Criminal Procedure

Bond Forfeiture

State v. Fred Adams, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05ODgtMS5wZGY=). The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the trial court's ruling was properly based on G.S. 15A-544.5(f) (no forfeiture may be set aside when the surety had actual notice before executing a bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed).

Counsel Issues

State v. Jones, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzMwLTEucGRm). Based on the trial court's extensive colloquy with the defendant, the trial court properly took a waiver of counsel in compliance with G.S. 15A-1242.

Absolute Impasse

State v. Jones, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzMwLTEucGRm). An absolute impasse did not occur when trial counsel refused to abide by the defendant's wishes to pursue claims of prosecutorial and other misconduct that counsel believed to be frivolous. Under the absolute impasse doctrine counsel need only abide by a defendant's lawful instructions with respect to trial strategy. Here, the impasses was not over tactical decisions, but rather over whether the defendant could compel counsel to file frivolous motions and assert theories that lacked any basis in fact. The court concluded: "Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to Defendant's wishes." [Author's note: for a detailed discussion of the absolute impasse doctrine, see my chapter in the superior court judges' bench book here: http://www.sog.unc.edu/node/2122].

Jury Instructions

State v. Laurean, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjktMS5wZGY=). In a case in which the defendant was convicted of first-degree murder, the trial court did not err by failing to instruct the jury on second-degree murder. The defendant conceded that the evidence warranted an instruction on first-degree murder. However, he argued that because the evidence failed to illustrate the circumstances immediately preceding the murder, the jury should have been allowed to consider that he formed the intent to kill absent premeditation and deliberation and, therefore, was entitled to an instruction on second-degree murder. The court concluded that in the absence of evidence suggesting

that the victim was killed without premeditation and deliberation, an instruction on second-degree murder would be improper.

Sex Offenders

In re Hamilton, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDYzLTEucGRm). (1) Amendments to the sex offender registration scheme's period of registration and automatic termination provision made after the defendant was required to register applied to the defendant. When the defendant was required to register in 2001, he was subject to a ten-year registration requirement which automatically terminated if he did not re-offend. In 2006 the registration statutes were amended to provide that registration could continue beyond ten years, even when the registrant had not reoffended. Also, the automatic termination language was deleted and a new provision was added providing that persons wishing to terminate registration must petition the superior court for relief. The court held that both legislative changes applied to the defendant. (2) The trial court erred by finding that the defendant's removal from the registry would not comply with the federal Adam Walsh Act.

Evidence

404(b) Evidence

State v. Donald Adams, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05MzAtMS5wZGY=). In the defendant's trial for breaking and entering into his ex-wife's Raleigh residence and for burning her personal property, the trial court did not abuse its discretion by admitting 404(b) evidence of an argument the defendant had with the victim and of a prior break-in at the victim's Atlanta apartment for which the defendant was not investigated, charged, or convicted. The victim testified that in June 2008, while at her apartment in Raleigh, the defendant became angry and threw furniture and books, shoved a television, and broke a lamp. A few months later, the victim's Atlanta apartment was burglarized and ransacked. Her couch was shredded, a lamp was broken, the floor was covered in an oily substance, her personal belongings were strewn about, and her laptop and car title were stolen. Police could not locate any fingerprints or DNA evidence tying the defendant to the crime; no eyewitnesses placed the defendant at the scene. In January 2009, the crime at issue occurred when the victim's apartment in Raleigh was burglarized and ransacked. Her clothes and other personal belongings were strewn about and covered in liquid, her furniture was cut, her electronics destroyed, the floor was covered in liquid, her pictures were slashed, and a fire was lit in the fireplace, in which pictures of the defendant and the victim, books, shoes, picture frames, and photo albums had been burned. The only stolen item was a set of jewelry given to her by the defendant. As with the earlier break-in, the police could not locate any forensic evidence or eyewitnesses tying the defendant to the crime. The court found it clear from the record that the evidence established "a significant connection between defendant and the three incidents." The court went on to find that the prior bad acts were properly admitted to show common plan or scheme, identity, and motive.

State v. Laurean, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS01NjktMS5wZGY=). In a murder case, the trial court did not err by excluding defense evidence of the victims' military disciplinary infractions. Both the defendant and the victim were in the military. After several military infractions, the victim was referred to the defendant for counseling. The victim later alleged that the defendant raped her. She was subsequently killed. At trial, the defendant sought to question military personnel about the victim's disciplinary infractions which led to the request that he counsel her. The defendant argued that this evidence established the victim's motive for making a false rape allegation against him. The trial court excluded this evidence. The court of appeals concluded that the question of whether the victim's accusation of rape was grounded in fact or falsehood was not before the jury. Moreover, her specific instances of conduct unrelated to the defendant shed no light upon the crimes charged. Therefore, it concluded, the specific instances of conduct resulting in minor disciplinary infractions were not relevant and were properly excluded.

Arrest, Search & Investigation

Probable Cause for Arrest

Beeson v. Palombo, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzI0LTEucGRm). Because probable cause supported the issuance of arrest warrants for assault on a female, the defendants were shielded by public official immunity from the plaintiff's claims based on false imprisonment and other grounds. The defendant officer told the magistrate that the plaintiff, a teacher, had "touched [the] breast area" of two minor female students after at least one of the students had covered herself with her arms and asked the plaintiff not to touch her. This evidence was enough for a reasonable person to conclude that an offense had been committed and that the plaintiff was the perpetrator.

