Criminal Procedure

Counsel Issues

State v. Sorrow, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzM1LTEucGRm). The trial court erred by permitting the defendant to waive counsel and proceed pro se at a probation revocation hearing without first satisfying the requirements of G.S. 15A-1242. The court concluded that even though the defendant executed two Waiver of Counsel forms (AOC-CR-227), one of which was certified by the trial court, "these waivers are not presumed to have been knowing, intelligent, and voluntary because the rest of the record indicates otherwise." Nothing in the record indicated that the defendant understood and appreciated the consequences of the decision to proceed pro se, the nature of the charges, the proceedings, or the range of possible punishments. Noting that the trial court is not required to follow a specific "checklist" of questions when conducting the waiver inquiry, the court referenced a checklist that appears in the judges' bench book. [Author's note: the Bench Book cited in the opinion is out of print. However, the relevant section in the current version of the Superior Court Judges' Bench Book is available here, and it includes the relevant checklist].

Indictment Issues

State v. Griffin, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjc0LTEucGRm). A habitual felon indictment was not defective where it described one of the prior felony convictions as "Possess Stolen Motor Vehicle" instead of Possession of Stolen Motor Vehicle. The defendant's argument was "hypertechnical;" the indictment sufficiently notified the defendant of the elements of the offense. Moreover, it referenced the case number, date, and county of the prior conviction.

State v. Leonard, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg3LTEucGRm). An indictment charging felonious speeding to elude arrest and alleging an aggravating factor of reckless driving was not required to specify the manner in which the defendant drove recklessly.

Selective Prosecution

State v. Pope, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzItMS5wZGY=). The trial court erred by dismissing charges on grounds of selective prosecution. The defendant, a public works director, was charged with larceny by employee in connection with selling "white goods" and retaining the proceeds. To demonstrate selective prosecution, the defendant must: (1) make a prima facie showing that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not; and (2) demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. The trial court erroneously concluded that other similarly situated employees were not charged. The defendant was the public works director while the others were his subordinates; none were in a position to oversee wholesale theft from the town; and the defendant alone received the money from the sales, divided up the money, failed to remit it to the town, and kept a portion for himself while distributing the remainder to other employees. The court also rejected the defendant's assertion that his prosecution resulted from support of certain town political candidates, concluding that he failed to demonstrate that the prosecution, as opposed to the initial

investigation, was politically motivated. While the initial investigation may or may not have been politically motivated, local officials subsequently brought in the SBI to investigate and it was the SBI's investigation which resulted in defendant being charged and prosecuted by the district attorney, who is not an agent of local government.

Joinder

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The trial court did not abuse its discretion by granting the State's motion to join charges against two defendants. The defendant had argued that as a result of joinder, the jury was allowed to consider against him "other crimes" evidence introduced against a co-defendant. The court rejected this argument, concluding that the no prejudice occurred; the defendant was clearly not involved in the other crime and the trial court gave an appropriate limiting instruction.

Controlling the Defendant in the Courtroom

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUyLTEucGRm). (1) The trial court did not abuse its discretion by failing to remove the defendant's handcuff restraints during trial. The defendant was an incarcerated prisoner charged with possession of drugs at a penal institution. The trial court properly considered the defendant's past record and reasoned that incarceration for second-degree murder and kidnapping raised safety concerns. (2) Although the trial court erred by failing to give the limiting instruction required by G.S. 15A-1031 regarding the defendant's restraints, the error was not prejudicial.

Mistrial

State v. Phillpott, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzgtMS5wZGY=). The trial court did not abuse its discretion by refusing to declare a mistrial and instead allowing the jury to go home and return the next day to continue deliberating. The jury deliberated approximately 7 hours over the course of two days; at the end of the day, when asked whether they wished to continue deliberating or come back the next day, a juror indicated that nothing would "change[.]" The trial judge ordered the jury to return the next day. They did so and reached a verdict.

Verdict

State v. Wade, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00MTItMS5wZGY=). The trial court did not err by accepting a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury when the jury had acquitted the defendant of attempted first-degree murder. The verdicts were not mutually exclusive under *State v. Mumford,* 364 N.C. 394 (2010).

Sentencing

Prior Record Level

State v. Mungo, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTgtMS5wZGY=). Declining to revisit cases on point, the court held that the trial court did not err in calculating prior record level.

State v. Wingate, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg1LTEucGRm). Where the defendant stipulated that he was previously convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine and that these convictions were Class G felonies, there was sufficient proof to establish his prior conviction level. The class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court.

Probation

State v. Floyd, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDk4LTEucGRm). The trial court erred by failing to make findings of fact that clearly show it considered and evaluated the defendant's evidence before concluding that the defendant violated his probation by failing to pay the cost of his sexual abuse treatment program. The defendant presented ample evidence of an inability to pay after efforts to secure employment; the probation officer corroborated this evidence and testified that he believed that the defendant would complete the treatment program if he could pay for it.

State v. Stephenson, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzE5LTEucGRm). The defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug treatment program.

