

Criminal Procedure

Sex Offenders

State v. Clark, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=>). Applying an elemental analysis, the court determined that first-degree rape under G.S. 14-27.2(a)(1) fits within the definition of an aggravated offense in G.S. 14-208.6(1a). An aggravated offense includes engaging in a sexual act involving vaginal, anal, or oral penetration with a victim (1) of any age through the use of force or the threat of serious violence or (2) who is less than 12 years old. Rape under G.S. 14-27.2(a)(1) cannot satisfy the second prong because it occurs when a person engages in vaginal intercourse with a child under the age of 13, not 12. However, the offense does fall within the first prong of the aggravated offense definition. Such a rape requires proof that a defendant engaged in vaginal intercourse with the victim. This contrasts with G.S. 14-27.4(a)(1), which allows a defendant to be convicted of first-degree sexual offense on the basis of cunnilingus, an act that does not require penetration. Also, vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence.

State v. Pell, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MTUtMS5wZGY=>). (1) G.S. 14-202(l) (requiring sex offender registration for certain peeping offenses when a judge finds, in part, that the defendant is “a danger to the community”) is not unconstitutionally vague. (2) The trial court erred by requiring the defendant to register as a sex offender when there was no competent evidence to support a finding that he was a danger to the community. “A danger to the community” refers to those defendants who pose a risk of engaging in sex offenses following release from incarceration. Here, the State’s expert determined that the defendant represented a low to moderate risk of re-offending and acknowledged that his likelihood of re-offending may be even lower after considering a revised risk assessment scale. The trial court also reviewed letters from the defendant’s psychiatrist and counselor opining that the defendant’s prior diagnoses of major depression, alcohol abuse, and paraphilia were in remission.

Evidence

Rule 404(b)

State v. Beckelheimer, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yMDMtMS5wZGY=>). In a child sexual assault case, the trial judge committed reversible error by admitting 404(b) evidence. The defendant was charged with first-degree sexual offense and indecent liberties. At the time of the alleged offense, the defendant was 27 and the male victim was 11. The trial judge allowed the victim’s half-brother, Mr. Branson, to testify about sexual activity between himself and the defendant. The court found that the 404(b) evidence lacked sufficient similarity to the events charged. The acts involving Branson occurred when Branson was less than 13 years old and the defendant only was 3-4 years older. When Branson spent the night at the defendant’s house they played, looked at pornography, and then got into the defendant’s bed at night. The defendant rubbed Branson’s “private,” performed oral sex on Branson, and attempted to put his fingers in Branson’s rectum. Branson performed oral sex on defendant. In the case at hand, however, the defendant was 27 and the victim was 11. The defendant invited the victim to his room to play a video game and onto his bed during the daytime. The defendant then got on top of the victim, at first pretending to be asleep but then holding the victim down, while kissing his penis. The defendant also put his hand on the victim’s penis, while they both had their clothes on. The court found

the acts to be dissimilar, noting the 16-year age difference between the adult defendant and the minor victim and the fact that the defendant and Branson were both minors and only 3-4 years apart in age. The court also noted the consensual nature of the contact with Branson compared to the forcible conduct at issue. Other differences included the lack of reciprocal sexual contact by the victim, that the defendant did not attempt to put his fingers in the victim's rectum, and that no pornography was used in the acts at issue.

Arrest, Search & Investigation

***Miranda* Issues**

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(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=>). A reasonable person in the defendant's position would not have believed that he or she was under arrest or restrained in such a way as to necessitate *Miranda* warnings. Key factors in the *Miranda* custody determination include: whether a suspect is told he or she is free to leave, is handcuffed, or is in the presence of uniformed officers and the nature of any security around the suspect. There was no evidence that officers ever explicitly told the defendant that he was being detained. The court rejected the defendant's argument that because he was moved to a patrol car and instructed to remain there when he came in contact with the victim's father and that he was told to "come back and stay" when he attempted to talk to his girlfriend, the victim's sister, this was tantamount to a formal arrest. The court concluded that the officers' actions were nothing more than an attempt to control the scene and prevent emotional encounters between a suspect and members of the victim's family. Moreover, even if the defendant was detained at the scene, his statements are untainted given that the detective expressly told him that he was not under arrest, the defendant repeatedly asked to speak with the detective, and the defendant voluntarily accompanied the detective to the sheriff's department.

Vehicle Checkpoints

State v. Nolan, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MTgtMS5wZGY=>). The trial court did not err by concluding that the vehicle checkpoint passed constitutional muster. The trial court properly concluded that the primary programmatic purpose of the checkpoint was "the detection of drivers operating a motor vehicle while impaired and that the 'procedure was not merely to further general crime control'" and that this primary programmatic purpose was constitutionally permissible. Applying the three-pronged test of *Brown v. Texas*, 443 U.S. 47, 50 (1979), the trial court properly determined that the checkpoint was reasonable.

Criminal Offenses

Assaults

Serious Injury

State v. McLean, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02MDEtMS5wZGY=>). (1) There was sufficient evidence that the victim suffered serious injury. The defendant shot the victim with a shotgun, causing injuries to the victim's calf and 18-20 pellets to lodge in his leg, which did not fully work themselves out for six months. One witness testified that the victim had holes in his leg from the ankle up and another observed blood on his leg and noted that the wounds looked like little holes from birdshot from a shotgun. (2) When the trial judge used N.C.P.J.I.—Crim. 208.15 to instruct the jury on

the offense of assault with a deadly weapon with intent to kill inflicting serious injury, it did not err by failing to also give instruction 120.12, defining serious injury.

Discharging a Weapon into an Occupied Conveyance in Operation

State v. McLean, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02MDEtMS5wZGY=>). (1) This crime is a general intent crime; it does not require the State to prove any specific intent to shoot into the vehicle but only that the defendant intentionally fire a weapon under such circumstances where he or she had reason to believe the conveyance that ended up being shot was occupied. (2) N.C.P.J.I.—Crim. 208.90D, which was used in this case, properly charged the jury as to the required mental state.

Post-Conviction

Ineffective Assistance of Counsel

State v. Clark, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MDMtMS5wZGY=>). Because a SBM hearing is not a criminal proceeding to which the right to counsel applies, the defendant cannot assert an ineffective assistance of counsel claim as to counsel's performance at such a hearing.

State v. Womak, __ N.C. App. __, __ S.E.2d __ (April 19, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTg0LTEucGRm>). (1) Defense counsel did not commit a *Harbison* error during the habitual felon proceeding by admitting that the defendant had pled guilty to three felonies. Although defense counsel admitted the defendant's prior convictions, he never argued that the jury should find that the defendant had attained habitual felon status and in fact suggested that the jury take certain mitigating factors into account. (2) Even if such an admission occurred, the defendant would not be entitled to relief because *Harbison* does not apply to a habitual felon proceeding. (3) Defense counsel did not render deficient performance at the sentencing hearing by "ask[ing] the Court to take umbrage with my client in terms of sentencing him in the mitigating range, which I believe would be an 80-month minimum sentence." The defendant argued that this comment urged the trial judge to sentence the defendant harshly. Taken in context, the court determined that this comment could not be construed as a request for a harsh sentence.