Searches

State v. Fowler, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDE0LTEucGRm). Roadside strip searches of the defendant were reasonable and did not violate the constitution. The court first rejected the State's argument that the searches were not strip searches. During both searches the defendant's private areas were observed by an officer and during one search the defendant's pants were removed and an officer searched inside of the defendant's underwear with his hand. Next, the court held that probable cause supported the searches. The officers stopped the defendant's vehicle for speeding after receiving information from another officer and his informant that the defendant would be traveling on a specified road in a silver Kia, carrying 3 grams of crack cocaine. The strip search occurred after a consensual search of the defendant's vehicle produced marijuana but no cocaine. The court found competent evidence to show that the informant, who was known to the officers and who had provided reliable information in the past, provided sufficient reliable information, corroborated by an officer, to establish probable cause to believe that the defendant would be carrying a small amount of cocaine in his vehicle. When the consensual search of defendant's vehicle did not produce the cocaine, the officers

had sufficient probable cause, under the totality of the circumstances, to believe that the defendant was hiding the drugs on his person. Third, the court found that exigent circumstances supported the search. Specifically, the officer knew that the defendant had prior experience with jail intake procedures and that he could reasonably expect that the defendant would attempt to get rid of evidence in order to prevent his going to jail. Finally, the court found the search reasonable. The trial court had determined that although the searches were intrusive, the most intrusive one occurred in a dark area away from the traveled roadway, with no one other than the defendant and the officers in the immediate vicinity. Additionally, the trial court found that the officer did not pull down the defendant's underwear or otherwise expose his bare buttocks or genitals and no females were present or within view during the search. The court determined that these findings support the trial court's conclusion that, although the searches were intrusive, they were conducted in a discreet manner away from the view of others and limited in scope to finding a small amount of cocaine based on the corroborated tip of a known, reliable informant.

State v. Watkins, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTc2LTEucGRm). The search of a vehicle driven by the defendant was valid under *Gant* as incident to the arrest of the defendant's passenger for possession of drug paraphernalia. Officers had a reasonable belief that evidence relevant to the passenger's possession of drug paraphernalia might be found in the vehicle. Additionally, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle. The drug paraphernalia found on the passenger, an anonymous tip that the vehicle would be transporting drugs, the fact that there were outstanding arrest warrants for the car's owner, the defendant's nervous behavior while driving and upon exiting the vehicle, and an alert by a drug-sniffing dog provided probable cause for the warrantless search of the vehicle.

Vehicle Stops

State v. Watkins, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTc2LTEucGRm). Officers had reasonable suspicion to stop the defendant's vehicle. Officers had received an anonymous tip that a vehicle containing "a large amount of pills and drugs" would be traveling from Georgia through Macon County and possibly Graham County; the vehicle was described as a small or mid-sized passenger car, maroon or purple in color, with Georgia license plates. Officers set up surveillance along the most likely route. When a small purple car passed the officers, they pulled out behind it. The car then made an abrupt lane change without signaling and slowed down by approximately 5-10 mph. The officers ran the vehicle's license plate and discovered the vehicle was registered a person known to have outstanding arrest warrants. Although the officers where pretty sure that the driver was not the wanted person, they were unable to identify the passenger. They also saw the driver repeatedly looking in his rearview mirror and glancing over his shoulder. They then pulled the vehicle over. The court concluded that the defendant's lane change in combination with the anonymous tip and defendant's other activities were sufficient to give an experienced law enforcement officer reasonable suspicion that some illegal activity was taking place. Those other activities included the defendant's slow speed in the passing lane,

frequent glances in his rearview mirrors, repeated glances over his shoulder, and that he was driving a car registered to another person. Moreover, it noted, not only was the defendant not the owner of the vehicle, but the owner was known to have outstanding arrest warrants; it was reasonable to conclude that the unidentified passenger may have been the vehicle's owner.

Identification

State v. Stowes, __ N.C. App. __, __ S.E.2d __ (May 1, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04MzEtMS5wZGY=). (1) In a store robbery case, the court found no plain error in the trial court's determination that a photo lineup was not impermissibly suggestive. The defendant argued that the photo lineup was impermissibly suggestive because one of the officers administering the procedure was involved in the investigation, and that officer may have made unintentional movements or body language which could have influenced the eyewitness. The court noted that the eyewitness (a store employee) was 75% certain of his identification; the investigating officer's presence was the only irregularity in the procedure; the eyewitness did not describe any suggestive actions on the part of the investigating officer; and there was no testimony from the officers to indicate such. Also, the lineup was conducted within days of the crime. The perpetrator was in the store for 45-50 minutes and spoke with the employee several times. (2) The trial court did not commit plain error by granting the defendant relief under the Eyewitness Identification Reform Act (EIRA) but not excluding evidence of a pretrial identification. The trial court found that an EIRA violation occurred because one of the officers administering the procedure was involved in the investigation. The court concluded: "We are not persuaded that the trial court committed plain error by granting Defendant all other available remedies under EIRA, rather than excluding the evidence."