

Criminal Procedure Jurisdiction

State v. Reeves, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODAtMS5wZGY=>). Where the defendant was charged with impaired driving and reckless driving and the State took a voluntary dismissal of the reckless driving charge in district court, that charge was not properly before the superior court on appeal for trial de novo and judgment on that offense must be vacated. The court noted that the dismissal was not pursuant to a plea agreement.

Pretrial Release and Bond Forfeiture

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03MjEtMS5wZGY=>). (1) The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the defendant was not surrendered until 9:40 pm on the day the 150-day time limit in G.S. 15A-544.5 expired and the surety's motion to set aside was not filed until the next day. The court rejected the surety's argument that the 150-day period should not expire when the courthouse closes, but should be extended until 11:59 pm. (2) The trial court did not abuse its discretion by failing to fully remit the forfeited amount pursuant to G.S. 15A-544.8(b)(2). The surety had argued that because the trial court found extraordinary circumstances warranting partial remission, remission should be in full unless the trial court makes specific findings supporting partial remission, but cited no authority for this proposition.

Pleas and Plea Procedure

State v. Reynolds, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01MzYtMS5wZGY=>). The defendant's plea was not constitutionally valid where the trial judge misinformed the defendant of the maximum sentence he would receive. The trial court told the defendant that the maximum possible sentence would be 168 months' imprisonment when the maximum sentence (and the maximum ultimately imposed) was 171 months. The court rejected the State's argument that the defendant was not prejudiced by this error.

State v. King, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (COA11-526)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01MjYtMS5wZGY=>). The trial court erred by setting aside the plea agreement in response to the defendant's motion seeking return of seized property. The defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over \$6,000 in seized funds. The defendant complied with her obligations under the agreement, but the State did not return the funds, on grounds that they had been forfeited to federal and State authorities. When the defendant filed a motion for return of the property, the trial court found that the State had breached the agreement but that specific performance was impossible; instead, the trial judge struck the plea. The court began by agreeing that the State breached the plea agreement. It went on to conclude that because the State was in a better position to know whether the money had been forfeited, it bore the risk as to the mistake of fact. It explained:

[When] the district attorney entered into the plea agreement, he was capable of confirming the status of the funds prior to agreeing to return them to defendant. The money was seized from defendant and sent to the DEA the same month. The parties did not enter into the plea agreement until approximately nine months after the forfeiture .

. . . The State could have easily confirmed the availability of the funds prior to the execution of the agreement but failed to do so. Therefore, the State must bear the risk of that mistake and the Court erred by rescinding the plea agreement based on a mistake of fact.

In this case, it concluded, rescission could not repair the harm to the defendant because the defendant had already completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs. The court reasoned that while the particular funds seized were no longer available, “money is fungible” and “there is no requirement that *the exact funds seized* must be returned to defendant and the State cannot avoid its obligation on this basis.” The court reversed the trial court’s order, reinstated the plea, and ordered the State to return the funds

Joinder

State v. Privette, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzktMS5wZGY=>). The trial court did not abuse its discretion by joining charges against two defendants for trial, where joinder did not impede the defendant’s ability to receive a fair trial.

Trial in the Defendant’s Absence

State v. Shaw, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NzQtMS5wZGY=>). The court rejected the defendant’s argument that he had an absolute right to waive the right to be present at trial. The court noted that no such right exists.

Motion to Dismiss

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMS5wZGY=>). There was insufficient evidence of constructive possession to support a conviction of felon in possession of a firearm. Although the defendant confessed that the gun was his, the case raised a corpus delicti issue. Under that rule, the State may not rely solely on the extrajudicial confession of a defendant to obtain a conviction; rather, it must produce substantial independent corroborative evidence that supports the facts underlying the confession. Here, the only evidence of possession was the extrajudicial confession. [Author’s note: for a discussion of the corpus delicti rule, see my chapter on the issue in the N.C. Superior Court Judges’ Benchbook here: <http://www.sog.unc.edu/node/2131>].

State v. Reeves, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODAtMS5wZGY=>). In an impaired driving case, there was sufficient evidence apart from the defendant’s extrajudicial confession to establish that he was driving the vehicle. When an officer arrived at the scene, the defendant was the only person in the vehicle and he was sitting in the driver's seat.

Closing Argument

State v. Privette, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzktMS5wZGY=>). While the prosecutor would have been better advised to have refrained from making comments that might have

encouraged the jury to lend an ear to the community and engage in general deterrence, any impropriety did not render the trial fundamentally unfair.

