

Criminal Procedure Appeal

State v. Miller, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090927-1.pdf>). The court held that it did not have jurisdiction to hear the defendant's appeal. Although the defendant gave notice of intent to appeal the trial court's adverse ruling on his motion to suppress, he failed to appeal from the judgment of conviction, entered after a guilty plea.

Clerical Errors

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf>). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number.

Counsel Issues

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100051-1.pdf>). Defendant's forfeiture of his right to counsel did not carry over to his resentencing, held after a successful appeal. To determine the life of a forfeiture of counsel the court adopted the standard for life of a waiver of counsel (a waiver is good and sufficient until the proceedings are terminated or the defendant makes it known that he or she desires to withdraw the waiver). Applying this standard, the court found that "a break in the period of forfeiture occurred" when the defendant accepted the appointment of counsel (the Appellate Defender) for the appeal of his initial conviction. The court noted in dicta that the defendant's statement at resentencing that he did not want to be represented and his refusal to sign a written waiver did not constitute a new forfeiture. Because the initial forfeiture did not carry through to the resentencing and because the trial judge did not procure a waiver of counsel under G.S. 15A-1242 at the resentencing, the defendant's right to counsel was violated.

Discovery

State v. Ellis, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090869-1.pdf>). The trial court did not abuse its discretion by denying the defendant's motion to continue because of the State's alleged discovery violation. Although the State provided the defendant with a copy the robbery victim's pre-trial written statement and a composite sketch of the perpetrator based on the victim's description, the defendant argued that the State violated its continuing duty to disclose by failing to inform the defense of the victim's statement, made on the morning of trial, that she recognized the defendant as the robber when he entered in the courtroom. After the victim identified the defendant as the perpetrator, the defense moved to continue to obtain an eyewitness identification expert. Finding no abuse of discretion, the court relied, in part, on the timing of the events and that the defendant could have anticipated that the victim would be able to identify the defendant.

Guilty Pleas

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf>). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error that did not invalidate a plea to obtaining property by false pretenses where the plea was taken in compliance with G.S. 15A-1022

and the body of the form referenced the correct file number. The incorrect file number related to an armed robbery charge against the defendant.

Indictment Issues

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf>). There was no fatal variance between a forgery indictment and the evidence presented at trial. The indictment charged the defendant with forgery of “an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION.” The evidence showed that the defendant, who was not a law enforcement officer, issued citations to several individuals. The court rejected the defendant’s arguments that the citations were not “orders” and were not “drawn on a government unit” because he worked for a private police entity.

Interpreters

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf>). The court rejected the defendant’s claim that inadequacies with his trial interpreters violated his constitutional rights. The court held that because the defendant did not challenge the adequacy of the interpreters at trial, the issue was waived on appeal and that plain error review did not apply. The court further held that because the defendant selected the interpreters, he could not complain about their adequacy. Finally, the court concluded that the record did not reveal inadequacies, given the interpreters’ limited role and the lack of translation difficulties.

Joinder

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf>). The trial court did not err by joining charges of impersonating a law enforcement officer and felony forgery that occurred in March 2006 with charges of impersonating a law enforcement officer that occurred in April 2006. The offenses occurred approximately one month apart. Additionally, on both occasions the defendant acted as a law enforcement officer (interrogating individuals and writing citations for underage drinking), notified the minors’ family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to family members. His actions evidence a scheme or plan to act under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors.

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf>). The trial court did not abuse its discretion by joining charges of felony assault with a deadly weapon and possession of stolen firearms. There was a sufficient transactional connection (a firearm that was the basis of the firearm charge was used in the assault) and joinder did not prejudicially hinder the defendant’s ability to receive a fair trial.

Motion to Dismiss

State v. Pastuer, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091432-1.pdf>). The trial court erred by denying the defendant’s motion to dismiss a charge alleging that he murdered his wife. The State’s case was based entirely on circumstantial evidence. Distinguishing *State v. Lowry*, __ N.C. App. __, 679 S.E.2d 865 (2009) (evidence showing both motive and opportunity was sufficient to survive a motion to

dismiss), and another case, the court held that although the State may have introduced sufficient evidence of motive, evidence of the defendant's opportunity and ability to commit the crime was insufficient to show that he was the perpetrator. No evidence put the defendant at the scene. Although a trail of footprints bearing the victim's blood was found at her home and her blood was found on the bottom of one of the defendant's shoes, the State failed to present substantial evidence that the victim's DNA could only have gotten on the defendant's shoe at the time of the murder. Evidence that the defendant was seen walking down a highway sometime around the victim's disappearance and that her body was later found in the vicinity did not supply substantial evidence that he was the perpetrator.