G.S. 15-196.1 Credit

State v. Stephenson, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzE5LTEucGRm). The defendant was not entitled to credit under G.S. 15-196.1 for time spent in a drug treatment program as a condition of probation because the program was not an institution operated by a State or local government.

Evidence

404(b)

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The court rejected the defendant's argument that, in a drug trafficking case, the trial court erred by admitting evidence regarding a co-defendant's earlier incident of drug possession that did not involve the defendant. The evidence was relevant to the co-defendant's guilty knowledge and was sufficiently similar to the matter in question. The court also found that the evidence was not subject to exclusion under Rule 403.

Hearsay

State v. Stanley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzUyLTEucGRm). When statements

were offered to explain an officer's subsequent action, they were not offered for the truth of the matter asserted and thus were not hearsay.

Rebuttal

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). In a drug trafficking case, the trial court did not abuse its discretion by allowing the State's witness to identify the substance as an opium derivative on rebuttal. Under G.S. 15A-1226, a trial judge may, in his or her discretion, permit a party to introduce additional evidence prior to the verdict and offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal.

Impeachment

State v. Phillpott, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzgtMS5wZGY=). The court rejected the defendant's argument that the trial court erred by overruling the defendant's objection to the reading of a witness's prior inconsistent statement, concluding that the statement was consistent with the witness's testimony. A concurring judge concluded that the statement was inconsistent but properly admitted.

Arrest, Search & Investigation

Stops

State v. Brown, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MjAtMS5wZGY=). Officers had reasonable suspicion to stop the defendant. When officers on a gang patrol noticed activity at a house, they parked their car to observe. The area was known for criminal activity. The defendant exited a house and approached the officers' car. One of the officers had previously made drug arrests in front of the house in question. As the defendant approached, one officer feared for his safety and got out of the car to have a better defensive position. When the defendant realized the individuals were police officers his "demeanor changed" and he appeared very nervous--he started to sweat, began stuttering, and would not speak loudly. Additionally, it was late and there was little light for the officers to see the defendant's actions.

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). An officer had reasonable suspicion to stop the defendant's vehicle. An informant told the officer that after having his prescriptions for hydrocodone and Xanax filled, Mr. Shaw would immediately take the medication to defendant Treadway's residence, where he sold the medications to Treadway; Treadway then sold some or all of the medications to defendant Ellison. Subsequently, the officer learned that Shaw had a prescription for Lorcet and Xanax, observed Shaw fill the prescriptions, and followed Shaw from the pharmacy to Treadway's residence. The officer watched Shaw enter and exit Treadway's residence. Minutes later the officer observed Ellison arrive. The officer also considered activities derived from surveillance at Ellison's place of work, which were consistent with drug-related activities. Although the officer had not had contact with the informant prior to this incident, one of his co-workers had worked

with the informant and found the informant to be reliable; specifically, information provided by the informant on previous occasions had resulted in arrests.

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDcwLTEucGRm). An officer's act of handcuffing the defendant during a *Terry* stop was reasonable and did not transform the stop into an arrest. The officer observed what he believed to be a hand-to-hand drug transaction between the defendant and another individual; the defendant was sitting in the back seat of a car, with two other people up front. Upon frisking the defendant, the officer felt an item consistent with narcotics, corroborating his suspicion of drug activity. The officer then handcuffed the defendant and recovered crack cocaine from his pocket. The circumstances presented a possible threat of physical violence given the connection between drugs and violence and the fact that the officer was outnumbered by the people in the car.

Searches

In re T.A.S., __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yNzUtMS5wZGY=). In a split opinion, the court held that a search of a juvenile's bra was constitutionally unreasonable. The school's principal was told by students that pills that "would cause kids to be unsafe" were coming into the school; no detail was provided regarding the nature of the pills or of the students responsible. The only other information provided was that some students were hiding the pills in places not normally searched when they came through metal detectors at the school's entrance, like shoe tongues, socks, bras, and underwear. As a result of the tip and after passing through the metal detectors, all students were brought one-by-one to a classroom to be searched. They emptied their book bags, had their jackets thoroughly searched, removed their shoes, and emptied their pockets. A staff member of unspecified sex conducted the searches and patted down the students' socks. The girls were required to perform a "bra lift," where they "pull their shirts out," "shake them," and "go underneath themselves with their thumb in the middle of their bra [to] pull it out." Other administrators and a resource officer, whose sexes were unspecified, were in the room, along with a male law enforcement officer who observed. The juvenile unsuccessfully moved to suppress drugs and drug paraphernalia founds during her search. The court concluded that when the school required the juvenile to pull out her bra in searching for evidence of pills of an unknown nature and quantity, the content of the suspicion failed to match the degree of intrusion and the search was unreasonable. One judge concurred in the result; another dissented.

Informants

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The trial court did not err by denying the defendant's motion for disclosure of an informant's identity where the informant's existence was sufficiently corroborated under G.S. 15A-978(b).

Criminal Offenses

Homicide

State v. Phillpott, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MzgtMS5wZGY=). There was

sufficient evidence of premeditation and deliberation where the victim did not provoke the defendant; after shooting the victim, the defendant pointed the gun at the victim's wife; and the victim had five gunshot wounds, four to the head.

