

Criminal Procedure Appeal

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf>). Because no objection is required to preserve sentencing issues, the defendant's argument that the trial court improperly calculated his prior record level (by including a drug trafficking conviction) was preserved for appeal.

State v. Yonce, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091504-1.pdf>). The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules.

Motion to Dismiss

State v. Szucs, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf>). In a case involving felonious breaking or entering, larceny, and possession of stolen goods, the State presented sufficient evidence identifying the defendant as the perpetrator. The evidence showed that although the defendant did not know the victim, she found his truck in her driveway with the engine running; the victim observed a man matching the defendant's description holding electronic equipment subsequently determined to have been stolen; the man dropped the electronic equipment and jumped over a fence; a police dog tracked the man's scent through muddy terrain and lost the trail near Thermal Road; a canine officer observed fresh slide marks in the mud; the defendant was found on Thermal Road with muddy pants and shoes and in possession of a Leatherman tool, which could have been used to open the door of the residence; the defendant had approximately \$30.00 in loose change, which could have been taken from the residence; and when police apprehended an accomplice, the defendant's roommate and known associate, he had the victim's electronic device in his possession.

Pleas

State v. Szucs, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf>). The defendant's plea of habitual felon was valid based on the totality of the circumstances. Although the trial court informed the defendant that the plea would elevate punishment for the underlying offenses from Class H to Class C, it did not inform the defendant of the minimum and maximum sentences associated with habitual felon status.

Jury Misconduct

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf>). The trial court did not abuse its discretion by denying a defense motion to dismiss a juror, made after the juror sent a letter to the trial judge requesting to see a DVD that had been played the previous day in court and stating that she thought the defendant's accent was fabricated. Despite being presented with only a suspicion of potential misconduct, the court made inquiry and determined that the juror had not made up her mind as to guilt or innocence and that she was willing to listen to the remainder of the evidence before considering guilt or

innocence. The juror did not indicate that she was unable to accept a particular defense or penalty or abide by the presumption of innocence. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared the note with anyone, or participated in any kind of misconduct. Given the trial court's examination, it was not required to allow the defense to examine the juror.

Sentencing Prior Record Level

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf>). The State's evidence regarding the defendant's prior record level was insufficient. The State offered only an in-court statement by the prosecutor and the prior record level worksheet. The court rejected the State's argument that the prior record level was agreed to by stipulation, noting that defense counsel objected to the worksheet and to two listed convictions.

Probation Violations

State v. Yonce, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091504-1.pdf>). (1) The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules. (2) The trial court did not abuse its discretion by declining to further stay another judge's order finding a probation violation for failure to pay restitution and activating the sentence but staying execution of the order when the defendant presented no evidence of an inability to pay.

Arrest, Search & Investigation Arrest

State v. Banner, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100123-1.pdf>). Provided the underlying charges that form the basis for an order for arrest (OFA) for failure to appear remain unresolved at the time the OFA is executed, the OFA is not invalid and an arrest made pursuant to it is not unconstitutional merely because a clerk or judicial official failed to recall the OFA after learning that it was issued erroneously. On February 22, 2007, the defendant was cited to appear in Wilkes County Court for various motor vehicle offenses ("Wilkes County charges"). On June 7, 2007 he was convicted in Caldwell County of unrelated charges ("unrelated charges") and sent to prison. When a court date was set on the Wilkes County charges, the defendant failed to appear because he was still in prison on the unrelated charges and no writ was issued to secure his presence. The court issued an OFA for the failure to appear. When the defendant was scheduled to be released from prison on the unrelated charges, DOC employees asked the Wilkes County clerk's office to recall the OFA, explaining defendant had been incarcerated when it was issued. However, the OFA was not recalled and on October 1, 2007, the defendant was arrested pursuant to that order, having previously been released from prison. When he was searched incident to arrest, officers found marijuana and cocaine on his person. The court rejected the defendant's argument that the OFA was invalid because the Wilkes County clerk failed to recall it as requested, concluding that because the underlying charges had not been resolved at the time of arrest, no automatic recall occurred. The court further noted that even if good cause to recall existed, recall was not mandatory and therefore failure to recall did not nullify the OFA. Thus, the officers were entitled to rely on it, and no independent probable

cause was required to arrest the defendant. The court declined to resolve the issue of whether there is a good faith exception to Article I, Section 20 of the state Constitution.

Consent

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100025-1.pdf>). The defendant voluntarily consented to allow officers to take a saliva sample for DNA testing. The defendant was told that the sample could be used to exonerate him in ongoing investigations of break-ins and assaults on women that occurred in Charlotte in 1998. The defendant argued that because the detective failed to inform him of all of the charges that were being investigated—specifically, rape and sexual assault—his consent was involuntary. Following *State v. Barkley*, 144 N.C. App. 514 (2001), the court rejected this argument. The court concluded that the consent was voluntary even though the defendant did not know that the assaults were of a sexual nature and that a reasonable person in the defendant’s position would have understood that the DNA could be used generally for investigative purposes.

Confessions

State v. Bordeaux, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091484-1.pdf>). (1) The trial court properly suppressed the defendant’s confession on grounds that it was involuntary. Although the defendant received *Miranda* warnings, interviewing officers, during a custodial interrogation, suggested that the defendant was involved in an ongoing murder investigation, knowing that to be untrue. The officers promised to testify on the defendant’s behalf and these promises aroused in the defendant a hope of more lenient punishment. The officers also promised that if the defendant confessed, he might be able to pursue his plans to attend community college. (2) Citing *Berghuis v. Thompkins*, __ U.S. __, 176 L. Ed. 2d 1098 (2010), the court held that the defendant’s silence or refusal to answer the officers’ questions was not an invocation of the right to remain silent.

Criminal Offenses

Larceny & Related Offenses

State v. Szucs, __ N.C. App. __, __ S.E.2d __ (Nov. 2, 2010) (<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100305-1.pdf>). (1) In a case involving felonious breaking or entering, larceny, and possession of stolen goods, there was sufficient evidence of possession. The defendant’s truck was parked at the residence with its engine running; items found in the truck included electronic equipment from the residence; a man fitting the defendant’s description was seen holding items later identified as stolen; items reported as missing included electronic equipment and a large quantity of loose change; the police dog’s handler observed evidence that someone recently had been in a muddy area behind the residence; the side door of the residence showed pry marks; the defendant was found wearing muddy clothing and shoes and in possession of a Leatherman tool and a large quantity of loose change. A reasonable juror could conclude that the defendant possessed goods stolen from the residence, either as the person standing in the yard holding electronic equipment, through constructive possession of the items in his truck, or through actual possession of the loose change. (2) A defendant may not be convicted of both felony larceny and felonious possession of the same goods.