Criminal Procedure

Appeal

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). Where the defendant's motion to suppress raised only lack of reasonable suspicion for the stop, the defendant failed to preserve other grounds for suppression raised on appeal.

State v. Wray, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090304-1.pdf). The court held that it had jurisdiction to consider the defendant's appeal of a trial court's ruling that he had forfeited his right to counsel, notwithstanding his failure to timely object to the trial court's order.

State v. Hargrove, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081538-1.pdf). Because the defendant failed to object to the declaration of a mistrial in his noncapital case, he failed to preserve his double jeopardy claim.

In Re R.N., __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091406-1.pdf). In an appeal from a delinquency adjudication based on a charge of crime against nature, the court held that defects in the transcript made review impossible and remanded for reconstruction of the record. One count alleged that the juvenile put his penis in the victim's mouth. At trial, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the delinquency adjudication and remanded for reconstruction of a record regarding the social worker's testimony.

Counsel Issues

Forfeiture of the Right to Counsel

State v. Wray, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090304-1.pdf). The trial court erred by ruling that the defendant forfeited his right to counsel. The defendant's first lawyer was allowed to withdraw because of a breakdown in the attorney-client relationship. His second lawyer withdrew on grounds of conflict of interest. The defendant's third lawyer was allowed to withdraw after the defendant complained that counsel had not promptly visited him and had "talked hateful" to his wife and after counsel reported that the defendant accused him of conspiring with the prosecutor and contradicted everything the lawyer said. The trial court appointed Mr. Ditz and warned the defendant that failure to cooperate with Ditz would result in a forfeiture of the right to counsel. After the defendant indicated that he did not want to be represented by Ditz, the trial court explained that the defendant either could accept representation by Ditz or proceed pro se. The defendant rejected these choices and asked for new counsel. When Ditz subsequently moved to withdraw, the trial court allowed the motion and found that

the defendant had forfeited his right to counsel. On appeal, the court recognized "a presumption against the casual forfeiture" of constitutional rights and noted that forfeiture should be restricted cases of "severe misconduct." The court held that the record did not support the trial court's finding of forfeiture because: (1) it suggested that while the defendant was competent to be tried, under *Indiana v. Edwards*, 554 U.S. 164 (2008), he may have lacked the capacity to represent himself; (2) Ditz had represented the defendant in prior cases without problem; (3) the record did not establish serious misconduct required to support a forfeiture (the court noted that there was no evidence that the defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate); (4) evidence of the defendant's misbehavior created doubt as to his competence; and (5) the defendant was given no opportunity to be heard or participate in the forfeiture hearing.

Conflict of Interest

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Over a dissent, the court held that the trial court did not err by failing to conduct an evidentiary hearing concerning defense counsel's possible conflict of interest due to prior representation, in unrelated matters, of a person who appeared in a crime scene videotape. When the prosecutor brought the matter to the trial court's attention, the trial court conducted a hearing and fully advised the defendant of the facts underlying the potential conflict and gave him the opportunity to express his views. In light of this, the court held that the defendant waived any possible conflict of interest. The dissenting judge believed that the trial court's inquiry did not fully inform the defendant of the potential conflict of interest and that the defendant's waiver was not knowing, intelligent, and voluntary.

Double Jeopardy

State v. Hargrove, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081538-1.pdf). Because the defendant failed to object to the declaration of a mistrial in his noncapital case, he failed to preserve his double jeopardy claim.

DWI Procedure

Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090370-2.pdf). After a rehearing, the court issued a new opinion, over a dissent, superseding and replacing its prior opinion. *See* Lee v. Gore, __ N.C. App. __, __ S.E.2d __ (Jan. 19, 2010). The court rejected the DMV's implicit argument that a suspension of driving privileges can occur based on a refusal to submit to chemical analysis in the absence of willfulness. As in its prior decision, the court held that form DHHS 3908 is not a substitute for a properly executed affidavit required by G.S. 20-16.2(c1). The court noted that form DHHS 3908 or other relevant documents may be attached to a properly executed affidavit but held "that the affidavit, in whatever form submitted, must indicate that a person's refusal to submit to chemical analysis was willful." Because the officer here testified that he did not check the box indicating that there was a willful refusal before

executing the affidavit, the requirements of G.S. 20-16.2(c1) were not satisfied. Construing G.S. 20-16.2, the court held that before the DMV can revoke a person's driving privileges, it must receive a properly executed affidavit that meets all of the requirements in G.S. 20-16.2(c1). Given this, the DMV had no authority to revoke the Petitioner's license and there was no authority for a DMV review hearing or appellate review in the superior court. The court remanded for reinstatement of the Petitioner's driving privileges.

