

Criminal Procedure Appeal

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCOxMTQ0LTEucGRm>). In an appeal from a driving while license revoked conviction, the court held that the defendant's claim that his due process rights were violated when the DMV revoked his license was not properly before the court.

Capacity to Proceed

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(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCOxMTQ0LTEucGRm>). The court rejected the defendant's argument that his due process rights were violated when the trial judge failed to provide him with a hearing before ordering an examination of his capacity to proceed. G.S. 15A-1002 does not require the trial judge to conduct a hearing before such an examination. A defendant may request a hearing after the examination but failure to do so—as happened here—constitutes a waiver.

Counsel Issues

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(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCOxMTQ0LTEucGRm>). (1) The trial court did not err by appointing counsel for the defendant where there was no clear and unequivocal waiver. The defendant refused to answer whether he waived or asserted his right to counsel and made contradictory statements on the issue. He stated: "I'm not waiving my right to assistance of counsel," "I want to retain my right", and "I'm reserving my rights". He also said: "I don't need an attorney", "I refuse his counsel", and "I'll have no counsel". (2) The trial court did not err by allowing the defendant to proceed pro se where the defendant forfeited his right to counsel. In July 2007, the defendant refused to sign a waiver of counsel form. At a Jan. 2008 hearing, the court twice advised the defendant of his right to counsel and repeatedly asked if he wanted a lawyer. The defendant refused to answer, arguing, "I want to find out if the Court has jurisdiction before I waive anything". Even after the court explained the basis of its jurisdiction, the defendant refused to state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. At a July 2008 hearing, the defendant would not respond to the court's inquiry regarding counsel, asserting, "I'm not waiving my right to assistance of counsel," but also refusing the assistance of the appointed attorney. At the next hearing, he continued to challenge the court's jurisdiction and would not answer the court's inquiry regarding whether he wanted an attorney or to represent himself. Instead, he maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." The defendant willfully obstructed and delayed the proceedings and thus forfeited his right to counsel.

State v. Howell, __ N.C. App. __, __ S.E.2d __ (May 3, 2011)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCO0NzYtMS5wZGY=>). The trial court did not err by considering the defendant's pro se speedy trial motion, filed when he was represented by counsel.

Indictment Issues

State v. Cobos, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NTctMS5wZGY=>). The trial court committed reversible error by allowing the State to amend an indictment charging conspiracy to engage in “trafficking to deliver Cocaine” to add the following language: “to deliver 28 grams or more but less than 200 grams of cocaine.” To allege all of the essential elements, an indictment for conspiracy to traffic in cocaine must allege that the defendant facilitated the transfer of 28 grams or more of cocaine. Here, the indictment failed to specify the amount of cocaine. The court also concluded that a defendant cannot consent to an amendment that cures a fatal defect; the issue is jurisdictional and a party cannot consent to subject matter jurisdiction.

Speedy Trial Issues

State v. Howell, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC00NzYtMS5wZGY=>). (1) Remanding for additional findings of fact and conclusions of law, the court noted that G.S. 15A-711 does not guarantee a defendant the right to have a matter tried within a specific period of time and is not a “speedy trial” statute. (2) The court remanded for further action the trial court’s order dismissing the charges based on a violation of the constitutional right to a speedy trial, finding that the trial court “reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in this case.” The court’s opinion details the required analysis.

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm>). The court rejected the defendant’s speedy trial claim, finding that any delay was caused by his failure to state whether he asserted or waived his right to counsel, requiring four hearings on the issue.

Jury’s Review of Evidence

State v. Stevenson, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzEzLTEucGRm>). The trial court did not abuse its discretion by denying the jury’s request, made during deliberations, for a transcript of a witness’s testimony. The trial court expressly denied the request in its discretion; there is no requirement that the trial judge provide any further explanation to demonstrate that he or she is in fact exercising discretion.

Sex Offenders

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjgzLTEucGRm>). Citing *State v. Clark*, __ N.C. App. __, __ S.E.2d __ (2011), the court held that because rape of a child under the age of 13 necessarily involves the use of force or threat of serious violence, the offense is an aggravated offense requiring lifetime SBM. In dicta, it concluded: “Under the test created by this Court . . . there are no offenses that ‘fit within’ the second definition of ‘aggravated offense,’ i.e., an offense that includes ‘engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.’”

State v. Green, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTYzLTEucGRm>). Although one of its factual findings was erroneous, the trial court did not err by requiring the defendant to enroll in SBM for five years after finding that he required the highest possible level of supervision. The trial court based its conclusion on a DOC risk assessment of “moderate-low” and on three additional findings: (1) the victims were especially young, neither was able to advocate for herself, and one was possibly too young to speak; therefore the risk to similarly situated individuals is substantial; (2) the defendant has committed multiple acts of domestic violence; and (3) the defendant obtained no sex offender treatment. Distinguishing the determination at issue from the “aggravated offense” determination and the determination as to whether an offense involves the physical, mental, or sexual abuse of a minor, the court rejected the defendant’s argument that the first additional finding was erroneous because it relied on the underlying facts of the conviction. The court concluded that this finding was supported by competent evidence, specifically, the defendant’s stipulation to the prosecutor’s summary of facts provided at the defendant’s *Alford* plea. The court concluded that additional finding two was not supported by competent evidence. The only relevant evidence was the State’s representation that the defendant pled guilty to an assault charge involving the victim’s mother and a list of priors on his Prior Record Level worksheet, containing the following entry: “AWDWIKI G/L AWDW AND CT”. The court concluded that additional finding three was supported by the defendant’s admission that he had not completed the treatment. Finally, the court determined that the risk assessment and additional findings one and three supported the trial court’s order.

