

Criminal Procedure

Indictment Issues

State v. Harris, __ N.C. App. __, __ S.E. 2d __ (April 3, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDMxLTEucGRm>).

An indictment charging the defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of G.S. 14-208.18 was defective. According to the court the “essential elements” of the charged offense are that the defendant (1) knowingly is on the premises of any place intended primarily for the use, care, or supervision of minors (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under the age of 16. The court rejected the defendant’s argument that the indictment, which alleged that the defendant “did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School,” was defective because it omitted any affirmative assertion that he actually went on the school’s premises. The court reasoned that although the indictment contained a grammatical error, it clearly charged the defendant with unlawfully being on the premises of the school. Next, the court rejected the defendant’s argument that the indictment was defective because it failed to allege that he knowingly went on the school’s premises. The court reasoned that the indictment’s allegation that the defendant acted “willfully” sufficed to allege the requisite “knowing” conduct. However, the court found merit in the defendant’s argument that the indictment was defective because it failed to allege that he had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under 16 years of age at the time of the offense.

State v. Justice, __ N.C. App. __, __ S.E. 2d __ (April 3, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjMyLTEucGRm>). An indictment charging the defendant with larceny from a merchant by removal of antitheft device in violation of G.S. 14-72.11 was defective in two respects. The elements of this offense include a larceny (taking the property of another, carrying it away, without the consent of the possessor, and with the intent to permanently deprive) and removal of an antishoplifting or inventory control device. In this case, the defendant was alleged to have taken clothing from a department store. The court determined that the indictment’s description of the property taken as “merchandise” was “too general to identify the property allegedly taken.” Additionally, the indictment alleged that the defendant “did remove a component of an anti-theft or inventory control device . . . in an effort to steal” property. This language, the court determined, alleged only an attempted larceny not the completed offense.

Motions for Appropriate Relief

State v. Rhodes, __ N.C. App. __, __ S.E. 2d __ (April 3, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzU1LTEucGRm>). The trial court did not abuse its discretion by granting the defendant’s motion for appropriate relief (MAR) on the basis of newly discovered evidence. The defendant was convicted on drug charges for drugs found in his parents’ house. At trial the defendant asserted that he did not live in his parents’ house. When the defendant’s father was asked if the drugs were his he replied, “I plead the Fifth.” He was then excused as a witness. After the defendant’s conviction, however, the defendant’s father admitted to a probation officer that the drugs were his. The defendant then filed a MAR on the basis of this newly discovered evidence and the trial court granted a new trial. In order to succeed on a claim of newly discovered evidence, the defendant must show that (1) a witness will give newly discovered evidence; (2) the evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was

used and proper means were employed to procure the testimony at trial; (5) the evidence is not merely cumulative or corroborative; (6) the evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial. The court rejected the State's argument that the evidence could have been elicited through due diligence at trial. It noted that the witness did not admit exclusive ownership of the drugs until after trial. Moreover, the defense exercised due diligence by calling the defendant's father as witness and asking him whether the drugs were his. However, the witness exercised his right against self-incrimination, prompting the trial court to excuse him as a witness. The defense also tried to elicit this information from the defendant's mother but she was unwilling to implicate her husband. The court also rejected the State's challenge to the trial court's conclusion that the witness's confession was "probably true," noting that it is for the trial court to determine credibility and that the witness had a history of violating drug laws. Finally, the court rejected the State's assertion that the witness's confession would not exculpate the defendant in a new trial.