Jury Selection

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf>). In an impaired driving case, the trial court did not abuse its discretion by allowing the State's challenge for cause of a juror while denying a defense challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defense was employed with a local university police department as a traffic officer. He had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

Jury Argument

State v. Mills, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091144-1.pdf>). The trial court did not abuse its discretion by denying the defendant's mistrial motion based on the prosecutor's closing statement. During closing arguments in this murder case, defense counsel stated that "a murder occurred" at the scene in question. In his own closing, the prosecutor stated that he agreed with this statement by defense counsel. Although finding no abuse of discretion, the court "remind[ed] the prosecutor that the State's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf>). The trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error. Reversed for a new trial.

Jury Instructions

State v. Haire, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf>). The trial court did not abuse its discretion by declining to provide the jury with a written copy of the jury instructions when asked to do so by the jury.

Sentencing

State v. Pinkerton, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090654-1.pdf>). Over a dissent, the court held that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty."

Prayer for Judgment Continued

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf>). The court had jurisdiction to enter judgment on a PJC. The defendant was indicted on August 7, 2006, and entered a guilty plea on January 22, 2007, when a PJC was entered, from term to term. Judgment was entered on March 13, 2009. Because the defendant never requested sentencing, he consented to continuation of sentencing and the two-year delay was not unreasonable.

Sex Offender Registration and Monitoring

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091263-1.pdf>). A conviction for abduction of a child under G.S. 14-41 triggers registration requirements if the offense is committed against a minor and the person committing the offense is not the minor's parent. The court held that as used in G.S. 14-208.6(1i), the term parent includes only a biological or adoptive parent, not one who "acts as a parent" or is a stepparent.

Evidence

Rule 401 (Relevance)

State v. Peterson, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090365-1.pdf>). Evidence of events leading up to the assault in question was relevant to complete the story of the crime.

404(b) Evidence

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf>). In an armed robbery case, evidence of the defendant's involvement in another robbery was properly admitted under Rule 404(b). In both instances, the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by the defendant to purchase gas at the same gas station within a very short period of time. The evidence was admissible to prove a common plan or scheme and identity. The court further held that the trial court did not abuse its discretion by failing to exclude the evidence under Rule 403.

Crawford Issues

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf>). Following *State v. Brewington*, __ N.C. App. __ (May 18, 2010) (trial court committed reversible error by allowing a substitute analyst to testify to an opinion that a substance was cocaine), the court held that the defendant's

confrontation clause rights were violated when the trial court allowed a substitute analyst to testify that a substance was cocaine, based on testing done and reports prepared by non-testifying analysts. Even though the State had offered lay testimony by a cocaine user that the substance was cocaine, the court concluded that the error was not harmless beyond a reasonable doubt, reasoning that a lay opinion would not have the same effect on the jury as an expert opinion.

Admissibility of Chemical Test Results in an Impaired Driving Case

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf>). The trial court did not err by denying the defendant's motion to suppress the results of the chemical analysis performed on the defendant's breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant's argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the analysis at issue was done only 23 days after the December maintenance.

Arrest, Search & Investigation Consent Search

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf>). A warrantless search of the defendant's car was valid on grounds of consent. The court rejected the defendant's argument that his consent was invalid because the officer who procured it was not fluent in Spanish. The court noted that the defendant was non-responsive to initial questions posed in English, but that he responded when spoken to in Spanish. The officer asked simple questions about weapons or drugs and when he gestured to the car and asked to "look," the defendant nodded in the affirmative. Although not fluent in Spanish, the officer had Spanish instruction in high school and college and the two conversed entirely in Spanish for periods of up to 30 minutes. The officer asked open ended-questions which the defendant answered appropriately. The defendant never indicated that he did not understand a question. The court also rejected the defendant's argument that his consent was invalid because the officer wore a sidearm while seeking the consent, concluding that the mere presence of a holstered sidearm does not render consent involuntary.

