Criminal Procedure

Indictments & Related Issues

State v. Abbott, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NTgtMS5wZGY=). (1) In a larceny by employee case, the trial court erred by allowing the State to amend the bill of indictment. The indictment stated that the defendant was an employee of "Cape Fear Carved Signs, Incorporated." The State moved to amend by striking the word "Incorporated," explaining that the business was a sole proprietorship of Mr. Neil Schulman. The amendment was a substantial alteration in the charge. (2) The court rejected the State's argument that the defendant waived his ability to contest the indictment by failing to move to dismiss it at trial, reiterating that jurisdictional issues may be raised at any time.

State v. Clowers, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01OTAtMS5wZGY=). In an impaired driving case, citation language alleging that the defendant acted "willfully" was surplusage.

Suppression Motions

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03MDktMS5wZGY=). The defendant gave sufficient notice of his intent to appeal the denial of his motion to suppress so as to preserve his right to appeal. The State had argued that defense counsel's language was not specific enough to put the trial court and prosecution on notice of his intention to appeal the adverse ruling. Immediately following an attempt to make a renewed motion to suppress at the end of the State's evidence, defense counsel stated "that [the defendant] would like to preserve any appellate issues that may stem from the motions in this trial." The court noted that the defendant had only made five motions during trial, two of which were motions to suppress, and that following defense counsel's request, the trial court reentered substantially similar facts as he did when initially denying the pretrial motion to suppress. Clearly, the court concluded, the trial court understood which motion the defendant intended to appeal and decided to make its findings of fact as clear as possible for the record.

Jury Argument

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NzctMS5wZGY=). In a drug trafficking case, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. The prosecutor asserted: "Think about the type of people who are in that world and who would be able to testify and witness these type of events. I submit to you that when you try the devil, you have to go to hell to get your witness. When you try a drug case, you have to get people who are involved in that world. Clearly the evidence shows that [the defendant] was in that world. He's an admitted drug dealer and admitted drug user." Citing *State v. Willis*, 332 N.C. 151, 171 (1992), the court concluded that the prosecutor was not characterizing the defendant as the devil but rather was using this phrase to illustrate the type of witnesses which were available in this type of case.

Sentencing

State v. Mabry, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xMDgtMS5wZGY=). (1) A defendant

may, pursuant to G.S. 15A-1444(a1), appeal a sentence in the mitigated range. (2) Based on the evidence presented, the trial court did not err by failing to find the following statutory mitigating factors: the defendant has been a person of good character or has had a good reputation in the community; the defendant supports the defendant's family; the defendant has a support system in the community; and the defendant has a positive employment history or was gainfully employed.

Sex Offenders

State v. Self, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS04MzktMS5wZGY=). The court rejected the defendant's argument that the trial court lacked jurisdiction to conduct an SBM determination hearing because the DOC did not file a complaint or issue a summons to the defendant as required by the Rules of Civil Procedure. The court concluded that G.S. 14-208.40B(b), "which governs the notification procedure for an offender when there was no previous SBM determination at sentencing, does not require NCDOC to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing." Moreover, it concluded, the defendant does not argue that the DOC's letter failed to comply with the notification provisions of G.S. 14-208.40B(b).

Evidence

Authentication

State v. Crawley, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS05My0xLnBkZg==). Cell phone records introduced by the State were properly authenticated. At trial the State called Ryan Harger, a custodian of records for Sprint/Nextel, a telecommunications company that transmitted the electronically recorded cell phone records to the police department. The defendant argued that the cell phone records were not properly authenticated because Harger did not himself provide the records to the police and that he could not know for certain if a particular document was, in fact, from Sprint/Nextel. The court noted that Harger, a custodian of records for Sprint/Nextel for 10 years, testified that: he is familiar with Sprint/Nextel records; he has testified in other cases; Sprint/Nextel transmitted records to the police and that he believed that was done by e-mail; the records were kept in the normal course of business; the documents he saw were the same as those normally sent to law enforcement; and the relevant exhibit included a response letter from Sprint, a screen print of Sprint's database, a directory of cell sites, and call detail records. Although Harger did not send the documents to the police, he testified that he believed them to be accurate and that he was familiar with each type of document. This was sufficient to show that the records were, as the State claimed, records from Sprint/Nextel, and any question as to the accuracy or reliability of such records is a jury question. The court went on to conclude that even if Harger's testimony did not authenticate the records, any error was not prejudicial, because an officer sufficiently authenticated another exhibit, a map created by the officer based on the same phone records. The officer testified that he received the records from Sprint/Nextel pursuant to a court order and that they were the same records that Harger testified to. He then testified as to how he mapped out cell phone records to produce the exhibit.