Evidence

404(b)

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjkzLTEucGRm>). In a case in which the defendant was charged with sexually assaulting his minor child, the court rejected, over a dissent, the defendant’s argument that the trial court erred by admitting evidence that he possessed pornographic materials (“Family Letters,” a publication purporting to contain letters regarding individuals’ sexual exploits with family members). The defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes. The court concluded that the evidence was properly admitted to show motive and intent. As to motive, it stated: “evidence of a defendant’s incestuous pornography collection sheds light on that defendant’s desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant’s motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant’s child – constituting the offense charged.” As to intent, it concluded that the defendant’s desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge. The court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge. Finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction.

Corroboration

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8wOS0xNjkzLTEucGRm>). In a case in which the defendant was charged with sexually assaulting his minor child, the court held that no plain error occurred when the trial judge admitted the victim’s prior statements that at the time in question the

defendant sexually assaulted both her and her sister. The victim testified at trial that her sister was present when the assault occurred did not state that the sister was assaulted. Although the victim's prior statements did not exactly mirror her in-court testimony, they did not contradict it and, in fact, the additional information strengthened and added credibility to her version of the events by explaining and expanding upon the sister's presence during the incident.

Judicial Notice

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTQ0LTEucGRm>). The trial court did not err by refusing to take judicial notice of provisions in the Federal Register when those provisions were irrelevant to the charged offense.

Photographs

State v. Stevenson, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMzEzLTEucGRm>). (1) In a case involving murder and other charges, the trial court properly admitted a picture of the defendant with a silver revolver to illustrate a witness's testimony that she saw the defendant at her apartment with a silver gun with a black handle. Before being received into evidence, the witness testified that the gun depicted appeared to be the same gun that the defendant had at her apartment. (2) The trial court did not abuse its discretion by concluding that the prejudice caused by the photograph did not substantially outweigh probative value.

Criminal Offenses

Homicide

State v. Dibiase, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTMtMS5wZGY=>). In a case in which the defendant was convicted of second-degree murder, the trial court committed reversible error by denying the defendant's request for a jury instruction on involuntary manslaughter. The evidence tended to show that the defendant did not intend to kill or seriously injure the victim: the victim became angry at the defendant when the defendant offered drugs to the victim's girlfriend; after the victim punched or shoved the defendant, others separated the men; the victim then charged at the defendant, who struck him on the head or neck with a beer bottle, shattering the bottle; the defendant and the victim struggled and fell; and the defendant did not stab the victim. Cause of death was a large laceration to the neck. The court rejected the State's argument that the defendant's admission that he intentionally hit the victim with the bottle supported the trial court's refusal to instruct on involuntary manslaughter. Although the intentional use of a deadly weapon causing death creates a presumption of malice, if the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice and unlawfulness, the presumption disappears, leaving only a permissible inference which the jury may accept or reject. Here, the defendant's evidence sufficed to so convert the presumption.

Sexual Assault

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NjYtMS5wZGY=>). (1) The court

reversed the defendant's second-degree sexual offense conviction where there was insufficient evidence as to the victim's mental disability. Even if the State presented sufficient evidence of mental retardation, it did not present sufficient evidence that the condition rendered her incapable of resistance. The victim was in the top range of achievement in high school, she babysat, she planned to get her driver's license and attend community college, at the time of trial she was living with her boyfriend and his mother, and there was some indication that she was pregnant but there had been no DSS intervention or charges filed against the boyfriend. On the other hand, the victim was described as "childlike", she attended classes for children with learning disabilities and was classified as intellectually disabled in the mild category, with an I.Q. of 61, DSS paid her bills, and it would be difficult for her to get a community college associate's degree. The court held: "where the victim's IQ falls within the range considered to be 'mental retardation[,] but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5." (2) Reversing the defendant's conviction for crime against nature (based on private conduct with a 17-year-old female, not for money), the court concluded that there was insufficient evidence of lack of consent.

Post-Conviction

State v. Goode, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMCOxMjU4LTEucGRm>). Citing, *State v. Oliver*, 155 N.C. App 209 (2002), the court held that no violation of G.S. 15A-1335 occurred when, after the defendant's two death sentences for murder were vacated, the trial judge imposed two consecutive life sentences. [Author's note: for a detailed discussion of G.S. 15A-1335, see the publication posted here: <http://www.sog.unc.edu/programs/crimlaw/aoj200303.pdf>].