Criminal Procedure

Capacity and Related Issues

In re v. Murdock, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03OS0xLnBkZg==). When assessing whether a defendant is charged with a violent crime pursuant to G.S. 15A-1003(a) and in connection with an involuntary commitment determination, courts may consider the elements of the charged offense and the underlying facts giving rise to the charge. However, the fact-based analysis applies only with respect to determining whether the crime involved assault with a deadly weapon. The court held:

> [F]or purposes of [G.S.] 15A-1003(a), a "violent crime" can be either one which has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another[,]" or a crime which does not have violence as an element, but assault with a deadly weapon was involved in its commission.

Slip Op. at 10 (citation omitted). Here, the defendant was charged with possession of a firearm by a felon and resisting an officer. Because violence is not an element of either offense, neither qualifies as a violent crime under the elements-based test. However, applying the fact-based analysis, the commission of the offenses involved an assault with a deadly weapon. The fact that the defendant stated that he wasn't going with the officers, that he ran into a bedroom and stood within reach of a loaded revolver, and that he resisted while being handcuffed and removed showed an unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the officers.

Indictment Issues

State v. Avent, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). In a murder case in which the defendant relied on an alibi defense, the trial court did not err by allowing the State to amend the date of the offense stated in the indictment from December 28, 2009, to December 27, 2009. The court noted that because the defendant's alibi witness's testimony encompassed December 27th the defendant was not deprived of his ability to present a defense. Additionally, the State's evidence included two eyewitness statements and an autopsy report, all of which noted the date of the murder as December 27; the defendant did not argue that he was unaware of this evidence well before trial. [Author's note: for more information about this and other indictment issues, see my paper here: http://shopping.netsuite.com/s.nl/c.433425/it.I/id.347/.f].

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTYzLTEucGRm). (1) By failing to assert fatal variance as a basis for his motion to dismiss, the defendant failed to preserve the issue for appellate review. (2) Even if the issue had been preserved, it had no merit. Defendant argued that there was a fatal variance between the name of the victim in the indictment, You Xing Lin, and the evidence at trial, which showed the victim's name to be Lin You Xing. The variance was immaterial. [Author's note:

for more information about this and other indictment issues, see my paper here: http://shopping.netsuite.com/s.nl/c.433425/it.I/id.347/.f].

Motion to Suppress Procedure

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). The trial court was not required to make written finding of fact supporting its denial of a suppression motion where the trial court provided its rationale from the bench and there were not material conflicts in the evidence.

State v. O'Connor, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNjctMS5wZGY=). (1) Although a trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so. (2) In granting the defendant's motion to suppress, the trial judge erred by failing to make findings of fact resolving material conflicts in the evidence. The court rejected the defendant's argument that the trial court "indirectly provided a rationale from the bench" by stating that the motion was granted for the reasons in the defendant's memorandum.

Motion to Dismiss -- Corpus Delicti Rule

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMi5wZGY=). On remand for reconsideration in light of *State v. Sweat*, __ N.C. __, __ S.E.2d __ (June 14, 2012) (clarifying the contours of the corpus delicti rule), the court affirmed its decision in *State v. Cox*, __ N.C. App. __, 721 S.E.2d 346 (Feb. 7, 2012), finding insufficient evidence of constructive possession to support a conviction of felon in possession of a firearm under the corpus delicti rule. [Author's note: for a discussion of this rule, see my chapter in the N.C. Superior Court Judges' Bench Book here: http://www.sog.unc.edu/node/2131].

Trial in the Defendant's Absence

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). The trial court did not err by denying a motion to dismiss asserting that the defendant was deprived of his constitutional rights due to his involuntary absence at trial. The defendant was missing from the courtroom on the second day of trial and reappeared on the third day. To explain his absence he offered two items. First, the fact that his friend Stacie Wilson called defense counsel to say that the defendant was in the hospital suffering from stomach pains. Defense counsel did not know who Stacie Wilson was, what hospital the defendant was in, or any other information. Second, the defendant offered a note from a hospital indicating that he had been treated there at some point. The note did not contain a date or time of treatment. The defendant failed to sufficiently explain his absence and his right to be present was waived. [Author's note: For a more detailed discussion of trial in the defendant's absence see my chapter in the N.C. Superior Court Judges' Bench Book: http://www.sog.unc.edu/node/2120].