Exigent Circumstances

State v. Cline, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100007-1.pdf>). Exigent circumstances existed for an officer to make a warrantless entry into the defendant's home to ascertain whether someone inside was in need of immediate assistance or under threat of serious injury. The officer was summoned after motorists discovered a young, naked, unattended toddler on the side of a major highway. The officer was able to determine that the child was the defendant's son with reasonable certainty and that the defendant resided at the premises in question. When the officer knocked and banged on front door, he received no response. The officer found the back door ajar. It would have taken the officer approximately two hours to get a search warrant for the premises.

Miranda Issues

State v. Medina, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100071-1.pdf>). The defendant's waiver of

Miranda rights was valid where *Miranda* warnings were given by an officer who was not fluent in Spanish. The officer communicated effectively with the defendant in Spanish, notwithstanding the lack of fluency. The defendant gave clear, logical, and appropriate responses to questions. Also, when the officer informed the defendant of his *Miranda* rights, he did not translate English to Spanish but rather read aloud the Spanish version of the waiver of rights form. Even if the defendant did not understand the officer, the defendant read each right, written in Spanish, initialed next to each right, and signed the form indicating that he understood his rights. The court noted that officers are not required to orally apprise a defendant of *Miranda* rights to effectuate a valid waiver.

State v. Mohamed, __ N.C. App. __, __ S.E.2d __ (July 20, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090943-1.pdf>). The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant's ability to comply with an officer's instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf>). The trial court did not err by denying the defendant's motion to suppress where, although the defendant initially invoked his *Miranda* right to counsel during a custodial interrogation, he later reinitiated conversation with the officer. The defendant was not under the influence of impairing substances, no promises or threats were made to him, and the defendant was again fully advised of and waived his *Miranda* rights before he made the statement at issue.

Vehicle Stops Based on Reasonable Suspicion

State v. Simmons, __ N.C. App. __, __ S.E.2d __ (July 20, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090862-1.pdf>). Distinguishing *State v. Fields* __ N.C. App. __, (Mar. 17, 2009) (no reasonable suspicion for a stop where an officer saw the vehicle swerve to the white line three times), the court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

Criminal Offenses

Robbery & Possession of Stolen Property

State v. Moses, __ N.C. App. __, __ S.E.2d __ (July 20, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091468-1.pdf>). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

Drug Crimes

State v. Craven, __ N.C. App. __, __ S.E.2d __ (July 20, 2010)

(<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091138-1.pdf>). The trial court did not err by denying the defendant's motion to dismiss where the evidence was sufficient to establish that the

defendant had possession of cocaine in his mother's vehicle over a duration of time and/or on more than one occasion.

Forgery

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf>). There was sufficient evidence of forgery under G.S. 14-119 when the evidence showed that the defendant signed a law enforcement officer's name on five North Carolina Uniform Citations.

Impersonating An Officer

State v. Guarascio, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090883-1.pdf>). The trial court erred in its jury instructions for the crime of impersonating an officer under G.S. 14-277(b). The court noted that while G.S. 14-277(a) makes it a crime for an individual to make a false representation to another person that he is a sworn law enforcement officer, G.S. 14-277(b) makes it a crime for an individual, while falsely representing to another that he is a sworn law enforcement officer, to carry out any act in accordance with the authority granted to a law enforcement officer. Accordingly, the court concluded, a charge under G.S. 14-277(b) includes all of the elements of a charge under G.S. 14-277(a). The court further concluded that while NCPJI – Crim. 230.70 correctly charges an offense under G.S. 14-277(a), NCPJI – Criminal 230.75 “inadequately guides the trial court regarding the elements of [an offense under G.S. 14-277(b)] . . . by omitting from the instruction the ways enumerated in [G.S. 14-277(a)] and N.C.P.I. – Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer.” The trial court's instructions based on this pattern instruction were error, however the error was harmless.

Defenses

State v. Haire, __ N.C. App. __, __ S.E.2d __ (July 20, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100037-1.pdf>). No error, much less plain error, occurred when the trial judge gave a self defense instruction based on NCPJI – Crim. 308.45. Although the court found the wording of the pattern instruction confusing as to burden of proof on self defense, it concluded that the trial court properly edited the pattern instruction by repeatedly telling the jury that the State had the burden of proving beyond a reasonable doubt that defendant's actions were not in self-defense.