Jury Instructions – Alibi

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). In a murder case, the trial court did not err by denying the defendant's request for an alibi instruction. The alibi defense rested on the defendant's testimony that he did not injure the child victim and that he left the child unattended in a bathtub for an extended period of time while meeting with someone else. The court concluded that this testimony was merely incidental to the defendant's denial that he harmed the child and did not warrant an alibi instruction. The testimony did not show that the defendant was somewhere which would have made it impossible for him to have been the perpetrator, given that the precise timing of the incident was not determined and the defendant had exclusive custody of the child before his death.

Motion to Dismiss

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense. The evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.

Sentencing

Mitigating Factors

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The trial court did not abuse its discretion by failing to find mitigating factors. As to acceptance of responsibility, the court found that although the defendant apologized for her actions, her statement did not lead to the "sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct." Although defense counsel argued other mitigating factors, no supporting evidence was presented to establish them. Finally, although the defendant alleged that a drug addiction compelled her to commit the offenses, the court noted that drug addiction is not *per se* a statutorily enumerated mitigating factor and in any event, the defendant did not present any evidence on this issue at sentencing.

Restitution

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091589-1.pdf). The evidence was insufficient to support a restitution award. The State conceded that it did not introduce evidence to support the restitution request. However, it argued that the defendant stipulated to the amount of restitution when she stipulated to the factual basis for the plea and that the specific amounts of restitution owed were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. The court rejected these arguments, concluding that a restitution worksheet, unsupported by testimony or documentation, cannot support a restitution order and that the defendant did not stipulate to the amounts awarded.

Use of Defendant's Silence at Trial

State v. Mendoza, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090327-1.pdf). The trial court erred by allowing the State to introduce evidence, during its case in chief, of the defendant's pre-arrest and post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment; since the defendant had not yet testified when the State presented the evidence, the testimony could not have been used for that purpose. Also, the State's use of the defendant's post-arrest, post-*Miranda* warnings silence was forbidden for any purpose. However, the court concluded that there was no plain error given the substantial evidence pointing to guilt.

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The trial court did not improperly allow use of the defendant's post-arrest silence when it allowed the State to impeach him with his failure to provide information about an alleged meeting with a drug dealer. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with the dealer. The defendant's pre-trial statements to the police never mentioned the meeting. The court held that because the defendant waived his rights and made pre-trial statements to the police, the case did not involve the use of post-arrest silence for impeachment. Rather, it involved only the evidentiary issue of impeachment with a prior inconsistent statement.

Evidence

***Crawford* Issues**

State v. Grady, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090823-1.pdf). Even if the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify regarding DNA testing done by a non-testifying analyst, the error was harmless beyond a reasonable doubt.

Hearsay Exceptions

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The

statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

Opening the Door

State v. Choudhry, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090773-1.pdf). Because the State did not offer a portion of a co-defendant's inadmissible hearsay statement into evidence, it did not open the door to admission of the statement. The only evidence in the State's case pertaining to the statement was an officer's testimony recounting the defendant's response after being informed that the co-defendant had made a statement to the police.

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the court held that the defendant opened the door to admission of hearsay statements by the child victim and her babysitter.

Opinions

Lay Opinions

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual exploitation of a minor and indecent liberties case, the trial court did not err by allowing lay opinion testimony regarding photographs of a five-year-old child that formed the basis for the charges. None of the witnesses perceived the behavior depicted; instead they formed opinions based on their perceptions of the photographs. In one set of statements to which the defendant failed to object at trial, the witnesses stated that the photographs were "disturbing," "graphic," "of a sexual nature involving children," "objectionable," "concerning" to the witness, and that the defendant pulled away the minor's pant leg to get a "shot into the vaginal area." As to these statements, any error did not rise to the level of plain error. However the defendant did object to a statement in the Police Incident report stating that the photo "has the juvenile's female private's [sic] showing." At to this statement, the court held that the trial court did not abuse its discretion by admitting this testimony as a shorthand statement of fact.