Larceny and Robbery

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjYzLTEucGRm). In a robbery case, the court held that the trial judge properly instructed the jury on the doctrine of recent possession as to non-unique goods (cigarettes).

State v. Whitley, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgzLTEucGRm). The trial court did not err by failing to define the term "larceny" for the jury. The court noted that it has previously determined that "larceny" is a word of "common usage and meaning to the general public[,]" and thus it is not error to not define it in the jury instructions. It further noted: "While we disagree that the legal term "larceny" is commonly understood by the general public, we are bound by precedent . . . and thus this issue is overruled."

Frauds

State v. Griffin, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjc0LTEucGRm). The evidence was sufficient to establish that the defendant perpetrated the offense of obtaining property by false pretenses. A surveillance video showed that he took a purse containing the victim's credit card at 9:06 a.m. The credit card was used at 9:30 a.m. to purchase a laptop computer only 3.4 miles from the scene of the theft. Also, there was evidence that the defendant was involved in a similar crime.

Weapons Offenses

State v. Lee, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjYzLTEucGRm). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, ___ N.C. App. ___, 707 S.E.2d 664 (2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: "While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges."

Drug Offenses

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). (1) The trial court

did not err by denying the defendant's motion to dismiss trafficking charges on the grounds that a conviction would infringe upon his constitutional rights to due process and freedom from cruel and unusual punishment. The defendant argued that he lacked adequate notice that "possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills" and because punishment would be grossly unfair given the relatively small amount of controlled substance at issue. The court rejected the defendant's "lack of notice" argument concluding that in North Carolina, liability for trafficking cases involving prescription medications hinges upon the total weight of the pills or tablets in question not the weight of the controlled substance in those medications. The court rejected his "substantive unfairness" argument, concluding that there is a rational basis for subjecting individuals involved with large-scale distribution of mixtures containing controlled substances to more severe punishment: deterrence of large scale drug distribution. (2) The trial court did not err by denying the defendants' motions to dismiss trafficking in opium charges; the defendant had asserted that the medications at issue, which were Schedule III controlled substances, were not punishable under G.S. 90-95(h)(4). At trial the State's witness testified that a portion of the pills contained a mixture of hydrocodone and acetaminophen; that hydrocodone is a derivative of opium; that a mixture consisting of hydrocodone combined with acetaminophen is called dihydrocodeinone; and that dihydrocodeinone is a derivative of opium. Thus, there was substantial evidence that the pills consisted of a mixture containing an opiate derivative. The court rejected the defendant's argument that the General Assembly intended G.S. 90-95(d)(2) to govern criminal liability in connection with prescription drugs, reasoning, in part, that G.S. 90-95(d)(2) clearly limits its application to situations not covered by G.S. 90-95(h)(4). The court further concluded: "the controlled substance schedule to which a particular opiate derivative is assigned has nothing to do with the extent to which activities involving that substance are subject to punishment under the trafficking statutes."

Motor Vehicle Offenses

State v. Banks, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzUtMS5wZGY=). (1) In a felony speeding to elude case, the trial court did not err by giving a disjunctive jury instruction that allowed the jury to convict the defendant if it found at least two of three aggravating factors submitted. The defendant had argued that the trial court should have required the jury to be unanimous as to which aggravating factors it found. (2) The trial judge did not commit plain error by failing to define the aggravating factor of reckless driving in felony speeding to elude jury instructions. The defendant had argued that the trial court was obligated to include the statutory definition of reckless driving in G.S. 20-140.

State v. Leonard, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg3LTEucGRm). There was sufficient evidence of felonious serious injury by motor vehicle. The defendant had argued that his willful action in attempting to elude arrest was the proximate cause of the victim's injuries, not his impaired driving. The court rejected this argument concluding that even if his willful attempt to elude arrest was a cause of the injuries, his driving under the influence could also be a proximate cause.

Defenses

Insanity

State v. Castillo, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC04MTQtMS5wZGY=). No plain error

occurred when the trial judge instructed the jury on insanity using N.C.P.I.—Crim. 304.10. The defendant had argued that the trial court erred by failing to instruct the jury that the insanity defense applies if a defendant believed, due to mental illness, that his conduct was morally right.

Entrapment by Estoppel

State v. Pope, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05MzItMS5wZGY=). The trial court erred by dismissing larceny by employee charges based on the theory of entrapment by estoppel. The defendant, a public works supervisor, was accused of selling "white goods" and retaining the proceeds. The court concluded that while officials testified that they were aware that some "white goods" were sold and that the money was deposited to a common pool, no evidence was offered to show that government officials expressly condoned the defendant pocketing money from that fund. Thus, the explicit permission requirement for entrapment by estoppel was not met.

Correcting Errors

State v. Carrouthers, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDcwLTEucGRm). In dicta, the court noted that the trial judge was entitled to modify her ruling on a suppression motion because court was still in session.

State v. Ellison, __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0zODYtMS5wZGY=). The court remanded to the trial court for correction of a clerical error in the judgment so that the judgment would reflect the offense the defendant was convicted of committing (trafficking by transportation versus trafficking by delivery).