Criminal Procedure

Indictments

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-622-1.pdf). (1) An indictment for breaking or entering a motor vehicle alleging that the vehicle was the personal property of "D.L. Peterson Trust" was not defective for failing to allege that the victim was a legal entity capable of owning property. The indictment alleged ownership in a trust, a legal entity capable of owning property. (2) Because the State indicted the defendant for breaking or entering a motor vehicle with intent to commit larceny therein, it was bound by that allegation and had to prove that the defendant intended to commit larceny.

Counsel Issues

State v. Paterson, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-446-1.pdf). (1) The defendant's waiver of counsel was sufficient even though a box on the waiver form was left blank and the form was executed before the court advised the defendant of the charges and the range of punishment. Citing *State v. Heatwole*, 344 N.C. 1, 18 (1996), and *State v. Fulp*, 355 N.C. 171, 177 (2002), the court first concluded that a waiver of counsel form is not required and any deficiency in the form will not render the waiver invalid, if the waiver was knowing, intelligent, and voluntary. Next, the court concluded that the waiver was not invalid because the trial court failed to go over the charges and potential punishments prior to the defendant signing the waiver form. The trial court discussed the charges and potential punishments with the defendant the following day, and defendant confirmed his desire to represent himself in open court. Although the waiver form requires the trial judge to certify that he or she informed the defendant of the charges and punishments, given that the form is not mandatory, no prejudice occurs when the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts the right to proceed pro se. (2) The trial court conducted an adequate inquiry under G.S. 15A-1242. The court noted that there is no mandatory formula for complying with the statute. Here, the trial judge explicitly informed the defendant of his right to counsel and the process to secure a court-appointed attorney; the defendant acknowledged that he understood his rights after being repeatedly asked whether he understood them and whether he was sure that he wanted to waive counsel; the judge informed him of the charges and potential punishments; and the judge explained that he would be treated the same at trial regardless of whether he had an attorney. The trial court's colloquies at the calendar call and before trial, coupled with the defendant's repeated assertion that he wished to represent himself, demonstrate that the defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

Driver's License Revocation

Hartman v. Robertson, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-636-1.pdf). (1) In an appeal of a driver's license revocation under G.S. 20-16.2(e), the court declined to consider the defendant's argument that the officer lacked reasonable and articulable suspicion to stop his vehicle. Reasonable and articulable suspicion for the stop is not relevant to determinations in connection with a license revocation; the only inquiry with respect to the officer, the court explained, is that he or she have reasonable grounds to believe that the person has committed an implied consent offense. Here, the evidence supported that conclusion. (2) The exclusionary rule does not apply in a civil license revocation proceeding.

Motions to Suppress

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-178-1.pdf). Any alleged violation of the New Jersey constitution in connection with a stop in that state leading to charges in North Carolina, provided no basis for the suppression of evidence in a North Carolina court.

Motion to Dismiss

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). There was sufficient evidence that the defendant perpetrated a murder when, among other things, cuts on the defendant's hands were visible more than 10 days after the murder; neither the defendant's nor the victim's DNA could be excluded from a DNA sample from the scene; DNA from blood stains on the defendant's jeans matched the victim's DNA; and 22 shoe prints found in blood in the victim's residence were consistent with the defendant's shoes.

Jury Argument

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The prosecutor's characterization of the defendant's statements as lies, while "clearly improper," did not require reversal. The court noted that the trial court's admonition to the prosecutor not to so characterize the defendant's statements neutralized the improper argument.

Sentencing

Aggravating Factors

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The evidence was sufficient to support the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. The defendant assaulted his 72-year-old grandmother, stabbing her, striking her in the head, strangling her, and impaling her with a golf club shaft eight inches into her back and chest.

Probation Violations

State v. Crowder, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1364-1.pdf). (1) The trial court abused its discretion by revoking the defendant's probation when the State failed to present evidence that he violated the condition of probation that he "not reside in a household with a minor child." Although the trial court interpreted the term "reside" to mean that the defendant could not have children anywhere around him, *State v. Strickland*, 169 N.C. App. 193 (2005), construed that term much more narrowly, establishing that the condition is not violated simply when a defendant sees or visits with a child. Because the evidence showed only that the defendant was visiting with his fiancée's child, it was insufficient to establish a violation. (2) The trial court improperly revoked the defendant's probation for violating conditions that he not (a) socialize or communicate with minors unless accompanied by an approved adult; or (b) be alone with a minor without approval. The conditions were not included in the written judgments and there was no evidence that the defendant ever was provided written notice of them. As such, they were not valid conditions of probation.

Evidence

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State v. Capers, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1613-1.pdf). The defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again," was relevant as an implicit admission of guilt.

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State v. Capers, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1613-1.pdf). The trial court did not abuse its discretion under Rule 403 by admitting the defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again."

Hearsay Exceptions

State v. Capers, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1613-1.pdf). A victim's statement to his mother, made in the emergency room approximately 50 minutes after a shooting and identifying the defendant as the shooter, was a present sense impression under Rule 803(1). The time period between the shooting and the statement was sufficiently brief. The court noted that the focus of events during the gap in time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation.

Crawford Issues

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-475-1.pdf). In a drug case, the trial court committed plain error by admitting a report of a non-testifying crime lab technician, detailing the chemical analysis performed and the technician's conclusion that the substance was cocaine.

Opinions

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-475-1.pdf). The trial court committed plain error by allowing an officer to identify a substance, using visual identification, as crack cocaine. Citing *State v. Ward*, 364 N.C. 133, 142-43 (2010), and other cases, the court concluded that visual identification, even by a trained police officer with four years of experience, is insufficient to establish that a substance is a controlled substance.

