

Criminal Procedure

Sentencing

State v. Patterson, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zNTYtMS5wZGY=>). (1) The trial court erred by failing to exercise discretion when ordering the defendant to pay court costs. Ordering payment of costs, the court stated: "I have no discretion but to charge court costs and I'll impose that as a civil judgment." Amended G.S. 7A-304(a) does not mandate imposition of court costs; rather, it includes a limited exception under which the trial court may waive court costs upon a finding of just cause. The trial court's statement suggests that it was unaware of the possibility of a just cause waiver. (2) Court costs must be limited to the amounts authorized by G.S. 7A-304.

State v. Wilkerson, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNzUtMS5wZGY=>). The trial court made sufficient findings to support its decision to place the defendant on probation for sixty months.

Evidence

***Crawford* Issues**

State v. Poole, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yMS0yLnBkZg==>). (1) Admission of a forensic report identifying a substance as a controlled substance without testimony of the preparer violated the defendant's confrontation clause rights. (2) The trial court erred by allowing a substitute analyst to testify that a substance was a controlled substance based on the same forensic report where the substitute analyst did not perform or witness the tests and merely summarized the conclusions of the non-testifying analyst.

Opinions

Child Sexual Abuse Cases

State v. Black, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQyLTEucGRm>). Although the trial court erred by allowing the State's expert to testify that the child victim had been sexually abused, the error did not rise to the level of plain error. Responding to a question about the child's treatment, the expert, a licensed clinical social worker, said: "For a child, that means . . . being able to, um, come to terms with all the issues that are consistent with someone that has been sexually abused." She also testified several times to her conclusion that the sexual abuse experienced by the victim started at a young age, perhaps age seven, and continued until she was removed from the home. When asked why the victim lashed out at a family member, the expert said that the behavior was "part of a history of a child that goes through sexual abuse." With respect to her concerns about the adequacy of a family member's care, the expert testified: "She had every opportunity to get the education and the information to become an informed parent about a child that is sexually abused." And, when asked if it

was reasonable for a family member to have doubt about the victim's story given that she had recanted, the expert responded: "With me, there was no uncertainty." The testimony was indistinguishable from that found to be error in *State v. Towe*, __ N.C. __, __ S.E.2d __ (June 14, 2012) (expert's testimony was improper when she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse). Here, it was error for the expert to "effectively assert[]" that the victim was a sexually abused child absent physical evidence of abuse. [Author's note: for a discussion expert testimony in child abuse cases, see my paper here: <http://shopping.netsuite.com/s.nl/c.433425/it.l/id.369/f>].

Rape Shield Statute

State v. Okwara, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMzAtMS5wZGY=>). In the context of an appeal from a contempt proceeding, the court held that by asking the victim at trial about a possible prior instance of rape between the victim and a cousin without first addressing the relevance and admissibility of the question during an in camera hearing, defense counsel violated the Rape Shield Statute.

Cross-Examination and Impeachment Opening the Door/Invited Error

State v. Black, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQyLTEucGRm>). In this child sexual abuse case, the trial court did not err by allowing the State to ask a DSS social worker about a 2009 DSS petition alleging that the victim was neglected, sexually abused and dependent where the defendant opened the door to this testimony. Before the witness testified, the defendant had cross-examined two child witnesses about their testimony at the 2009 DSS hearing, pointing out inconsistencies. This cross-examination opened the door for the State to ask the DSS social worker about the 2009 hearing.

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNTgtMS5wZGY=>). (1) In this child sexual abuse case, the trial court did not err by allowing an emergency room doctor who examined one of the children to testify to the child's credibility where the defendant elicited this evidence during his own cross-examination. (2) The trial court did not err by allowing into evidence the defendant's statement that he was investigated in Michigan for similar sexual misconduct decades prior to the current incident. On direct examination the defendant stated that he had "never been in trouble before" and that he had no interaction with the police in connection with a criminal case. These statements opened the door for the State to inquire as to the Michigan investigation.

