

Criminal Procedure
DWI Procedure
License Revocation

Hoots v. Robertson, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTE5LTEucGRm>). The trial court erred by determining that a clerical error on a law enforcement officer's affidavit under G.S. 20-16.2(d) divests the DMV of its authority to suspend the driving privileges of a person who has willfully refused to submit to a chemical analysis when charged with an implied consent offense where the error does not involve an element of the offense of willful refusal. The clerical error involved listing the time of refusal as 3:45 am instead of 3:47 am.

Jury Instructions

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDcyLTEucGRm>). Although the trial judge did not expressly instruct the jury that if it failed to find the required elements it must find the defendant not guilty, the defendant was not prejudiced by the trial court's alternative final mandate language ("If you do not so find . . . you will not return a verdict of guilty"). Notably, the verdict sheet provided an option of returning a not guilty verdict.

Verdict

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg4LTEucGRm>). In a case in which the defendant was indicted on 24 counts of indecent liberties, 6 counts of first-degree statutory sex offense, and 6 counts of second-degree sex offense, the court cited *State v. Lawrence*, 360 N.C. 368 (2006), and rejected the defendant's argument that because the indictments did not distinguish the separate acts, there was a possibility that the jury verdicts were not unanimous as to all of the convictions.

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDcyLTEucGRm>). The defendant's right to a unanimous verdict was violated in a kidnapping case where the trial judge instructed on the theories of restraint, confinement and removal but no evidence supported a theory of removal.

Sentencing
Prior Record Level

State v. Best, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjY0LTEucGRm>). Distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), the court held that the trial court did not err by using a felonious breaking or entering conviction for the purpose of both supporting a possession of a firearm by a felon charge and calculating the defendant's prior record level.

Sex Offenders

State v. Jarvis, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMS0xLnBkZg==>). (1) The trial court erred by requiring the defendant to enroll in satellite-based monitoring (SBM) for ten years after finding that he required the highest level of supervision and monitoring. The DOC risk assessment classified the defendant as a low risk and only two of the trial court's four additional findings of fact were supported by competent evidence. One finding of fact involved the defendant's *Alford* plea and lack of remorse. Remanding, the court instructed that the trial court may consider whether the defendant's actions showed lack of remorse but indicated that no authority suggests that the fact of an *Alford* plea itself shows lack of remorse. (2) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to order SBM enrollment because the State failed to file a written pleading providing notice regarding the basis for SBM. (3) The court rejected the defendant's argument that the trial court violated his due process rights by ordering him to enroll in SBM without providing any notice of the ground triggering SBM. Because the defendant was placed on probation and as a condition of his probation was incarcerated for 120 days, his eligibility for SBM was determined by the trial court pursuant to G.S. 14-208.40A; neither the DOC nor the trial court was responsible for any type of notice regarding defendant's eligibility. (4) Citing *State v. Cowan*, __ N.C. App. __, __, 700 S.E.2d 239, 247 (2010), the court rejected the defendant's argument that the trial court erred by determining that indecent liberties involved the physical, mental, or sexual abuse of a minor.

State v. Mann, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTg2LTEucGRm>). (1) The trial court failed to follow the procedures set out in G.S. 14-208.40A when ordering the defendant to register as a sex offender and enroll in lifetime SBM. Specifically, the trial court erred by considering the risk assessment before deciding whether the defendant committed an aggravated offense. (2) The trial court erred by finding that sex offense in a parental role (G.S. 14-27.7(a)) is an aggravated offense.

Evidence

***Crawford* Issues**

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm>). Assuming *arguendo* that the defendant properly preserved the issue for appeal, no confrontation clause violation occurred when the State's expert forensic pathologist, Dr. Deborah Radisch, testified about the victim's autopsy and gave her own opinion concerning cause of death. Distinguishing *State v. Locklear*, 363 N.C. 438 (2009), and *Bullcoming v. New Mexico*, __ U.S. __, 180 L. Ed. 2d. 610 (2011), and following *State v. Blue*, __ N.C. App. __, 699 S.E.2d 661 (2010), the court noted that Dr. Radisch was present for the autopsy and testified as to her own independent opinion as to cause of death.

Rule 403 Balancing

State v. King, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjM3LTEucGRm>). Over a dissent, the court held that the trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403.

