

Criminal Procedure

Pretrial Release

State v. Harrison, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNDMtMS5wZGY=>). A district court judge did not err by failing to follow an administrative order issued by the senior resident superior court judge when that order was not issued in conformity with G.S. 15A-535(a) (issuance of policies on pretrial release). The administrative order provided, in part, that “the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement.” The district court judge was not required to follow the administrative order because the superior court judge issued it without consulting with the chief district court judge or other district court judges within the district.

Pleas

State v. Rico, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCOxNTM2LTEucGRm>). The court determined that a plea agreement must be set aside. The defendant initially was indicted for first-degree murder. The State and the defendant entered into a plea agreement whereby the defendant agreed to plead guilty to voluntary manslaughter, admit to an aggravating factor, and receive a sentence in the aggravated range. The court determined that the plea agreement improperly used the aggravating factor of using a deadly weapon at the time of the crime to elevate the defendant’s sentence and that this portion of the agreement was material to the agreement as a whole. Determining that the defendant may not retain only the favorable terms of the plea agreement while repudiating the unfavorable terms, the court held that the plea agreement must be set aside. Concluding that the defendant did not fulfill the plea agreement, the court stated that on remand the State may choose to have the defendant’s judgment vacated in full and reindict defendant for first degree murder or to have defendant resentenced on his guilty plea to voluntary manslaughter. However, it noted, regardless of which option the State chooses G.S. 15A-1335 (resentencing after appellate review) applies. [Author’s note: It is unclear how the defendant breached the agreement, why a new indictment would be required, and how the defendant can be resentenced on a guilty plea when the underlying plea agreement was set aside.]

Sequestration

State v. Sprouse, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01MTgtMS5wZGY=>). Based on the facts presented in this child sexual assault case, the trial court did not abuse its discretion by denying the defendant’s request to sequester witnesses. The court noted however that “the better practice should be to sequester witnesses on request of either party unless some reason exists not to.” (quotation omitted).

Jury Argument

State v. Gillikin, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02MDctMS5wZGY=>). Although reversing on other grounds, the court characterized the prosecutor’s closing argument as “grossly improper.” The prosecutor repeatedly engaged in abusive name-calling of the defendant and expressed

his opinion that defendant was a liar and was guilty. The entire tenor of the prosecutor's argument was undignified and solely intended to inflame the passions of the jury. The court noted that had the trial court not issued a curative instruction to the jury, it would have been compelled to order a new trial on this basis.

Jury Deliberations

State v. Gillikin, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02MDctMS5wZGY=>). The trial court's instructions to a deadlocked jury unconstitutionally coerced guilty verdicts. The jury began their initial deliberations and continued deliberating for about three hours. Following a lunch break, the jury resumed deliberations. After an hour the jury sent the following note to the court: "We cannot reach a unanimous decision on 4 of the 5 verdicts." Upon receiving the note, the trial judge brought the jury back into the courtroom and gave the following instruction:

It's not unusual, quite frankly, in any case for jurors to have a hard time reaching a unanimous verdict on one charge, much less four or five or more.

So what the Court is prepared to do is remind you – and if you look at the jury instructions – that it is your duty to find the truth in this case and reach a verdict.

What I'm going to do is understand that you guys are having some difficulty back there but most respectfully, direct once again you go back into that jury room, deliberate until you reach a unanimous verdict on all charges. You've not been deliberating that long. I understand it's difficult and I understand sometimes it can be frustrating, but what I ask you to do is continue to be civil, professional, cordial with each other, exchange ideas, continue to deliberate and when you've reached a unanimous verdict, let us know.

Thank you so much. Once again, I ask you [to] retire to your jury room to resume deliberations.

The jury then resumed deliberations, and after approximately 90 minutes, returned three guilty verdicts. Although the trial judge's instructions contained the substance of G.S. 15A-1235(a) and (c), they did not contain the substance of G.S. 15A-1235(b) and as a result were coercive. Nowhere in the instructions was there a suggestion to the jurors that no juror is expected to "surrender his honest conviction" or reach an agreement that may do "violence to individual judgment." The court went on to conclude that the error was not harmless and ordered a new trial.

Sentencing

State v. Rico, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTM2LTEucGRm>). (1) Although the defendant pleaded guilty, admitting an aggravating factor, and the plea agreement included a sentence in the aggravated range, the trial judge erred by sentencing the defendant in the aggravated range in that he failed to "make the required findings of any aggravating factors and also failed to exercise his discretion in determining whether an aggravated sentence was appropriate." The court stated: "the presence of a plea agreement as to sentence does not vitiate the requirement that the trial court make written findings when deviating from the presumptive sentencing range under the Structured Sentencing Act." (2) The trial court's restitution order was not supported by competent evidence.

Sex Offenders

State v. Sprouse, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01MTgtMS5wZGY=>). (1) Following prior case law, the court held that taking indecent liberties with a child is not an aggravated offense for purposes of lifetime SBM. (2) Relying on *State v. Clark*, __ N.C. App. __ (April 19, 2011) (first-degree statutory rape involving a victim under 13 is an aggravated offense for purposes of SBM), the court held that statutory rape of a victim who is 13, 14, or 15 is an aggravated offense for purposes of lifetime SBM. (3) Neither statutory sex offense under G.S. 14-27.7A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) are aggravated offenses for purposes of SBM.