Jury Deliberations

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). (1) Although the trial court erred by sending exhibits to the jury deliberation room over objection of defense counsel, the error was not prejudicial. The deliberating jury asked to review a number of exhibits. After consulting with counsel outside of the presence of the jury the trial court directed that certain items be sent back to the jury. Defense counsel objected. Under G.S. 15A-1233, it was error for the court to send the material to the jury room over the defendant's objection. [Author's note: For a discussion of this issue, see my chapter of the N.C. Superior Court Judges' Bench Book here: http://www.sog.unc.edu/node/2139] (2) The trial court did not impermissibly coerce a verdict. While deliberating, the jury asked to hear certain trial testimony again. The trial judge initially denied the request. After the jury indicated that it could not reach a verdict, the trial judge asked if it would be helpful to have the testimony played back. This was done and the trial judge gave an *Allen* instruction.

Sentencing

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). The trial court erred by ordering the defendant to pay restitution when the State failed to present any evidence to support the restitution order. The State conceded the error.

Evidence

Applicability of the Rules

State v. Foster, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjI3LTEucGRm). The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269.

Rule 607

State v. Avent, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). In a murder case, the trial court did not abuse its discretion by allowing the State to impeach two witnesses with their prior inconsistent statements to the police. Both witnesses testified that they were at the scene but did not see the defendant. The State then impeached them with their prior statements to the police putting the defendant at the scene, with one identifying the defendant as the shooter. Both of the witnesses' statements to the police were material and both witnesses admitted having made them. Use of the inconsistent statements did not constitute subterfuge on the State's part to present otherwise inadmissible evidence, where there was no evidence indicating that the State was not genuinely surprised by the witnesses' testimony.

Crawford and Confrontation Issues

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). The defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene through the use of a telephonic translation service. The defendant argued that his confrontation rights were violated when the interpreter's statements were admitted through the officer's testimony. These statements were outside of the confrontation clause because they were not admitted for the truth of the matter asserted but rather for corroboration.

Opinions

State v. Martin, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). The trial court did not abuse its discretion by refusing to allow a defense witness to testify as an expert. The defense proffered a forensic scientist and criminal profiler for qualification as an expert. Because the witness's testimony was offered to discredit the victim's account of the defendant's actions and to comment on the manner in which the criminal investigation was conducted, it appears to invade the province of the jury. Although disallowing this testimony, the trial court made clear that the defendant would still be allowed to argue the inconsistencies in the State's evidence.

State v. Cox, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS02MDktMi5wZGY=). The trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience.

Arrest, Search & Investigation

Miranda

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). Citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), the court held that the defendant was not in custody for purposes of *Miranda* during a traffic stop.

Stops

State v. Sellars, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzE1LTEucGRm). The trial court erred by granting the defendant's motion to suppress on grounds that officers impermissibly prolonged a lawful vehicle stop. Officers McKaughan and Jones stopped the defendant's vehicle after it twice weaved out of its lane. The officers had a drug dog with them. McKaughan immediately determined that

the defendant was not impaired. Although the defendant's hand was shaking, he did not show extreme nervousness. McKaughan told the defendant he would not get a citation but asked him to come to the police vehicle. While "casual conversation" ensued in the police car, Jones stood outside the defendant's vehicle. The defendant was polite, cooperative, and responsive. Upon entering the defendant's identifying information into his computer, McKaughan found an "alert" indicating that the defendant was a "drug dealer" and "known felon." He returned the defendant's driver's license and issued a warning ticket. While still in the police car, McKaughan asked the defendant if he had any drugs or weapons in his car. The defendant said no. After the defendant refused to give consent for a dog sniff of the vehicle, McKaughan had the dog do a sniff. The dog alerted to narcotics in the vehicle and a search revealed a bag of cocaine. The period between when the warning ticket was issued and the dog sniff occurred was four minutes and thirty-seven seconds. Surveying two lines of cases from the court which "appear to reach contradictory conclusions" on the question of whether a de minimis delay is unconstitutional, the court reconciled the cases and held that any prolonged detention of the defendant for the purpose of the drug dog sniff was de minimis and did not violate his rights.

Search & Seizure

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzM1LTEucGRm). On what it described as an issue of first impression in North Carolina, the court held that a drug dog's positive alert at the front side driver's door of a motor vehicle does not give rise to probable cause to conduct a warrantless search of the person of a recent passenger of the vehicle who is standing outside the vehicle.

State v. Joe, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xMDM3LTIucGRm). (1) On remand from the N.C. Supreme Court for consideration of an issue not addressed in the original decision, the court held that the trial court did not err by granting the defendant's motion to suppress cocaine found following the defendant's arrest. The State argued that suppression was erroneous because the officer had reasonable suspicion to conduct an investigatory stop. The court found that an arrest, not an investigatory stop, had occurred. Additionally, because its previous ruling in *State v. Joe*, __ N.C. App. __, 711 S.E.2d 842 (July 5, 2011), that no probable cause supported the arrest controlled, any evidence found during a search incident to the arrest must be suppressed. (2) The defendant did not voluntarily abandon controlled substances. Noting that the defendant was illegally arrested without probable cause, the court concluded that property abandoned as a result of illegal police activity cannot be held to have been voluntarily abandoned.

