Criminal Procedure

Appellate Issues

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjIzLTEucGRm). Because a civil no contact order entered under G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim) imposes a civil remedy, notice of appeal from such an order must comply with N.C. R. Appellate Procedure 3(a).

State v. Lineberger, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMDk4LTEucGRm). In an appeal from an order requiring the defendant to enroll in lifetime SBM in which defense counsel filed an *Anders* brief, the court noted that SBM proceedings are civil in nature and that *Anders* protections do not extend to civil cases. The court however exercised discretion to review the record and found no error.

State v. Miles, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjAzLTEucGRm). Plain error review is not available for a claim that the trial court erred by requiring the defendant to wear prison garb during trial. Plain error is normally limited to instructional and evidentiary error.

Counsel Issues

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDg4LTEucGRm). (1) The trial court did not abuse its discretion by denying the defendant's motion to replace his court-appointed lawyer. Substitute counsel is required and must be appointed when a defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. However, general dissatisfaction or disagreement over trial tactics is not a sufficient basis to appoint new counsel. In this case, the defendant's objections fell into the latter category. The court also rejected the defendant's argument that the trial court failed to inquire adequately when the defendant raised the substitute counsel issue. (2) The court declined to consider the defendant's pro se MAR on grounds that he was represented by appellate counsel. It noted that having elected for representation by appointed counsel, the defendant cannot also file motions on his own behalf or attempt to represent himself; a defendant has no right to appear both by himself and by counsel.

Indictment Issues

State v. Herman, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjkxLTEucGRm). Following *State v. Harris,* __ N.C. App. __, __ S.E. 2d __ (April 3, 2012) (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 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), the court held that the indictment at issue was defective.

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDg4LTEucGRm). In a felony possession of cocaine case, the defendant waived the issue of fatal variance by failing to raise it at trial. The court however went on summarily reject the defendant's argument on them merits. The defendant had argued that there was a fatal variance between the indictment, which alleged possession of .1 grams of cocaine and the evidence, which showed possession of 0.03 grams of cocaine.

State v. Ross, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDYyLTEucGRm). The trial court lacked jurisdiction over a habitual felon charge where the habitual felon indictment was returned before the principal felonies occurred.

Restraint of the Defendant During Trial

State v. Miles, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjAzLTEucGRm). The trial court did not err by requiring the defendant to be restrained during trial. [Author's note: for a discussion of this issue generally, see my chapter on point in the online superior court judges' bench book here: http://www.sog.unc.edu/node/2121].

Motion to Dismiss

State v. Carver, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzgyLTEucGRm). Over a dissent, the court held that there was sufficient evidence that the defendant perpetrated the murder. The State's case was entirely circumstantial. Evidence showed that at the time the victim's body was discovered, the defendant was fishing not far from the crime scene and had been there for several hours. Although the defendant repeatedly denied ever touching the victim's vehicle, DNA found on the victim's vehicle was, with an extremely high probability, matched to him. The court found *State v. Miller*, 289 N.C. 1 (1975), persuasive, which it described as holding "that the existence of physical evidence establishing a defendant's presence at the crime scene, combined with the defendant's statement that he was never present at the crime scene and the absence of any evidence that defendant was ever lawfully present at the crime scene, permits the inference that the defendant committed the crime and left the physical evidence during the crime's commission." The court rejected the defendant's argument that the evidence was insufficient given that lack of evidence regarding motive. [Author's note: for a collection of related cases, see my Criminal Case Compendium posted here: http://www.sog.unc.edu/node/1171 (look under Criminal; Motions; Motions to Dismiss; Defendant as Perpetrator)].

Mistrial

State v. Glenn, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDg4LTEucGRm). The trial court did not abuse its discretion by denying the defendant's motion for a mistrial made after three law enforcement officers, who were witnesses for the State, walked through the jury assembly room on their way to court while two members of the jury were in the room. The trial court had found that the contact with jurors was inadvertent and that there was no conversation between the officers and the jurors.