Jury Instructions

State v. Barr, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTktMS5wZGY=>). The trial court did not commit plain error by categorizing multiple identical charges in one instruction. The trial court gave the jury a copy of the instructions and separate verdict sheets clearly identifying each charge.

Jury Deliberations -- Jury Review of Evidence

State v. Harrison, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00MjUtMS5wZGY=>). (1) The trial court erred when it responded to the deliberating jury's request to review evidence by sending the requested evidence back to the jury room instead of conducting the jury to the courtroom, as required by G.S. 15A-1233. The defendant however suffered no prejudice. (2) The trial court erred when it allowed the jury to review a statement that had not been admitted in evidence. The defendant however suffered no prejudice. [Author's note: for a discussion of the rules governing a jury's request to review evidence, see my chapter on the issue in the N.C. Superior Court Judges' Benchbook here: <http://www.sog.unc.edu/node/2139>]

Sentencing

State v. Reeves, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODAtMS5wZGY=>). The court vacated the defendant's sentence on an impaired driving conviction and remanded for a new sentencing hearing where the State failed to provide the defendant with notice of its intent to use an aggravating factor under G.S. 20-179(d).

Sex Offenders

In re Hutchinson, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NTctMS5wZGY=>). The State could not appeal an order terminating the defendant's sex offender registration requirement when it had consented to the trial court's action. The court rejected the State's argument that the trial court lacked jurisdiction to terminate the defendant because he had not been registered for 10 years.

Appeal

State v. King, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (COA11-568)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjgtMS5wZGY=>). Gaps in the verbatim trial transcript were sufficiently addressed by other materials so that appellate review was possible. However, the complete lack of a verbatim transcript of the habitual felon phase of his trial precluded appellate review and warranted a new determination on this issue.

Evidence

Rules 401 & 403

State v. Privette, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzktMS5wZGY=>). (1) The trial court erred by admitting evidence concerning the history of the Bloods gang and the activities of various Bloods subsets. The court noted that “[e]vidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt.” Here, the court was unable to determine how the evidence was relevant and concluded that its effect “was to depict a ‘violent’ gang subculture of which [the defendant] was a part and to impermissibly portray [the defendant] as having acted in accordance with gang-related proclivities.” (2) The trial court did not err by allowing evidence about the hierarchy of gang structure when evidence regarding the defendant’s position in the gang was relevant to the extortion-related charges. The evidence helped explain why the defendant thought that he could induce a third party to confess to a robbery; placed into context his statements that the third party would be murdered if he did not turn himself in; and helped explain the third party’s decision to confess. (3) The trial court did not err by admitting photographs of the defendant’s tattoos and related testimony describing the relationship between some of these tattoos and Bloods symbols where that evidence also explained the defendant’s position in gang hierarchy (see discussion above). (4) Evidence of a telephone call between the defendant and his wife in which he described violent acts he would perform on her if she were a man was not relevant and had little purpose other than to show the defendant’s violent propensities.

Rule 609 (impeachment by prior conviction)

State v. Ellerbee, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDU1LTEucGRm>). The trial court erred by allowing the State to impeach a defense witness with a prior conviction that occurred outside of the ten-year “look-back” for Rule 609 when the trial court made no findings as to admissibility. However, no prejudice resulted.

Rule 612 (refreshed recollection)

State v. Harrison, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00MjUtMS5wZGY=>). The trial court properly allowed the State’s witness to use a prior statement to refresh her recollection. The prior statement was made to an officer and recounted an interaction between her and the defendant. The witness had an independent recollection of her conversation with the defendant and of making her statement to the officer. She affirmed that her recollection had been refreshed, testified from memory, and her testimony included details not in the statement. Her testimony showed that she was not using her prior statement as a crutch for something beyond her recall. In its decision the court reviewed and distinguished the law regarding the past recollection recorded and present recollection refreshed.

Crawford Issues

State v. Burrow, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzMtMS5wZGY=>). Over a dissent, the court held that the trial court committed plain error in a drug trafficking case by allowing the State to admit a SBI forensic report identifying the substance at issue as oxycodone when neither the preparer of the report nor a substitute analyst testified at trial. Although the defendant identified the pills as hydrocodone to an investigating officer, “such ‘identifying’ statements by the defendant . . . are insufficient to show what a substance is; the State must present evidence of the chemical makeup of the

substance at issue.” The court distinguished *State v. Nabors*, __ N.C. __, 718 S.E.2d 623, __ (2011) (testimony of the defendant’s lay witness that the substance at issue was “cocaine” was sufficient to identify the controlled substance as cocaine), on grounds that in this case, the defendant incorrectly identified the pills as hydrocodone (they were oxycodone). The court also rejected the notion that an officer’s testimony that the pills were oxycodone was sufficient. Noting that it might be permissible for an officer to give a lay opinion “as to a substance with a ‘distinctive color, texture, and appearance[,]’ it is not appropriate for an officer to render an opinion regarding a non-descript substance.” The dissenting judge agreed that error occurred but disagreed that the error rose to the level of plain error.

