

## **Criminal Procedure**

### **Criminal Pleadings**

*State v. Friend*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NzltMS5wZGY=>). A criminal summons charging the defendant with impaired driving was not defective on grounds that it failed to allege the exact hour and minute that the offense occurred.

### **Dismissal by the State; Refiling of Charges**

*State v. Friend*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NzltMS5wZGY=>). (1) The State's dismissal of an impaired driving charge following the district court's denial of its motion to continue did not violate separation of powers. The defendant had argued that the district attorney is an executive branch official who was obligated to proceed with the trial when the trial court denied the State's motion to continue. He further argued that to allow the State to voluntarily dismiss the charge allowed the executive branch to subvert the court's authority. (2) No violation of due process occurred when the State refiled charges against the defendant after having taken a dismissal of them in response to the trial court's denial of its motion to continue.

### **Counsel Issues**

*State v. Rogers*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODItMS5wZGY=>). The trial court did not err by removing the defendant's retained counsel, Wayne Eads, based on the possibility that Eads might be called to testify as a witness at trial. The defendant was charged with attempted murder and felony assault. The defendant was having an affair with the victim's wife and the victim's wife had discussed with the defendant the possibility of leaving her husband. Prior to the incident at issue, the victim's wife also communicated with Eads, who was the defendant's best friend and attorney, about her relationship with the defendant and the consequences of a divorce. The trial court's action was proper given "a serious potential for conflict" based on Eads' relationship with the defendant and communication with the victim's wife. The court stated:

Eads was aware of personal and sensitive information, including the nature of their affair, which was a major factor leading to the shooting. Had Eads remained as defendant's counsel, he might have been called to testify, at which time he might have been asked to disclose confidential information regarding the relationship between defendant and [the victim's wife], which information may have divulged defendant's motive for shooting [the victim], which in turn could compromise his duty of loyalty to his client.

The court went on to conclude that competent evidence supported the trial court's conclusion that Eads was likely to be a necessary witness at trial and that none of the exceptions to Rule 3.7 of the N.C. Revised Rules of Professional Conduct applied.

### **Speedy Trial**

*State v. Friend*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NzltMS5wZGY=>). The defendant was not denied his speedy trial rights. The date of the offense and the initial charge was 7 March 2006. The

defendant was tried upon a re-filed charge in district court on 13 April 2009. The defendant never made a speedy trial motion in district court; his only speedy trial request was made in superior court on 4 February 2010. Because the defendant already had a trial in district court, the time of the delay runs from his appeal from district court on 13 April 2009 until his superior court trial on 15 February 2010, a period of less than one year. Assuming arguendo that the delay exceeded one year, the claim still failed.

### **Collateral Estoppel**

*State v. Cornelius*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NC0xLnBkZg==>). The trial court did not err by allowing offensive collateral estoppel to establish the underlying felony for the defendant's felony murder conviction. The defendant was charged with felony-murder and an underlying felony of burglary. At the first trial the jury found the defendant guilty of burglary but hung on felony murder. The trial court entered a PJC on the burglary and declared a mistrial as to felony murder. At the retrial, the trial judge instructed the jury with respect to felony murder that "because it has previously been determined beyond a reasonable doubt in a prior criminal proceeding that [the defendant] committed first degree burglary . . . you should consider that this element [of felony murder (that defendant committed the felony of first degree burglary)] has been proven to you beyond a reasonable doubt." Citing *State v. Dial*, 122 N.C. App. 298 (1996), the trial court's instruction was proper.

### **Sentencing**

*State v. Blocker*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDAtMS5wZGY=>). The trial court abused its discretion by summarily denying the defendant's motion under G.S. 15A-980 for suppression, in connection with sentencing, of a prior conviction which the defendant alleged was obtained in violation of her right to counsel. The trial court dismissed the motion as an impermissible collateral attack on a prior conviction that only could be raised by motion for appropriate relief. Relying on a prior unpublished opinion, the court held that although the defendant "could not seek to overturn her prior conviction" on this basis, G.S. 15A-980 gave her "the right to move to suppress that conviction's use in this case."

*State v. Vaughters*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDQyLTEucGRm>). In a case decided under the Fair Sentencing Act the court rejected the defendant's argument that the trial court erred by finding as an aggravating factor that the defendant was armed with a deadly weapon at the time of the kidnapping. The defendant had argued that this was an element of kidnapping and could not be used to enhance sentence.

### **Arrest, Search & Investigation Confessions**

*State v. Cooper*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MDktMS5wZGY=>). (1) The court rejected the defendant's argument that his confession was involuntary because it was obtained through police threats. Although the defendant argued that the police threatened to imprison his father unless he confessed, the trial court's findings of fact were more than sufficient to support its conclusion that the confession was not coerced. The trial court found, in part, that the defendant never was promised or

told that his father would benefit from any statements that he made. (2) The court rejected the defendant's argument that his Fifth Amendment right to remain silent was violated where there was ample evidence to support the trial court's finding that the defendant did not invoke that right. The defendant had argued that his refusal to talk to police about the crimes, other than to deny his involvement, was an invocation of the right to remain silent. The court found that the defendant's "continued assertions of his innocence cannot be considered unambiguous invocations of his right to remain silent." (3) The court rejected the defendant's argument that his confession was improperly obtained after he invoked his right to counsel. Although the defendant invoked his right to counsel before making the statements at issue, because he re-initiated the conversation with police, his right to counsel was not violated when detectives took his later statements.