Sentencing

State v. Miles, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjAzLTEucGRm). Where the defendant admitted that he was serving a prison sentence when the crime was committed, no *Blakely* violation occurred when the trial judge assigned a prior record level point on this basis without submitting the issue to the jury.

Sex Offenders

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjIzLTEucGRm). The trial court did not err by entering a civil no contact order against the defendant pursuant to G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim). The court held that because the statute imposes a civil remedy, it does not impose an impermissible criminal punishment under article XI, sec. I of the N.C. Constitution. The court also rejected the defendant's due process argument asserting that the State did not give him sufficient notice of its intent to seek the order. It held that the defendant was not entitled to prior notice by the State that it would seek the no contact order at sentencing. The court held that because the order was civil in nature, it presented no double jeopardy issues. Finally, the court held that the trial judge followed proper procedure in entering the order.

State v. Manning, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDQ4LTEucGRm). (1) The DOC gave sufficient notice of a SBM hearing when its letter informed the defendant of both the hearing date and applicable statutory category. (2) The court rejected the defendant's argument that SBM infringed on his constitutional right to travel.

Evidence

***Crawford* Issues**

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC00NzUtMi5wZGY=). A SBI forensic

report identifying a substance as cocaine was properly admitted when the State gave notice under the G.S. 90-95(g) notice and demand statute and the defendant lodged no objection to admission of the report without the testimony of the preparer.

Opening the Door

State v. Sharpless, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQzLTEucGRm). The court rejected the State's argument that the defendant opened the door to admission of otherwise inadmissible hearsay evidence (a 911 call). Reversed and remanded for a new trial.

Personal Knowledge

State v. Sharpless, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQzLTEucGRm). In a murder and assault case involving a home invasion and two victims, the trial court did not err by admitting testimony from the surviving victim that touched on the deceased victim's state of mind when he initially opened the door to the intruder. The surviving victim "merely gave his understanding and interpretation of what went on at the door based on his sitting in the next room and being able to hear the whole situation." As such, the surviving victim properly testified regarding his own beliefs of the sequence of events that took place at the door.

Arrest, Search & Investigation

Search Incident to Arrest

State v. Jones, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC00NzUtMi5wZGY=). A search of the defendant's jacket incident to arrest was lawful. When the officer grabbed the defendant, the defendant ran. While attempting to evade capture, the defendant tried to punch the officer while keeping his right hand inside his jacket. The defendant refused to remove his hand from his jacket pocket despite being ordered to do so and the jacket eventually came off during the struggle. This behavior led the officer to believe that the defendant may be armed. After the defendant was subdued, handcuffed, and placed in a patrol vehicle, the officer walked about ten feet and retrieved the jacket from the ground. He searched the jacket and retrieved a bag containing crack cocaine.

Criminal Offenses

Abuse and Threats

Kennedy v. Morgan, __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzkyLTEucGRm). The trial judge erred by entering a domestic violence protective order. The defendant's act of hiring a private

investigator service to conduct surveillance to determine if the plaintiff was cohabiting does not constitute harassment. There thus was no act of domestic violence

Sex Offenses

In Re T.W., __ N.C. App. __, __ S.E.2d __ (June 5, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS04NzgtMS5wZGY=). Because there was no evidence of threat of force or special relationship there was insufficient evidence of constructive force to support second-degree sexual offense charges. The State had argued that constructive force was shown by (a) the fact that the juvenile threatened the minor victims with exposing their innermost secrets and their participation with him in sexual activities, and (2) the power differential between the juvenile and the victims. Rejecting this argument, the court concluded: for "the concept of constructive force to apply, the threats resulting in fear, fright, or coercion must be threats of physical harm." Acknowledging that constructive force also can be inferred from a special relationship, such as parent and child, the court concluded that the relationships in the case at hand did not rise to that level. In this case the juvenile was a similar age to the victims and their relationship was one of leader and follower in school.