Impeachment

State v. Black, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzQyLTEucGRm>). In this child sexual abuse case, the trial court did not impermissibly allow the State to use extrinsic evidence to impeach the defendant on a collateral matter. On cross-examination, the defendant denied that she had told anyone that the victim began masturbating at an early age, given the victim a vibrator, or taught the victim how to masturbate. In rebuttal, the State called a social worker to testify that the defendant told her that the victim started masturbating at age seven or eight and that she gave the victim a vibrator. The defendant's prior statements were not used solely to impeach but as substantive evidence in the form of admissions.

Authentication

State v. Wilkerson, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNzUtMS5wZGY=>). In a felony larceny after a breaking or entering case, the trial court did not abuse its discretion by determining that a text message sent from the defendant's phone was properly authenticated where substantial circumstantial evidence tended to show that the defendant sent the text message. The defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police; the eyewitness provided a license plate number and a description of the car that matched the defendant's car, and she testified that the driver appeared to be using a cell phone; the morning after the crime, the car was found parked at the defendant's home with some of the stolen property in the trunk; the phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone; the text message itself referenced a stolen item; and by referencing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a path of transit tracking the phone from the area of the defendant's home to the area of the victim's home and back.

Arrest, Search & Investigation

Searches

State v. Pasour, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xOTAtMS5wZGY=>). The trial court erred by denying the defendant's motion to suppress property seized in a warrantless search. After receiving a tip that a person living at a specified address was growing marijuana, officers went to the address and knocked on the front and side doors. After getting no answer, two officers went to the back of the residence. In the backyard they found and seized marijuana plants. The officers were within the curtilage when they viewed the plants, no evidence indicated that the plants were visible from the front of the house or from the road, and a "no trespassing" sign was plainly visible on the side of the house. Even if the officers did not see the sign, it is evidence of the homeowner's intent that the side and back of the home were not open to the public. There no evidence of a path or anything else to suggest a visitor's use of the rear door; instead, all visitor traffic appeared to be kept to the front door and traffic

to the rear was discouraged by the posted sign. Further, no evidence indicated that the officers had reason to believe that knocking at the back door would produce a response after knocking multiple times at the front and side doors had not. The court concluded that on these facts, “there was no justification for the officers to enter Defendant’s backyard and so their actions were violative of the Fourth Amendment.”

Confessions

State v. Graham, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNTgtMS5wZGY=>). In this child sexual abuse case, the defendant’s confession was not involuntary. After briefly speaking to the defendant at his home about the complaint, an officer asked the defendant to come to the police station to answer questions. The court rejected the defendant’s argument that his confession was involuntary because he was given a false hope of leniency if he was to confess and that additional charges would stem from continued investigation of other children. The officers’ offers to “help” the defendant “deal with” his “problem” did not constitute a direct promise that the defendant would receive a lesser or no charge should he confess. The court also rejected the defendant’s argument that the confession was involuntary because one of the officers relied on his friendship with the defendant and their shared racial background, and that another asked questions about whether the defendant went to church or believed in God. Finally, the court rejected the defendant’s argument that his confession was involuntarily obtained through deception.

Criminal Offenses

Weapons Offenses

State v. Miles, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMjMtMS5wZGY=>). In a discharging a firearm into occupied property case, a residence was occupied when the family was on the front porch when the weapon was discharged.

Drug Offenses

State v. Poole, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0yMS0yLnBkZg==>). In a case involving a charge of possessing a controlled substance on the premises of a local confinement facility, the defendant’s own testimony that he had a “piece of dope . . . in the jail” was sufficient evidence that he possessed a controlled substance on the premises.

Judicial Administration

Contempt

State v. Okwara, __ N.C. App. __, __ S.E.2d __ (Oct. 16, 2012)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMzAtMS5wZGY=>). For reasons discussed in the opinion, the court affirmed the trial judge's order finding defense counsel in contempt of court for willfully disobeying a court order regarding permissible inquiry under the Rape Shield statute.