Arrest, Search & Investigation

Consent

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm>). The fact that officers advised the defendant that if he did not consent to giving oral swabs and surrendering certain items of clothing they would detain him until they obtained a search warrant did not negate the defendant's voluntary consent to the seizure of those items.

Plain View

State v. Lupek, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02My0xLnBkZg==>). In a drug case, the trial court did not err by denying the defendant's motion to suppress when an officer saw the item in question—a bong—in plain view while standing on the defendant's front porch and looking through the open front door. The court rejected the defendant's argument that the officer had no right to be on the porch. The officer responded to a call regarding a dog shooting, the defendant confirmed that his dog was shot by a neighbor, and the officer went to the defendant's residence to investigate. Once there he encountered a witness from whom he sought to obtain identification as he followed her to the porch.

Confidential Informants

State v. Mack, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDIwLTEucGRm>). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case where—for reasons discussed in the court's opinion—the defendant failed to show that the circumstances of his case required disclosure.

Criminal Offenses

Homicide Offenses

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm>). (1) There was sufficient evidence of malice to sustain a second-degree murder conviction. Because there was evidence that the defendant killed the victim with a deadly weapon, the jury could infer that the killing was done with malice. The court rejected the defendant's argument that his statements that he and the victim "had words or something" provided evidence of provocation sufficient to negate the malice presumed from the use of a deadly weapon or require a voluntary manslaughter instruction. (2) The evidence was sufficient to support a first-degree felony-murder conviction when the underlying felony was armed robbery and where the defendant used the stolen item—a .357 Glock handgun—to commit the murder and the two crimes occurred during a continuous transaction.

Robbery

State v. McMillan, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNDE5LTEucGRm>). The evidence was sufficient to sustain an armed robbery conviction when the item stolen—a handgun—was also the item used to threaten or endanger the victim's life.

Sexual Assaults

State v. Davis, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzg4LTEucGRm>). In a case in which the defendant was indicted on 24 counts of indecent liberties, 6 counts of first-degree statutory sex offense, and 6 counts of second-degree sex offense, the evidence was sufficient even though the victim did not describe in detail each and every act. The victim testified that the defendant demanded he perform sexual acts at least once a week when the victim was in the sixth and seventh grades, with only three or four weeks in which the defendant did not commit sexual acts on or in the presence of the victim. He testified that during sixth grade, the defendant required that the victim masturbate him once a week. In addition, the defendant would make the victim watch him masturbate, and make the victim masturbate himself as well. The victim testified that during seventh grade, the defendant made the victim watch him masturbate and perform fellatio on him once a week. The victim's testimony described discrete instances of different types of sexual acts perpetrated upon him by the defendant over a long period of time.

Kidnapping

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDcyLTEucGRm>). In a kidnapping case, the trial court erred by submitting the theory of removal to the jury. Although evidence supported confinement and restraint, no evidence suggested that the defendant removed the victim in a case where the crime occurred entirely in the victim's living room. The court stated: "where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not 'removed' within the meaning of our kidnapping statute."

Weapons Offenses

State v. Best, __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjY0LTEucGRm>). There was sufficient evidence that the defendant constructively possessed a gun found in a van to support charges of carrying a concealed weapon and possession of a firearm by a felon. The fact that the defendant was the driver of the van gave rise to an inference of possession. Additionally, other evidence showed possession: the firearm was found on the floor next to the driver's seat, in close proximity to the defendant; the defendant admitted that he owned the gun; and this admission was corroborated by a passenger in the van who had seen the defendant in possession of the weapon that afternoon, and remembered that the defendant had been carrying the gun in his pants pocket and later placed it on the van floor.

In re N.T., __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgxLTEucGRm>). The evidence was insufficient to support an adjudication of delinquency based on assault by pointing a gun where the weapon was an airsoft gun from which plastic pellets were fired using a "pump action" mechanism. For purposes of the assault by pointing a gun statute, the term "gun" "encompasses devices ordinarily understood to be 'firearms' and not other devices that fall outside that category." Slip op. at 12. Thus, imitation firearms are not covered. The court noted that its conclusion had no bearing on whether the juvenile might be found delinquent for assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, assault inflicting serious injury, or assault on a child under twelve.