Disclosure of Confidential Informants

State v. Avent, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTA2LTEucGRm). The trial court did not err by denying the defendant's motion to compel disclosure of the identity of a confidential

informant who provided the defendant's cell phone number to the police. Applying *Roviaro v. United States*, 353 U.S. 53 (1957), the court noted that the defendant failed to show or allege that the informant participated in the crime and that the evidence did not contradict as to material facts that the informant could clarify. Although the State claimed that the defendant was the shooter and the defendant claimed he was not at the scene, the defendant failed to show how the informant's identity would be relevant to this issue. Additionally, evidence independent of the informant's testimony established the defendant's guilt, including an eyewitness to the murder.

Criminal Offenses

Robbery

State v. Mason, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNTYzLTEucGRm). A taking occurred when the defendant grabbed the victim's cell phone from his pocket and threw it away. The fact that the taking was for a relatively short period of time is insignificant.

Assaults & Sexual Assaults

State v. Anderson, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02LTEucGRm). In an assault with a deadly weapon inflicting serious injury case, the trial court did not err by instructing the jury that three gunshot wounds to the leg constituted serious injury. The victim was shot three times, was hospitalized for two days, had surgery to remove a bone fragment from his leg, and experienced pain from the injuries up through the time of trial. From this evidence, the court concluded, it is unlikely that reasonable minds could differ as to whether the victim's injuries were serious.

State v. Martin, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). Assault on a female is not a lesser-included of first-degree sexual offense.

Kidnapping

State v. Martin, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS05NDEtMS5wZGY=). The defendant's conviction for kidnapping was improper where the restraint involved was inherent in two sexual assaults and an assault by strangulation for which the defendant was also convicted. [Author's note: for an extensive discussion of this issue, see the note "Multiple convictions and punishments" under "First-Degree Kidnapping" in JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME (7th ed. 2012).]

State v. Boyd, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xMDcyLTIucGRm). On remand from

the N.C. Supreme Court and over a dissent, the court held that the trial court committed plain error by instructing the jury on a theory of second degree kidnapping (removal) that was not charged in the indictment or supported by evidence.

Resist, Delay and Obstruct Officer

State v. Cornell, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xNDE1LTEucGRm). (1) The evidence was sufficient to support a conviction for resisting, delaying and obstructing an officer during a 10-15 second incident. Officers observed members of the Latin Kings gang yelling gang slogans and signaling gang signs to a group of rival gang members. To prevent conflict, the officers approached the Latin Kings. The defendant stepped between the officer and the gang members, saying, "[t]hey was (sic) waving at me[,]" and "you wanna arrest me 'cuz I'm running for City Council." The officer told the defendant to "get away" and that he was "talking to them, not talking to you." The defendant responded, "[y]ou don't gotta talk to them! They (sic) fine!" Because the defendant refused the officer's instructions to step away, there was sufficient evidence that he obstructed and delayed the officers. Furthermore, there was sufficient evidence of willfulness. Finally, the court rejected the defendant's argument that his conduct was justified on grounds that he acted out of concern for a minor in his care. The court found no precedent for the argument that an individual's willful delay or obstruction of an officer's lawful investigation is justified because a minor is involved. In fact, case law suggest otherwise. (2) The trial court did not err by denying the defendant's request for a jury instruction stating that merely remonstrating an officer does not amount to obstructing. The defendant's conduct went beyond mere remonstrating.

Motor Vehicle Offenses

State v. Braswell, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY2LTEucGRm). (1) There was sufficient evidence of driving while impaired when a lab report of the defendant's blood indicated that in contained three Schedule II controlled substances and the defendant was unable to perform standardized field sobriety tests. (2) There was sufficient evidence of failure to stop after a crash involving property damage in violation of G.S. 20-166(c) where the driver of the other vehicle involved testified to all elements of the offense and the defendant admitted that he had been involved in the accident.

Post-Conviction

State v. Foster, __ N.C. App. __, __ S.E.2d __ (Aug. 7, 2012) (http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMjI3LTEucGRm). (1) The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269. (2) The trial court did not err by denying the defendant's motion for post-conviction DNA testing where the defendant did not meet his burden of showing materiality under G.S. 15A-269(a)(1). The defendant

made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense"; he provided no other explanation of why DNA testing would be material to his defense.