Opinion on Credibility

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). In a sexual

exploitation of a minor and indecent liberties case, the court rejected the defendant's argument that a testifying detective's statement that the defendant's explanation of the events was not consistent with photographic evidence constituted an improper opinion as to credibility of a witness. The court concluded that no improper vouching occurred.

Prior Inconsistent Statements

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091640-1.pdf). The State properly impeached the defendant with prior inconsistent statements. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with a drug dealer. Although the defendant gave statements prior to trial, he never mentioned that meeting. At trial, the State attempted to impeach him with this fact. The court noted that to qualify as inconsistent, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in the prior statement." The court noted that the defendant voluntarily gave the police varying explanations for why the child stopped breathing (he threw up and then stopped breathing after falling asleep; he drowned in the tub). An alleged meeting while the child was in the tub would have been natural to include in these prior statements. Thus, the court concluded, his prior inconsistent statements were properly used for impeachment.

Rule 403

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). In a homicide case in which the defendant asserted self-defense, the trial court did not abuse its discretion by admitting evidence that the defendant had been selling drugs in the vicinity of the shooting and was affiliated with a gang. The evidence showed that both the defendant and the victim were gang members. The court held that gang affiliation and selling drugs were relevant to show that the defendant could have had a different objective in mind when the altercation took place and could refute the defendant's claim of self-defense.

Arrest Search & Investigation

Police Power

State v. Yencer, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090001-1.pdf). A Davidson College Police Department officer who arrested the defendant for impaired and reckless driving had no authority to do so. Applying precedent, the court held that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force pursuant to G.S. 74G was unconstitutional under the Establishment Clause of the First Amendment. The court "urge[d]" the North Carolina Supreme Court to grant a petition for discretionary review.

Arrests and Investigatory Stops

Vehicle Stops

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). An officer had reasonable suspicion to stop the defendant's vehicle after the officer observed the vehicle twice cross the center line of I-95 and pull back over the fog line.

Frisk

State v. King, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091659-1.pdf). An officer had reasonable suspicion to believe that the defendant was armed and dangerous justifying a pat-down frisk. Around midnight, the officer stopped the defendant's vehicle after determining that the tag was registered to a different car; prior to the stop, the defendant and his passenger had looked oddly at the officer. After the stop, the defendant held his hands out of the window, volunteered that he had a gun, which was loaded, and when exiting the vehicle, removed his coat, even though it was cold outside. At this point, the pat down occurred. The court rejected the defendant's argument that his efforts to show that he did not pose a threat obviated the need for the pat down. It also rejected the defendant's argument that the discovery of the gun could not support a reasonable suspicion that he still might be armed and dangerous; instead the court concluded that the confirmed presence of a weapon is a compelling factor justifying a frisk, even where that weapon is secured and out of the defendant's reach. Additionally, the officer was entitled to formulate "common-sense conclusions," based upon an observed pattern that one weapon often signals the presence other weapons, in believing that the defendant, who had already called the officer's attention to one readily visible weapon, might be armed.

Criminal Offenses

Second-Degree Murder

State v. Mack, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090672-1.pdf). There was sufficient evidence of malice in a second-degree murder case involving a vehicle accident. The defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. When an officer attempted to stop the defendant, he fled, driving more than 90 miles per hour, running a red light, and traveling the wrong way on a highway — all with the vehicle's trunk open and with a passenger pinned by a large television and unable to exit the vehicle.

Crime Against Nature

In Re R.N., __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091406-1.pdf). The trial court erred by denying the juvenile's motion to dismiss a charge of crime against nature; as to a second charge alleging the same offense, defects in the transcript made appellate review impossible. The first count alleged that the juvenile licked the victim's genital area. The evidence established that the juvenile licked her private, put his mouth on her private area, and "touch[ed] . . . on her private parts." Citing, *State v. Whittemore*, 255 N.C. 583 (1961), the court held that the evidence was insufficient to establish penetration. As to the second count, alleging that the juvenile put his

penis in the victim's mouth, the evidence showed that the juvenile forced the victim's head down to his private and that she saw his private area. Under *Whittemore*, this was insufficient evidence of penetration. However, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the adjudication and remanded for a hearing to reconstruct the social worker's testimony.