Opinions – Drug Identification

State v. Burrow, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03NzMtMS5wZGY=>). See a discussion of this case immediately above.

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMS5wZGY=>). In a drug case, no error occurred when two officers testified, based on their observation, training, and experience, that green vegetable matter was marijuana. The defendant argued that this was improper because neither was tendered as an expert and neither had conducted a chemical analysis. The court noted that it has previously held that a police officer experienced in the identification of marijuana may testify to his or her visual identification of evidence as marijuana.

Evidence of Pre- or Post-Arrest Silence

State v. Harrison, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00MjUtMS5wZGY=>). The trial court committed plain error by allowing the State to use the defendant’s his pre- and post-arrest silence as substantive evidence of guilt. When explaining the circumstances of the defendant’s initial interview, an officer testifying for the State stated: “He provided me – he denied any involvement, wished to give me no statement, written or verbal.” Also, when the State asked the officer whether the defendant had made any statements after arrest, the officer responded, “After he was mirandized [sic], he waived his rights and provided no further verbal or written statements.” The court noted that a defendant’s pre-arrest silence and post-arrest, pre-Miranda warnings silence may not be used as substantive evidence of guilt, but may be used to impeach the defendant by suggesting that his or her prior silence is inconsistent with present statements at trial. A defendant’s post-arrest, post-Miranda warnings silence, however, may not be used for any purpose. Here, the defendant testified after the officer, so the State could not use the officer’s statement for impeachment. Also, the officer’s testimony was admitted as substantive evidence during the State’s case in chief. However, the errors did not rise to the level of plain error. [Author’s note: for a chart illustrating these rules, see this chapter in the N.C. Superior Court Judges’ Benchbook here: <http://www.sog.unc.edu/node/2198>]

Judicial Notice

State v. King, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (COA11-526) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01MjYtMS5wZGY=>). The court took judicial notice of the clerk of superior court’s records showing that the defendant paid \$1,758.50, the total amount due for court costs and fines pursuant to a criminal judgment.

Criminal Offenses

Homicide

State v. Chapman, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yMjktMS5wZGY=>). Because of a procedural error by the State, the court declined to address an issue regarding the born alive rule presented in the State's appeal of a trial court's order dismissing capital murder charges. The defendant shot a woman who was pregnant with twins. Although the bullet did not strike the fetuses, the injury caused a spontaneous abortion. While both twins had heartbeats, experts said that they were previable.

Larceny and Related Crimes

State v. Privette, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzktMS5wZGY=>). (1) In a possession of stolen property case, the evidence was insufficient to establish that the defendant constructively possessed the jewelry at issue. The necessary "other incriminating circumstances" for constructive possession could not be inferred from the fact that the defendant was a high-ranking member of a gang to which the others involved in a robbery and subsequent transfer of the stolen goods belonged; the defendant accompanied a person in possession of stolen property to an enterprise at which a legitimate transaction occurred; and the defendant and his wife made ambiguous references to "more scrap gold" and "rings" unaccompanied by any indication that these items were stolen. At most the State established that the defendant had been in an area where he could have committed the crimes. (2) The trial judge properly instructed the jury on extortion using the pattern jury instruction. The court rejected the notion that North Carolina recognizes a "claim of right" defense to extortion. Instead, it construed the statute to require proof that the defendant intentionally utilized unjust or unlawful means in attempting to obtain the property or other acquittance, advantage, or immunity; the statute does not require proof that the defendant sought to achieve an end to which he had no entitlement.

Frauds

State v. Barr, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTktMS5wZGY=>). (1) The evidence was sufficient to sustain a conviction under G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant admitted that she personally accessed STARS to make three transfers for the dealer, that she told a co-worker to run a fourth transaction in a similar fashion, and that she received payment for doing so. The court also found the evidence sufficient to support a conclusion that the defendant acted willfully. (2) In a case in which the defendant was charged with violations of G.S. 14-454.1(a)(2) and G.S. 14-454.1(b) (unlawful to "willfully and without authorization . . . accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a)") as to the same transaction, the indictment charging a violation of G.S. 14-454.1(b) was defective when it stated a purpose covered by G.S. 14-454.1(a)(2). The court concluded that the plain language of G.S. 14-454.1(b) requires that the purpose for accessing the computer must be one "other than those set forth" in subsection (a).

