

Criminal Procedure

Appeal, generally

State v. Hughes, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00OTUtMS5wZGY>). The court lacked jurisdiction over the appeal because the defendant failed to note an appeal in compliance with N.C.R. App. P. 4. Although the record included a copy of form AOC-CR-350 (Appellate Entries), this does not suffice to show that the defendant properly appealed from the trial court's judgment.

Pleas

State v. Shropshire, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEzLTEucGRm>). The trial court did not err by denying the defendant's motion to withdraw his guilty plea. When a defendant seeks to withdraw a guilty plea after being sentenced consistent with a plea agreement, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. Factors relevant to the analysis include whether the defendant was represented by competent counsel and is asserting innocence, and whether the plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion. None of these factors were present here. The defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement.

State v. Santos, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjgtMS5wZGY>). (1) Although the court treated the defendant's brief challenging his guilty plea as a writ of certiorari and addressed his contentions, it reviewed the law on the right to appeal after a plea, stating: A defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. Thus, the court concluded, a defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea as knowing and voluntary absent a denial of a motion to withdraw that plea. (2) The court rejected the defendant's argument that his guilty plea was not knowing and voluntary because it was the result of unreasonable and excessive pressure by the State and the trial court. The defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him the time he needed to reflect on the decision. However, the plea offer was made some days earlier and the trial judge engaged in an extensive colloquy with the defendant, beyond statutory mandates, to ensure that the plea was knowing and voluntary.

Sentencing

Restitution

State v. Smith, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDQtMS5wZGY>). The trial court committed plain error by ordering the defendant to pay restitution when no evidence supported the amount ordered. The court noted that no objection is required to preserve for appellate review issues concerning restitution. It held that the prosecutor's unsworn statements and the State's restitution worksheet were not competent evidence to support the restitution ordered. The court rejected the

notion that the defendant's silence or lack of objection to the restitution amount constituted a stipulation.

Probation

State v. Smith, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDQtMS5wZGY>). The trial court erred by considering improper factors when imposing a period of probation. According to the defendant, the trial court erred by requiring 48 months of supervised probation pursuant to G.S. 15A-1343.2(d) based upon the restitution to be paid and nature of the offense. Because the court separately reversed and remanded the trial court's restitution order, it concluded that it must remand on this issue as well, instructing the trial court to reconsider the length of probation in light of new evidence concerning the amount of restitution, if any, presented on rehearing.

Sex Offenders

State v. Santos, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjgtMS5wZGY>). The trial court erred by finding that first-degree sexual offense with a child under 13 is an aggravated offense for purposes of ordering lifetime satellite-based monitoring (SBM). As the State conceded, when making the relevant determination, the trial court only is to consider the elements of the offense of conviction, not the underlying facts giving rise to the conviction. In a footnote, the court noted that although the record contains several judgments imposing SBM with respect to indecent liberties, courts have held that indecent liberties is not an aggravated offense. The court declined to rule on this issue because it was not raised on appeal.

Evidence

404(b) Evidence

State v. Towe, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDEtMS5wZGY>). Remanding for other reasons, the court admonished the trial court to carefully determine the materiality of *each* purpose for which 404(b) evidence is offered. The trial court had remarked that the incidents could show motive, identity, and common plan or scheme. The court noted: "admission of this evidence was clearly problematic in at least one respect: the trial court failed to determine whether the purposes for which the evidence was offered were at issue." The court clarified that the defendant's identity is not at issue when the case hinges on whether the alleged crime occurred, but it may be at issue when the defendant contends someone else committed the alleged crime. Motive is at issue, it explained, when a defendant denies committing the crime charged.

Bruton Issues

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm>). No *Bruton* issue occurred when the trial court admitted a co-defendant's admission to police that "I only hit that man twice." A co-defendant's statement which does not mention or refer to the defendant does not implicate the Confrontation Clause or *Bruton*. Here, the co-defendant's statement did not mention the defendant and thus its admission did not implicate his constitutional rights

Expert Testimony in Child Abuse Cases

State v. Towe, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDEtMS5wZGY>). The trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused, when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." This amounted to impermissible testimony that the victim was sexually abused.

Arrest, Search & Investigation Pretrial Identification

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm>). (1) The trial court properly denied the defendant's motion to suppress asserting that an eyewitness's pretrial identification was unduly suggestive. The eyewitness had the opportunity to view the defendant at close range for an extended period of time and was focused on and paying attention to the defendant for at least fifteen minutes. Additionally, the eyewitness described the defendant by name as someone he knew and had interacted with previously, and immediately identified a photograph of him, indicating high levels of accuracy and confidence in the eyewitness's description and identification. Although, the eyewitness stated that he recognized but could not name all of the suspects on the night of the attack, he named the defendant and identified a photograph of him the next day. (2) No violation of G.S. 15A-284.52 (eyewitness identification procedures) occurred. The eyewitness told the detective that he had seen one of the perpetrators in a weekly newspaper called the *The Slammer*, but did not recall his name. The detective allowed the eyewitness to look through pages of photographs in *The Slammer*, and from this process the eyewitness identified one of the defendants. The detective did not know who the eyewitness was looking for and thus could not have pressured him to select one of the defendants, nor does any evidence suggest that this occurred.

Criminal Offenses Assaults

State v. Smith, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MDQtMS5wZGY>). The trial court did not commit plain error by peremptorily instructing the jury that multiple gunshot wounds to the upper body would constitute serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back and neck, and a bullet remained in his neck, causing him continuing pain.

Kidnapping

State v. Boozer, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDE4LTEucGRm>). (1) The evidence was sufficient to establish an intent to cause bodily harm or terrorize where the facts showed that after severely beating the victim, the defendants first attempted to stuff him into a garbage can and then threw him into a 10 or 12-foot-deep ditch filled with rocks and water; one defendant had been to the location several times and could have seen the ditch; and the victim could not recall anything after the

assault began and was not struggling or moving during this process. This evidence supports a reasonable inference that the defendants intended to cause the victim serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the ditch, landing on rocks and possibly drowning. Alternatively, it supports a reasonable inference that the defendants intended to terrorize the victim if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch. (2) The trial court did not commit plain error by failing to instruct on the lesser-included offense of false imprisonment where, for the reasons discussed above, the evidence was sufficient to establish an intent to cause bodily harm or terrorize. (3) The trial court erred by instructing the jury that it need only find that the restraint or removal aspect of the kidnapping “was a separate, complete act independent of and apart from the injury or terror to the victim.” As such, it did not distinguish between the restraint as a part of the kidnapping and any restraint or removal that was part of the assault or robbery of the victim. However, because the evidence indicates that the assault stopped before the victim’s removal, the court determined that this error was not prejudicial.

Post-Conviction

Motion for Appropriate Relief

State v. Shropshire, __ N.C. App. __ (Mar. 15, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTEzLTEucGRm>). The trial court did not err by denying the defendant’s post-sentencing motion to withdraw a plea without an evidentiary hearing. The defendant’s motion was a motion for appropriate relief. Evidentiary hearings are required on such motions only to resolve issues of fact. In this case, no issue of fact was presented. The defendant’s statement that he did not understand the trial court’s decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that “the court will determine whether the sentences will be served concurrently or consecutively.” Furthermore, nothing in the record indicates that the defendant’s plea was not the product of free and intelligent choice. Rather, it appears that his only reason for moving to withdraw was his dissatisfaction with his sentence.