

Criminal Procedure

Indictment Issues

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm>). A conspiracy to commit armed robbery indictment was defective when it did not allege an agreement to commit an unlawful act. The court rejected the State's argument that the indictment's caption, which identified the charge as "Conspiracy to Commit Robbery with a Dangerous Weapon," and the indictment's reference to the offense being committed in violation of G.S. 14-2.4 (governing punishment for conspiracy to commit a felony) saved the indictment.

Motion to Dismiss

State v. Joe, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDM3LTEucGRm>). The trial court's consideration of the defendant's pre-trial motion to dismiss a charge of resisting an officer for insufficiency of the evidence was invited error from which the State cannot appeal.

Dismissal by the State

State v. Joe, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDM3LTEucGRm>). The trial court did not err by dismissing felony drug possession and habitual felon indictments when, after the trial court granted the defendant's motion to suppress, the prosecutor entered an oral dismissal in open court. The dismissal on the State's motion also precluded review of the trial court's ruling on the suppression motion.

Pleas and Plea Agreements

State v. White, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjMxLTEucGRm>). The trial court erred by accepting a plea agreement that attempted to preserve the defendant's right to appeal the trial court's adverse ruling on his motion to dismiss a felon in possession of a firearm charge on grounds that the statute was unconstitutional as applied. Because a defendant has no right to appeal such a ruling, the court vacated the plea and remanded. A dissenting judge would have dismissed the appeal entirely because of the defendant's failure to include a copy of his written motion to dismiss and suppress in the record.

Sentencing

Based on Improper Factors

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm>). There was no evidence that the trial court improperly considered during sentencing the defendant's decision to plead not guilty.

Restitution

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm>). The trial court erred by ordering the defendant to pay restitution in connection with a conviction for possessing a weapon of mass death and destruction where the State conceded that the restitution had no connection to that conviction.

Probation

State v. Cleary, __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzI0LTEucGRm>). G.S. 15A-1023(b), which grants a defendant the right to a continuance when a trial court refuses to accept a plea, does not apply when the trial court refuses to accept a plea in the context of a probation revocation proceeding.

Evidence

Opinions

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm>). (1) The trial court did not err by allowing a lay witness to testify that the defendant was impaired. The witness formed the opinion that the defendant was impaired because of the strong smell of alcohol on him and because the defendant was unable to maintain balance and was incoherent, acting inebriated, and disoriented. The witness's opinion was based on personal observation immediately after the collision. (2) The trial court did not abuse its discretion by qualifying the State's witness as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. The witness was the head of the Forensic Test for Alcohol branch of the N.C. Department of Health and Human Services, oversaw the training of law enforcement officers on the operation of alcohol breath test instruments and of drug recognition experts. His specialty is in "scientific issues related to breath testing and blood testing for drugs and alcohol." He has a B.A. and master's in biology and is certified as a chemical analyst. He attended courses on the effects of alcohol on the human body and various methods for determining alcohol concentrations and the effects of drugs on human psychomotor performance. He has published several works and has previously been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. Despite his lack of a formal degree or certification in physiology and pharmacology, his extensive practical experience qualifies him to testify as an expert. (3) The trial court did not abuse its discretion by admitting the State's expert's testimony regarding the relative amount of cocaine in the defendant's system at the time of the collision and the effects of cocaine on an individual's ability to drive. The defendant argued that the testimony was based upon unreliable methods. Based on cocaine's half-life and a report showing unmetabolized cocaine in the defendant's system, the expert determined that the defendant had recently used cocaine and that the concentration of cocaine in his system would have been higher at the time of the crash. On cross-examination, he testified that there was no way to determine the quantity of cocaine in the defendant's system. He further testified as to the effects of cocaine on driving ability, noting a correlation between "high-risk driving, speeding, [and] sometimes fleeing . . . when cocaine is present." He based this testimony on a study which "looked at crashes and behaviors and found [an] association or correlation between the presence of cocaine and high-risk driving." He testified that it was possible for cocaine to be detected in a person's system even after the person was no longer impaired by the drug. The expert's testimony that the level of cocaine in the defendant's system would have been higher at the time of the collision and his testimony as to the

general effects of cocaine on a person's ability to drive was supported by reliable methods. Notably, the defendant's expert corroborated this testimony both as to the half-life of cocaine and the existence of studies showing a correlation between the effects of cocaine and "high-risk" driving.

Criminal Offenses

Homicide

State v. Norman __ N.C. App. __, __ S.E.2d __ (July 5, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTA4LTEucGRm>). (1) There was sufficient evidence of malice in a case arising from a vehicle accident involving impairment. The defendant admitted that he drank 4 beers prior to driving. The State's expert calculated his blood alcohol level to be 0.08 at the time of the collision and other witnesses testified that the defendant was impaired. Evidence showed that he ingested cocaine and that the effects of cocaine are correlated with high-risk driving. The defendant admitted that he was speeding, and experts calculated his speed to be approximately 15 mph over the posted speed limit. The State also introduced evidence that the defendant had 4 prior driving while impaired convictions. (2) There was sufficient evidence that the defendant's actions were the proximate cause of death. The defendant argued that two unforeseeable events proximately caused the victims' deaths: a third-party's turn onto the road and the victims' failure to yield the right-of-way. The court found that the first event foreseeable. As to the second, it noted that the defendant's speeding and driving while impaired were concurrent proximate causes.

Weapons Offenses

State v. Billinger, __ N.C. App. __, __ S.E.2d __ (July 5, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDEyLTEucGRm>). There was sufficient evidence to establish that the defendant constructively possessed a weapon of mass death and destruction. Following law from other jurisdictions, the court held that "constructive possession may be established by evidence showing the defendant's ownership of the contraband." Because the evidence showed that the defendant owned the sawed-off shotgun at issue, it was sufficient to show possession of a weapon of mass death and destruction.

Resist, Delay & Obstruct an Officer

State v. Joe, __ N.C. App. __, __ S.E.2d __ (July 5, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDM3LTEucGRm>). There was insufficient evidence of resisting an officer when the defendant fled from a consensual encounter. When the officer approached an apartment complex on a rainy, chilly day, the defendant was standing outside, dressed appropriately in a jacket with the hood on his head. Although the officer described the complex as a known drug area, he had no specific information about drug activity on that day. When the defendant saw the officer's van approach, "his eyes got big" and he walked behind the building. The officer followed to engage in a consensual conversation with him. When the officer rounded the corner, he saw the defendant run. The officer chased, yelling several times that he was a police officer. The officer eventually found the defendant squatting beside an air conditioning unit and arrested him for resisting.