Weapons Offenses

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMS5wZGY=>). There was insufficient evidence of constructive possession to support a conviction of felon in possession of a firearm. Although the defendant confessed that the gun was his, the case raised a corpus delicti issue. Under that rule, the State may not rely solely on the extrajudicial confession of a defendant to obtain a conviction; rather, it must produce substantial independent corroborative evidence that supports the facts underlying the confession. Here, the only evidence that the defendant possessed the gun was the extrajudicial confession. [Author's note: for a discussion of the corpus delicti rule, see my chapter on the issue in the N.C. Superior Court Judges' Benchbook here: <http://www.sog.unc.edu/node/2131>].

Drug Offenses

State v. Adams, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjEtMS5wZGY=>). In a trafficking by possession case, the evidence was sufficient to show constructive possession. After receiving a phone call from an individual named Shaw requesting cocaine, the defendant contacted a third person, Armstrong, to obtain the drugs. The defendant picked up Armstrong in a truck and drove to a location that the defendant had arranged with Shaw for the purchase. The defendant knew that Armstrong had the cocaine. Officers found cocaine on scales in the center of the truck. The defendant's facilitation of the transaction by providing the vehicle, transportation, and arranging the location constituted sufficient incriminating circumstances to support a finding of constructive possession.

Motor Vehicle Offenses

State v. Reeves, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODAtMS5wZGY=>). In an impaired driving case, there was sufficient evidence apart from the defendant's extrajudicial confession that he was driving the vehicle. Specifically, when an officer arrived at the scene, the defendant was the only person in the vehicle and he was sitting in the driver's seat.

Defenses

Entrapment

State v. Adams, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjEtMS5wZGY=>). In a drug trafficking case, the trial court did not err by denying the defendant's request for a jury instruction on entrapment. After an individual named Shaw repeatedly called the defendant asking for cocaine, the defendant told Shaw he would "call a guy." The defendant called a third person named Armstrong to try to obtain the cocaine. When Armstrong did not answer his phone, the defendant drove to his house. The next day, the defendant picked up Armstrong and drove him to a location previously arranged to meet Shaw. The court found that these actions illustrate the defendant's "ready compliance, acquiescence in, [and] willingness to cooperate in the criminal plan" and thus his predisposition. Additionally, the court noted, the defendant admitted that he had been involved as a middle man on a prior deal; this admission further demonstrates predisposition.

Entrapment by Estoppel

State v. Barr, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTktMS5wZGY=>). The trial court did not err by denying the defendant's request for an instruction on the defense of entrapment by estoppel. The defendant was charged with violating G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant asserted that she was told by a colleague named Granados, who was a licensed title clerk, how to enter the transaction. The court concluded that Granados was not a governmental official; Granados was an employee of the license plate agency, not the State of North Carolina, and the agency was a private contractor. It stated that a government license does not transform private licensees into governmental officials.

Ineffective Assistance of Counsel

State v. Holder, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05MTktMS5wZGY=>). The court rejected the defendant's *Harbison* claim (it is ineffective assistance of counsel for a defense lawyer to concede guilt without the defendant's consent) where defense counsel raised the admission with the trial court before it was made and the defendant consented to counsel's strategy. [Author's note: for a discussion of *Harbison* claims, see my chapter on ineffective assistance in the N.C. Superior Court Judges' Benchbook here: <http://www.sog.unc.edu/node/2169>].

State v. King, __ N.C. App. __, __ S.E.2d __ (Feb. 7, 2012) (COA11-568)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjgtMS5wZGY=>). The court dismissed the defendant's *Harbison* claim without prejudice to it being raised in a motion for appropriate relief. During closing argument, defense counsel stressed that the defendant was a drug user, not a drug dealer. With regard to a charge of possession of drug paraphernalia, counsel stated "finding him guilty of the drug paraphernalia I would agree is about as open and shut as we can get in this case, but finding him guilty of the selling, you don't have the seller." The court noted that this statement conceded guilt. However, because of the incomplete record as to consent by the defendant, the court dismissed without prejudice. [Author's note: for a discussion of *Harbison* claims, see my chapter on ineffective assistance in the N.C. Superior Court Judges' Benchbook here: <http://www.sog.unc.edu/node/2169>].