

## **Criminal Procedure**

### **Counsel Issues**

*State v. Watlington*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yODgtMS5wZGY=>). The trial court committed reversible error by allowing the defendant to proceed pro se without conducting the inquiry required by G.S. 15A-1242.

### **Corpus Delecti Rule**

*State v. Sweat*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01Ny0xLnBkZg==>). Over a dissent, the court held that there was sufficient evidence of fellatio under the corpus delecti rule to support sex offense charges involving this act.

### **Habitual Felon**

*State v. Holloway*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNDAtMS5wZGY=>). A conviction for habitual misdemeanor assault can be used as a predicate felony for habitual felon status.

### **Sentencing**

*State v. Ross*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTAzLTEucGRm>). The trial court erred by submitting to the jury three aggravating factors that had not been alleged in the indictment as required by G.S. 15A-1340.16(a4). The three aggravating factors were that the defendant used a firearm equipped with an unregistered silencing device; the defendant's conduct included involvement in the illegal sale and purchase of narcotics; and the defendant's conduct was part of a course of conduct which included the commission of other crimes of violence against another person or persons.

*State v. Watlington*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yODgtMS5wZGY=>). The trial court erred in calculating the defendant's prior record level with respect to whether a federal conviction was substantially similar to a N.C. felony. The determination of substantial similarity is a question of law which cannot be determined by stipulation to the worksheet.

## **Evidence**

### **404(b)**

*State v. Pierce*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTg4LTEucGRm>). (1) In a case in which the defendant faced homicide charges in connection with the death of an officer in a vehicular accident while that officer responded to a call regarding the defendant's flight from another officer's lawful stop of the defendant's vehicle, the trial court did not err by admitting 404(b) evidence that the defendant had been involved in a robbery. In the robbery the defendant and an accomplice fled from the police and the accomplice was shot and killed by police officers. This was admitted to show implied malice in that it showed the defendant's knowledge that flight from the police was dangerous and could

result in death. (2) The trial court did not err by admitting evidence that the defendant and two other occupants of his vehicle stole several pounds of marijuana just before the defendant fled from the officer. The evidence showed the defendant's motive to flee and his "intent or implied malice."

### **Crawford Issues**

*State v. Ross*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTAzLTEucGRm>). (1) Defense counsel's cross-examination of a declarant at a probable cause hearing satisfied *Crawford's* requirement of a prior opportunity for cross-examination. (2) Because evidence admitted for purposes of corroboration is not admitted for the truth of the matter asserted, *Crawford* does not apply to such evidence.

### **Criminal Offenses**

#### **Homicide**

*State v. Pierce*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTg4LTEucGRm>). (1) In a case in which a second officer got into a vehicular accident and died while responding to a first officer's communication about the defendant's flight from a lawful stop, the evidence was sufficient to establish malice for purposes of second-degree murder. The defendant's intentional flight from the first officer—including driving 65 mph in a residential area with a speed limit of 25 mph and throwing bags of marijuana out of the vehicle—reflected knowledge that injury or death would likely result and manifested depravity of mind and disregard of human life. (2) The defendant's flight from the first officer was the proximate cause of the second officer's death. The evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant not fled and that the second officer's death was reasonably foreseeable. The court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain.

#### **Sexual Assaults**

*State v. Sweat*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01Ny0xLnBkZg==>). In a case in which there was a dissenting opinion, the court held that (1) the trial court erred by instructing the jury that to find the defendant guilty of four charges of first-degree statutory sexual offense they could find that he engaged in "either anal intercourse and/or fellatio" with the victim when the evidence showed only two acts of fellatio and (2) the trial court did not err with respect to instructions on two counts because the jury could properly have found either anal intercourse or fellatio and was not required to agree as to which one occurred.

#### **Weapons**

*State v. Pierce*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTg4LTEucGRm>). (1) For purposes of a felon in possession charge, the evidence was insufficient to establish that the defendant possessed a firearm found along the route of his flight by vehicle from an officer. The defendant fled from an officer attempting to make a lawful stop. The officer did not see a firearm thrown from the defendant's vehicle; the firearm was found along the defendant's flight route several hours after the chase; the firearm was

traced to a dealer in Winston-Salem, where the other two occupants of the defendant's vehicle lived; and during the investigation a detective came to believe that one of the vehicle's other occupants owned the firearm. (2) The evidence was sufficient to show that the defendant possessed a shotgun found at his residence. The shotgun was found in the defendant's closet along with a lockbox containing ammunition that could be used in the shotgun, paychecks with the defendant's name on them, and the defendant's parole papers. Also, the defendant's wife said that the defendant was holding the shotgun for his brother.

### **Motor Vehicles**

*State v. Pierce*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTg4LTEucGRm>). In a case in which a second officer died in a vehicular accident when responding to a first officer's communication about the defendant's flight from a lawful stop, the evidence was sufficient to establish that the defendant's flight was the proximate cause of death to support a charge of fleeing to elude arrest and causing death. The evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant remained stopped after the first officer pulled him over and that the second officer's death was reasonably foreseeable. The court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain.

### **Ineffective Assistance of Counsel**

*State v. Surratt*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Oct. 18, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMzktMS5wZGY=>). In a sex offense case, the defendant received ineffective assistance of counsel when counsel failed to object to the prosecutor's motion in limine to exclude specific reference to a prior DSS hearing and/or to clarify the evidence regarding that hearing. At the prior hearing the district court considered a DSS petition for abuse, neglect, and dependency of the defendant's children and concluded that the children were not sexually abused but were neglected. At the criminal trial, the trial court granted the State's motion in limine to exclude specific references to the outcome of the DSS hearing. Defense counsel did not object to this motion. A DSS social worker then testified to the victim's allegations of sexual abuse and stated that DSS removed the defendant's children from the home. Because of this testimony, the jury would have thought that the children were removed due to the sexual abuse allegations when in fact they were removed due to neglect.