Rule 609

State v. Lynch, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS04MDEtMS5wZGY=). Over a dissent, the court held that the trial court committed prejudicial error by denying defense counsel's request to

allow into evidence an exhibit showing the victim's prior convictions for twelve felonies and two misdemeanors, offered under Rule 609. The court noted that Rule 609 is mandatory, leaving no room for discretion by the trial judge.

Arrest, Search & Investigation

Stops

State v. Brown, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03MDktMS5wZGY=). The trial court erred by denying the defendant's motion to suppress evidence of his alleged impairment where the evidence was the fruit of an illegal stop. An officer who was surveying an area in the hope of locating robbery suspects saw the defendant pull off to the side of a highway in a wooded area. The officer heard yelling and car doors slamming. Shortly thereafter, the defendant accelerated rapidly past the officer, but not to a speed warranting a traffic violation. Thinking that the defendant may have been picking up the robbery suspects, the officer followed the defendant for almost a mile. Although he observed no traffic violations, the officer pulled over the defendant's vehicle. The officer did not have any information regarding the direction in which the suspects fled, nor did he have a description of the getaway vehicle. The officer's reason for pulling over the defendant's vehicle did not amount to the reasonable, articulable suspicion necessary to warrant a *Terry* stop.

Criminal Offenses

Breaking or Entering a Motor Vehicle

State v. McDowell, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yOC0xLnBkZg==). Citing *State v. Jackson*, 162 N.C. App. 695 (2004), in this breaking or entering a motor vehicle case, the court held that the evidence was insufficient where it failed to show that that the vehicle contained any items of value apart from objects installed in the vehicle.

Drug Offenses

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NzctMS5wZGY=). In a trafficking case, the evidence was sufficient to show that the defendant constructively possessed cocaine found in a vehicle in which the defendant was a passenger. Another occupant in the vehicle testified that the cocaine belonged to the defendant, the cocaine was found in the vehicle "where [the defendant]'s feet would have been[,]" and, cocaine also was found on the defendant's person.

Impaired Driving

State v. Clowers, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01OTAtMS5wZGY=). (1) There was sufficient evidence that the defendant was operating the vehicle in question. At trial a witness testified about her observations of the car, which continued from her first sighting of it until the car stopped in the median and the police arrived. She did not observe the driver or anyone else exit the car and the car did not move. The witness talked to an officer who arrived at the scene and then left. An officer testified that when she arrived at the scene eight minutes after the call went out, another officer was already talking to the driver who was still seated in the car. (2) The evidence was sufficient to show that the

Intoxilyzer test was administered on the defendant at the time in question. Jacob Sanok, a senior identification technician with the local bureau of identification testified that he read the defendant his rights for a person requested to submit to a chemical analysis to determine alcohol concentration; the defendant indicated that he understood those rights; Sanok administered the Intoxilyzer tests to the defendant; and Sanok gave the defendant a copy of the Intoxilyzer test. The State introduced the rights form signed by the defendant; Sanok's "Affidavit and Revocation Report of Chemical Analyst[,]" showing that Sanok performed the Intoxilyzer test on the defendant; and the printout from the Intoxilyzer test showing that the defendant, who was listed by name, had a reported alcohol concentration of ".25g/210L[.]" Even though Sanok did not directly identify the defendant as the person to whom he administered the Intoxilyzer test, an officer identified the defendant in the courtroom as the person who was arrested and transported to the jail to submit to the Intoxilyzer test.

Defenses

State v. Clowers, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01OTAtMS5wZGY=). In an impaired driving case, the trial court did not err by declining to instruct on automatism or unconsciousness. The defendant asserted that even though unconsciousness through voluntary consumption of alcohol or drugs does not support an instruction as to automatism or unconsciousness, his unconsciousness could have been the result of the effects of voluntary consumption of alcohol combined with the effects of Alprazolam, a drug that he had been prescribed to control his panic attacks. The court concluded that there was no evidence that the defendant's consumption of alcohol or his medication was involuntary.

Ineffective Assistance of Counsel

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Dec. 20, 2011) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NzctMS5wZGY=). The court dismissed the defendant's *Harbison* claim without prejudice in order for it to be raised by way of a motion for appropriate relief in the trial division. As to a charge of resisting an officer, defense counsel had argued to the jury that "[T]he elements are there. They were officers of the law. They were discharging a duty of their office. We are not contending they were doing anything unlawful at the time and he didn't obey. He delayed them. He obstructed them, he resisted them[.]" The court concluded that such statements cannot be construed in any other light than admitting the defendant's guilt. However, the court determined, based on the record on appeal, it was unclear whether the defendant consented to this admission of guilt.