Sexual Exploitation of a Minor

State v. Ligon, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090747-1.pdf). The evidence was insufficient to sustain a conviction for first-degree sexual exploitation of a minor. The State's evidence consisted of photographs of the five-year-old child victim but did not depict any sexual activity. The court rejected the State's arguments that a picture depicting the child pulling up the leg of her shorts while her fingers were in her pubic area depicted masturbation; the court concluded that the photograph merely showed her hand in proximity to her crotch. It also rejected the State's argument that this picture, along with other evidence supported an inference that the defendant coerced or encouraged the child to touch herself for the purpose of producing a photograph depicting masturbation, concluding that no statutorily prohibited sexual activity took place. Finally, it rejected the State's argument that a photograph of the defendant pulling aside the child's shorts depicted prohibited touching constituting sexual activity on grounds that the picture depicted the defendant touching the child's shorts not her body.

Stalking

State v. Wooten, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091551-1.pdf). The evidence was sufficient to sustain a stalking conviction where it showed that the defendant sent five facsimile messages to the victim's workplace but the first four did not contain a direct threat. In this regard, the court noted, the case "diverges from those instances in which our courts historically have applied the stalking statute." Among other things, the faxes called the victim, Danny Keel, "Mr. Keel-a-Nigger," referenced the defendant having purchased a shotgun, and mentioned his daughter, who was living away from home, by first name.

Possession of Stolen Property

State v. Marshall, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091416-1.pdf). In a possession of stolen property case, the trial court committed reversible error by instructing the jury on constructive possession. The property, a vehicle stolen from a gas station, was found parked on the street outside of the defendant's residence. The defendant claimed that unknown to him, someone else drove the vehicle there. The State argued that evidence of a surveillance tape showing the defendant at the station when the vehicle was taken, the defendant's opportunity to observe the running, unoccupied vehicle, the fact that the vehicle was not stolen until defendant left the station, and the later discovery of the vehicle near the defendant's residence was

sufficient to establish constructive possession. The court concluded that although this evidence showed opportunity, it did not show that the defendant was aware of the vehicle's location outside his residence, was at home when it arrived, that he regularly used that location for his personal use, or that the public street was any more likely to be under his control than the control of other residents. The court concluded that the vehicle's location on a public street not under the defendant's exclusive control and the additional circumstances recounted by the State did not support an inference that defendant had "the intent and capability to maintain control and dominion over" the vehicle. Based on the same analysis, the court also agreed with the defendant's argument that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and by accepting the jury verdict as to possession of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

Drug Offenses

Possession Offenses

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). There was sufficient evidence of constructive possession to sustain a conviction for possession with the intent to sell and deliver marijuana. The drugs were found in a vehicle being transported by a car carrier driven by the defendant. The court determined that based on the defendant's power and control of the vehicle in which the drugs were found, an inference arose that he had knowledge their presence. The vehicle had been under the defendant's exclusive control since it was loaded onto his car carrier two days earlier and the defendant had keys to every car on the carrier. Although the defendant's possession of the vehicle was not exclusive because he did not own it, other evidence created an inference of his knowledge. Specifically, he acted suspiciously when stopped (held his hands up, nervous, sweating), he turned over a suspect bill of lading, and he had fully functional keys for all cars on the carrier except the one at issue for which he gave the officers a "fob" key which prevented its user from opening the trunk housing the marijuana.

Maintaining a Vehicle, Etc.

State v. Hudson, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091421-1.pdf). The evidence was sufficient to support a conviction for maintaining a vehicle. Drugs were found in a vehicle being transported by a car carrier driven by the defendant. The evidence showed that the defendant kept or maintained the vehicle where the bill of lading showed that the defendant picked it up and maintained possession as the authorized bailee continuously and without variation for two days. Having stopped to rest overnight at least one time during the time period, the defendant retained control and disposition over the vehicle and resumed his planned route with the car carrier.

Defenses

Self-Defense

State v. Kirby, __ N.C. App. __, __ S.E.2d __ (Aug. 17, 2010) (http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091631-1.pdf). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense where the evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.