant to section G.S. 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. In this case, the defendant signed an Appearance Bond for Pretrial Release which included the condition that the defendant appear in the action whenever required. The defendant subsequently failed to appear on the second day of trial. The court further held that the defendant, who failed to appear on felony charges, was not entitled to an instruction on misdemeanor failure to appear even though the felony charges resulted in misdemeanor convictions.

Possession of Weapons on School Grounds

In Re J.C., __ N.C. App. __, __ S.E. 2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100031-1.pdf). The evidence was sufficient to support the court's adjudication of a juvenile as delinquent for possession of a weapon on

school grounds in violation of G.S. 14-269.2(d). The evidence showed that while on school grounds the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed by tightening a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide several fingers through the link so that 3-4 inches of the 3/8-inch thick bar could be held securely across his knuckles and used as a weapon.

Motor Vehicle Offenses

State v. Hopper, __ N.C. App. __, __ S.E.2d __ (July 6, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091211-1.pdf). For purposes of the traffic violation at issue, failure to activate taillights under G.S. 20-129, the term highway is defined by G.S. 20-4.01(13), not case law decided before enactment of that provision.