*State v. Cornelius*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NC0xLnBkZg==>). The trial court did not err by denying the defendant's motion to suppress three statements made while he was in the hospital. The defendant had argued that medication he received rendered the statements involuntary. Based on testimony of the detective who did the interview, hospital records, and the recorded statements, the trial court made extensive findings that the defendant was alert and oriented. Those findings supported the trial court's conclusion that the statements were voluntary.

### **Checkpoints and Other Vehicle Stops**

*State v. Collins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01MjktMS5wZGY=>). The trial court erred by granting the defendant's motion to suppress on grounds that a checkpoint was unlawful under G.S. 20-16.3A. Because the defendant did not actually stop at the checkpoint, its invalidity was irrelevant to whether an officer had sufficient reasonable suspicion to stop the defendant once he attempted to evade the checkpoint. The court vacated the order granting the motion to suppress and remanded.

*State v. Fields*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTMtMS5wZGY=>). An officer had reasonable suspicion to stop the defendant's vehicle where the defendant's weaving in his own lane was sufficiently frequent and erratic to prompt evasive maneuvers from other drivers. Distinguishing cases holding that weaving within a lane, standing alone, is insufficient to support a stop, the court noted that here "the trial court did not find only that defendant was weaving in his lane, but rather that defendant's driving was 'like a ball bouncing in a small room'" and that "[t]he driving was so erratic that the officer observed other drivers -- in heavy traffic -- taking evasive maneuvers to avoid defendant's car." The court determined that none of the other cases involved the level of erratic driving and potential danger to other drivers that was involved in this case.

### **Criminal Offenses**

#### **Homicide**

*State v. Rogers*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODItMS5wZGY=>). No double jeopardy violation occurred when the defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on the same events. Each offense includes an element not included in the other.

## **Assaults**

*State v. Rogers*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODItMS5wZGY=>). No double jeopardy violation occurred when the defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on the same events. Each offense includes an element not included in the other.

## **Drug Offenses**

*State v. Lindsey*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTItMS5wZGY=>). There was insufficient evidence of constructive possession. After the defendant fled from his van, which he had crashed in a Wendy's parking lot, an officer recovered a hat and a cell phone in the van's vicinity. No weapons or contraband were found on the defendant or along his flight path. A search of the driver's side seat of the van revealed a "blunt wrapper" and a wallet with \$800. Officers discovered a bag containing cocaine and a bag containing marijuana near trash receptacles in the Wendy's parking lot. The officers had no idea how long the bags had been there, and though the Wendy's was closed at the time, the lot was open and had been accessible by the public before the area was secured. Finding the evidence insufficient, the court noted that the defendant was not at his residence or in a place where he exercised any control; although an officer observed the defendant flee, he did not see the defendant take any actions consistent with disposing of the marijuana and cocaine in two separate locations in the parking lot; there was no physical evidence linking the defendant to the drugs recovered; and no drugs were found on or in the defendant's van. A dissenting judge would have found the evidence sufficient to establish constructive possession of the marijuana.

## **Motor Vehicles**

*State v. Lindsey*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MTItMS5wZGY=>). In a felony speeding to elude case the court held, over a dissent, that the trial court erred by denying the defendant's motion to dismiss where an officer, who lost sight of the vehicle was unable to identify the driver. The court emphasized that it was not "suggest[ing] a bright-line rule that the officer from whom a suspect flees must always make visual contact with the suspect." "Clearly," it stated if "a vehicle is continuously tracked by one or more officers from the point of fleeing to the point of apprehension, and only one individual is in the vehicle, sufficient evidence would exist that the suspect apprehended was the same person who initially fled." The court found that on the facts presented, the "complete absence of any identification of the driver" was determinative: no officer or other witness saw the driver of the van before or during the pursuit and the original officer lost sight of the van for some time.

## **Gambling**

*Hest Technologies, Inc. v. North Carolina*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00NTktMS5wZGY=>). Over a dissent, the court held that G.S. 14-306.4 (electronic machines and devices for sweepstakes prohibited) is an unconstitutionally overbroad regulation of free speech. The court found that the statute regulated constitutionally protected speech. It held that the statutory ban on all "visual information . . . that takes the form of actual . . . or simulated game play" "necessarily encompasses all forms of video games, from

the simplest simulation to a much more complex game requiring substantial amounts of interactive gameplay by the player, and thus, operates as a categorical ban on all video games for the purposes of communicating a sweepstakes result.” As a result, the statute is constitutionally overbroad. The court invalidated the portion of G.S. 14-306.4 criminalizing the dissemination of a sweepstakes result through the use of an entertaining display. In this respect, the court’s ruling was broader than the trial court’s holding, which invalidated only a single statutory example of the term entertaining display.

*Sandhill Amusements v. North Carolina*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0zMDEtMS5wZGY=>). Over a dissent and relying on *Hest*, above, the court reversed a trial court ruling holding G.S. 14-306.4 to be constitutional.

### **Regulatory Offenses**

*Hill v. StubHub*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02ODUtMS5wZGY=>). Fees that the defendant StubHub charged for its services did not violate G.S. 14-344 (sale of admission tickets in excess of printed price) [Author’s note: As the court noted, after the present case was initiated, the General Assembly amended G.S. 14-344 and enacted G.S. 14-344.1 to exempt internet ticket sales accompanied by a ticket assurance guarantee from the strictures otherwise established by that statutory provision.]

### **Defenses**

#### **Automatism**

*State v. Rogers*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Mar. 6, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS00ODItMS5wZGY=>). The trial court did not commit plain error by instructing the jury that the defendant had the burden of persuasion to prove the defense of automatism. Automatism is an affirmative defense, and the burden is on the defendant to prove its existence to the jury.