

DWI Procedure -- Revocations

Lee v. Gore, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 26, 2011)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80MThBMTAtMS5wZGY=>). Affirming a divided decision below, *Lee v. Gore*, ___ N.C. App. ___, 698 S.E.2d 179 (Aug. 17, 2010), the court held that the Division of Motor Vehicles (DMV) may not revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful. The court reasoned that because G.S. 20-16.2(d) requires that the DMV first receive a “properly executed affidavit” from law enforcement swearing to a willful refusal to submit to chemical analysis before revoking driving privileges, DMV lacked the authority to revoke the petitioner’s driving privileges. In this case, the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was “refused.” However, neither document indicated that the petitioner’s refusal to participate in chemical analysis was willful.

Ineffective Assistance of Counsel

State v. Choudhry, ___ N.C. ___, ___ S.E.2d ___ (Aug. 26, 2011)

(<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS80MDIBMTAtMS5wZGY=>). Although the trial court’s inquiry of the defendant was insufficient to assure that the defendant knowingly, intelligently, and voluntarily waived his right to conflict free counsel, because the defendant failed to show that counsel’s performance was adversely affected by the conflict, he is not entitled to relief. At the defendant’s noncapital first-degree murder trial, the prosecution informed the trial court that defense counsel had previously represented a State’s witness, Michelle Wahome, who was the defendant’s girlfriend at the time of the incident in question and with whom the defendant had a child. Specifically, defense counsel had represented Wahome with respect to charges arising out of an incident at a shopping mall. The charges were reduced to common law forgery and although the defendant had not been charged in the matter, both he and Wahome appeared in the video surveillance and the items in question were men’s clothing. Defense counsel indicated that the prior representation would not impair his ability to represent the defendant and that he did not plan to question Wahome about the earlier incident. The trial court then informed the defendant that defense counsel had previously represented Wahome, a witness for the State and asked the defendant if he had any concerns about counsel’s ability appropriately to represent him, if he was satisfied with counsel’s representation, and if he desired to have counsel continue his representation. The defendant said that he had no concerns about counsel’s representation and gave an affirmative answer to each remaining question. The defendant was convicted and appealed. In a split decision, the court of appeals found no error. *State v. Choudhry*, ___ N.C. App. ___, ___, 697 S.E.2d 504 (2010). The dissenting judge contended that the trial court erred by failing to fully inform the defendant of the consequences of the potential conflict and that a remand was required. The supreme court determined that because the prosecutor brought a potential conflict to the trial judge’s attention, the trial judge was obligated to make an inquiry. The court concluded that because the trial court did not specifically explain the limitations that the conflict imposed on defense counsel’s ability to question Wahome regarding her earlier criminal charges or indicate that he had given the defendant such an explanation, the trial judge failed to establish that the defendant had sufficient understanding of the implications of counsel’s prior representation of Wahome to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest. However, it went on to conclude that in light of counsel’s effective cross-examination of Wahome, the defendant failed to demonstrate an actual conflict of interest adversely affecting performance and thus was not entitled to relief.