Correcting Errors

State v. Rico, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTM2LTEucGRm>). The trial judge erred when ruling on the defendant's motion for appropriate relief by treating the sentencing judge's failure to include required findings to support an aggravated sentence as a clerical error that could be corrected with an amended judgment. The error was one of law.

Evidence

Relevancy

State v. Britt, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMTEtMS5wZGY=>). In a case in which the defendant was charged with murdering his wife, the trial court did not abuse its discretion by admitting a letter the defendant wrote years before his wife's death to an acquaintance detailing his financial hardships. Statements in the letter supported the State's theory that the defendant had a financial motive to kill his wife.

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State v. Sprouse, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01MTgtMS5wZGY=>). In a child sexual assault case, the trial court erred by allowing a DSS social worker to testify that there had been a substantiation of sex abuse of the victim by the defendant. Citing its opinion in *State v. Giddens*, 199 N.C. App. 115 (2009), *aff'd*, 363 N.C. 826 (2010), the court agreed that this constituted an impermissible opinion vouching for the victim's credibility. However, the court found that unlike *Giddens*, the error did not rise to the level of plain error.

404(b)

State v. Britt, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMTEtMS5wZGY=>). In a case in which the defendant was charged with murdering his wife, the trial court did not abuse its discretion by admitting 404(b) evidence pertaining to the defendant's submission of false information in a loan application. Evidence of the defendant's financial hardship was relevant to show a financial motive for the killing.

Opinions

State v. Britt, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMTEtMS5wZGY=>). The trial court did not abuse its discretion by reversing its ruling on the defendant's motion in limine and allowing the State's expert witnesses' firearm identification testimony. The trial court initially had ruled that it would limit any testimony by the experts to statements that the bullets were "consistent," rather than that they had been fired from the same weapon. However, after defense counsel stated in his opening statement that defense experts would testify as to their "opinion that you cannot make a match, that there [are] simply not enough points of comparison on the two bullets," the trial court reversed its earlier ruling and permitted the State's experts to testify to their opinions that both bullets were fired from the same gun. (1) Citing case law, the court held that forensic toolmark identification is sufficiently reliable. (2) The court rejected the defendant's argument that the State's experts were not qualified to testify based on a lack of evidence verifying one of the expert's training and a shared lack of credentials. The State presented evidence of both experts' qualifications and experience. Although the State did not present verification of one of the expert's training and neither expert was a member of a professional organization, both experts explained how firearm toolmark identification works and how they conducted their investigations such that they were better qualified than the jury to form an opinion in the instant case.

Criminal Offenses

Sexual Assault

State v. Sprouse, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01MTgtMS5wZGY=>). There was sufficient evidence of penetration during anal intercourse to sustain convictions for statutory sex offense and sexual activity by a substitute parent. The victim testified that the defendant "inserted his penis . . . into [her] butt," that the incident was painful, and that she wiped blood from the area immediately after the incident.

Larceny and Related Offenses

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01NDYtMS5wZGY=>). (1) Following *State v. Nickerson*, __ N.C. __, 715 S.E.2d 845 (2011), the court held that unauthorized use is not a lesser included offense of possession of stolen property. (2) There was sufficient evidence to sustain the defendant's conviction for possession of a stolen vehicle. The court rejected the defendant's argument that he did not have reason to believe the vehicle was stolen, in part because the defendant's own statements indicated otherwise.

Frauds

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NTktMS5wZGY=>). (1) The evidence was insufficient to support a charge of uttering a forged check. For forgery, the "false writing must purport to be the writing of a party other than the one who makes it and it must indicate an attempted deception of similarity." Here, the State presented no evidence that the check was not in fact a check

from the issuer. (2) For the same reason the court held that the evidence was insufficient to support a conviction for obtaining property by false pretenses.

Ineffective Assistance of Counsel

State v. Britt, __ N.C. App. __, __ S.E.2d __ (Dec. 6, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zMTEtMS5wZGY=>). Defense counsel's statements in opening argument that opened the door to testimony by the State's two experts in firearm toolmaker identification that had been barred by the trial court's ruling on a motion in limine did not constitute ineffective assistance of counsel. The trial court initially ruled that it would limit any testimony by the State's experts to statements that the bullets were "consistent," rather than that they had been fired from the same weapon. However, after defense counsel stated in his opening statement that defense experts would testify as to their "opinion that you cannot make a match, that there [are] simply not enough points of comparison on the two bullets," the trial court reversed its earlier ruling and permitted the State's experts to testify to their opinions that both bullets were fired from the same gun.

Judicial Administration

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(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0zNDMtMS5wZGY=>). A district court judge did not err by failing to follow an administrative order issued by the senior resident superior court judge when that order was not issued in conformity with G.S. 15A-535(a) (issuance of policies on pretrial release). The administrative order provided, in part, that "the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement." The district court judge was not required to follow the administrative order because the superior court judge issued it without consulting with the chief district court judge or other district court judges within the district.