Evidence that Defendant Was Shackled When Arrested

State v. Capers, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/09-1613-1.pdf). The trial court properly admitted testimony that the defendant was handcuffed and shackled when he was arrested. The court declined to extend *State v. Tolley*, 290 N.C. 349, 365 (1976) ("a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances"), concluding that *Tolley* applies when the jury sees the defendant shackled at trial, not to prohibit the jury from hearing evidence that a defendant was previously handcuffed and shackled. The defendant had asserted that the relevant testimony violated his due process rights.

Arrest, Search & Investigation

Vehicle Stops

State v. Ford, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-470-1.pdf). The trial court properly denied the defendant's motion to suppress when officers had reasonable suspicion to believe that the defendant committed a traffic violation supporting the traffic stop. The stop was premised on the defendant's alleged violation of G.S. 20-129(d), requiring that a motor vehicle's rear plate be lit so that under normal atmospheric conditions it can be read from a distance of 50 feet. The trial court found that normal conditions existed when officers pulled behind the vehicle; officers were unable to read the license plate with patrol car's lights on; when the patrol car's lights were turned off, the plate was not visible within the statutory requirement; and officers cited the defendant for the violation. The defendant's evidence that the vehicle, a rental car, was "fine" when rented did not controvert the officer's testimony that the tag was not sufficiently illuminated on the night of the stop.

State v. Hernandez, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-178-1.pdf). (1) As a passenger in a vehicle that was stopped, the defendant had standing to challenge the stop. (2) The trial court properly denied a motion to suppress asserting that a vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

Pretextual Stops

State v. Ford, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-470-1.pdf). Citing *Whren v. United States*, 517 U.S. 806, 813 (1996), the court rejected the defendant's argument that a stop for an alleged violation of G.S. 20-129(d) (motor vehicle's rear plate must be lit so that it can be read from a distance of 50 feet) was pretextual. Under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved.

Search Incident to Arrest

State v. Foy, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-331-1.pdf). The trial court erred by suppressing evidence obtained pursuant to a search incident to arrest. After stopping the defendant's

vehicle, an officer decided not to charge him with impaired driving but to allow the defendant to have someone pick him up. The defendant consented to the officer to retrieving a cell phone from the vehicle. While doing that, the officer saw a weapon and charged the defendant with carrying a concealed weapon. Following the arrest, officers searched the defendant's vehicle, finding addition contraband, which was suppressed by the trial court. The court noted that under *Arizona v. Gant*, 556 U.S. ___, 173 L. Ed. 2d 485 (2009), officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Citing *State v. Toledo*, ___ N.C. App. ___, 693 S.E.2d 201 (2010), the court held that having arrested the defendant for carrying a concealed weapon, it was reasonable for the officer to believe that the vehicle contained additional offense-related contraband, within the meaning of the second *Gant* exception.

Confessions

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The court rejected the defendant's argument that because he was under the influence of cocaine he did not knowingly, intelligently, and understandingly waive his *Miranda* rights or make a statement to the police. Because the defendant was not under the influence of any impairing substance and answered questions appropriately, the fact that he ingested crack cocaine several hours prior was not sufficient to invalidate the trial court's finding that his statements were freely and voluntarily made. At 11:40 pm, unarmed agents woke the defendant in his cell and brought him to an interrogation room, where the defendant was not restrained. The defendant was responsive to instructions and was fully advised of his *Miranda* rights; he nodded affirmatively to each right and at 11:46 pm, signed a *Miranda* rights form. When asked whether he was under the influence of any alcohol or drugs, the defendant indicated that he was not but that he had used crack cocaine, at around 1:00 or 2:00 pm that day. He responded to questions appropriately. An agent compiled a written summary, which the defendant was given to read and make changes. Both the defendant and the agent signed the document at around 2:41 am. The agents thanked the defendant for cooperating and the defendant indicated that he was glad to "get all of this off [his] chest." On these facts, the defendant's statements were free and voluntary; no promises were made to him, and he was not coerced in any way. He was knowledgeable of his circumstances and cognizant of the meaning of his words.

Search Warrants

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). The court rejected the defendant's argument that a search warrant executed at a residence was invalid because the application and warrant referenced an incorrect street address. Although the numerical portion of the street address was incorrect, the warrant was sufficient because it contained a correct description of the residence.

Exclusionary Rule

Hartman v. Robertson, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-636-1.pdf). The exclusionary rule does not apply in a civil license revocation proceeding.

Criminal Offenses

Homicide

State v. Hunter, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-483-1.pdf). There was sufficient evidence of malice in a first-degree murder case. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption of malice. Here, the victim was stabbed in the torso with a golf club shaft, which entered the body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart; she was stabbed with a knife to a depth of three inches; her face sustained blunt force trauma consistent with being struck with a clothes iron; and there was evidence she was strangled. The perforation by the golf club shaft was fatal.

Breaking or Entering a Motor Vehicle

State v. Chillo, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-622-1.pdf). The evidence was insufficient to establish that the defendant intended to commit a larceny in the vehicle. The evidence suggested that the defendant's only intent was to show another how to break glass using a spark plug and that the two left without taking anything once the vehicle's glass was broken.

Drug Offenses

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-634-1.pdf). The trial court erred by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. Evidence that an officer found 1.89 grams of marijuana on the defendant separated into three smaller packages, worth about $30, and that the defendant was carrying $1,264.00 in cash was insufficient to establish the requisite intent.

State v. Jones, __ N.C. App. __, __ S.E.2d __ (Dec. 21, 2010) (http://appellate.nccourts.org/opinions/?c=2&pdf=2010/10-475-1.pdf). An officer's testimony that a substance's packaging was indicative of it being held for sale was sufficient evidence of an intent to sell to survive a motion to dismiss.