Criminal Procedure

Indictment Issues

State v. Hemphill, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzktMS5wZGY=). An indictment for resisting an officer was not defective. The indictment alleged that the defendant resisted "by not obeying [the officer's] command [to stop]." The court rejected the defendant's argument that the indictment failed to state with sufficient particularity the manner in which the defendant resisted.

Jury Deliberations

State v. Gettys, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MTAtMS5wZGY=). (1) The trial court did not abuse its discretion by giving an *Allen* charge. During the jury's second day of deliberations in a murder case, it sent a note to the trial judge stating that the jurors could not agree on a verdict. The trial judge inquired as to the numerical division, instructing the foreperson not to tell him whether the division was in favor of guilty or not guilty. The foreperson informed the judge that the jury was divided eleven to one. The trial court then gave additional instructions based on G.S. 15A-1235(b) and the jury found the defendant guilty almost two hours later. (2) Although the trial court's *Allen* instruction (which was almost identical to N.C.P.I.—Crim. 101.40) varied slightly from the statutory language, no error occurred.

Sentencing

State v. Lowery, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02NzMtMS5wZGY=). No violation of the Eighth Amendment's prohibition against cruel and unusual punishment occurred when the defendant, who was 16 years old at the time of his arrest, was convicted of first degree murder and sentenced to life in prison without the possibility of parole . The court rejected the defendant's argument that *Graham v. Florida*, 130 S. Ct. 2011 (2010) (the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime), warranted a different result; the court distinguished *Graham* on grounds that the case at hand involved a murder conviction.

Evidence

Hearsay

State v. Lowery, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02NzMtMS5wZGY=). The trial court did not err by excluding the defendant's statement to a doctor, offered under Rule 803(4) (hearsay exception for medical diagnosis and treatment). The defendant told the doctor that he only confessed to the murder because an officer told him he would receive the death penalty if he did not do so. Relying on appellate counsel's admission that the defendant saw the doctor with the hope that any mental illness he may have had could be diagnosed and used as a defense at trial, the court concluded, "[e]ven though defendant may have wanted continued treatment if he did, in fact, have a mental illness, his primary objective was to present the diagnosis as a defense." The court also noted that the defendant did not make any argument as to how his statement was relevant to medical diagnosis or treatment.

Confrontation

State v. Lowery, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02NzMtMS5wZGY=). The court rejected the defendant's argument that his constitutional right to confront witnesses against him was violated when the trial court refused to permit defense counsel to cross examine the defendant's accomplices about conversations they had with their attorneys regarding charge concessions the State would make to them if they testified against the defendant. The court held that the accomplices' private conversations with their attorneys were protected by the attorney-client privilege and that the privilege was not waived when the accomplices took the stand to testify against the defendant.

Arrest, Search & Investigation

State v. Lopez, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NTctMS5wZGY=). (1) An officer lawfully stopped a vehicle after observing the defendant drive approximately 10 mph above the speed limit. The court rejected the defendant's argument that the traffic stop was a pretext to search for drugs as irrelevant in light of the fact that the defendant was lawfully stopped for speeding. (2) Reasonable suspicion supported the length of the stop. The officer's initial questions regarding the defendant's license, route of travel, and occupation were within the scope of the traffic stop. Any further detention was appropriate in light of the following facts: the defendant did not have a valid driver's license; although the defendant said he had just gotten off work at a construction job, he was well kept with clean hands and clothing; the defendant "became visibly nervous by breathing rapidly[;] . . . his heart appeared to be beating rapidly[,] he exchanged glances with his passenger and both individuals looked at an open plastic bag in the back seat of the vehicle"; an officer observed dryer sheets protruding from an open bag containing a box of clear plastic wrap, which, due to his training and experience, the officer knew were used to package and conceal drugs; and the defendant told the officer that the car he was driving belonged to a friend but that he wasn't sure of the friend's name. (3) The defendant's voluntary consent to search his vehicle extended to the officer's looking under the hood and in the vehicle's air filter compartment.

State v. Schiro, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDkyLTEucGRm). (1) The defendant did not withdraw his consent to search his car when, while sitting in a nearby patrol car, he said several times: "they're tearing up my trunk." A reasonable person would not have considered these statements to be an unequivocal revocation of consent. (2) A consent search of the defendant's vehicle was not invalid because it involved taking off the rear quarter panels. The trial court found that both rear quarter panels were fitted with a carpet/cardboard type interior trim and that they "were loose." Additionally, the trial court found that the officer "was easily able to pull back the carpet/cardboard type trim . . . covering the right rear quarter panel where he observed what appeared to be a sock with a pistol handle protruding from the sock." (3) Although the search was not valid as one incident to arrest under *Gant*, it was a valid consent search.

State v. Hemphill, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MzktMS5wZGY=). (1) An officer had a reasonable, articulable suspicion that criminal activity was afoot when he detained the defendant. After 10 pm the officer learned of a report of suspicious activity at Auto America. When the officer arrived at the scene he saw the defendant, who generally matched the description of one of the

individuals reported, peering from behind a parked van. When the defendant spotted the officer, he ran, ignoring the officer's instructions to stop. After a 1/8 mile chase, the officer found the defendant trying to hide behind a dumpster. The defendant's flight and the other facts were sufficient to raise a reasonable suspicion that criminal activity was afoot. (2) Upon feeling a screwdriver and wrench on the defendant's person during a pat-down, the officer was justified in removing these items as they constituted both a potential danger to the officer and were further suggestive of criminal activity being afoot. (3) The defendant's response to the officer's questioning while on the ground and being restrained with handcuffs should have been suppressed because the defendant had not been given *Miranda* warnings. The officer's questioning constituted an interrogation and a reasonable person in the defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest. Thus, there was a custodial interrogation. The court went on, however, to find that the defendant was not prejudiced by the trial court's failure to suppress the statements. A concurring judge agreed that the defendant was not entitled to a new trial but believed that the defendant was not in custody and thus not subjected to a custodial interrogation.

Criminal Offenses

Accessory After the Fact

State v. Schiro, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDkyLTEucGRm). In an accessory after the fact case the evidence was sufficient to establish that the defendant knew that a gun he had hidden was used to commit a murder.

Drugs

State v. Lopez, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NTctMS5wZGY=). In a trafficking by possession case there was sufficient evidence of knowing possession where the defendant was driving the vehicle that contained the cocaine.

Post-Conviction

State v. Alshaif, __ N.C. App. __, __ S.E.2d __ (Feb. 21, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MTctMS5wZGY=). The court held that *Padilla v. Kentucky*, __ U.S. __, 176 L. Ed. 2d 284 (2010), dealing with ineffective assistance of counsel in connection with advice regarding the immigration consequences of a plea, did not apply retroactively to the defendant's motion for appropriate relief. Applying *Teague* retroactivity analysis, the court held that *Padilla* announced a new procedural rule but that the rule was not a watershed one. [Author's note: for the law on retroactivity and the *Teague* test, see my paper here]