

## **Criminal Procedure**

### **Dismissal of Charges**

*State v. Wilson*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NDEtMS5wZGY=>). The trial court erred by dismissing a misdemeanor DWI charge under G.S. 15A-954. The trial court erroneously dismissed the charges under G.S. 15A-954(a)(1) (statute alleged to have been violated is unconstitutional on its face or as applied to the defendant) without making a finding that the DWI statute, G.S. 20-138.1, was unconstitutional as applied to the defendant. The fact that G.S. 20-139.1(d1) was violated was not a basis for dismissal under G.S. 15A-954. Nor did G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice) support dismissal of the charges where there was no finding that the defendant suffered irreparable prejudice. The court noted that the proper vehicle for the defendant to have asserted his arguments was a motion to suppress; since the State had stipulated that it would not seek to introduce the challenged blood evidence at trial, the trial court was required to summarily grant the defendant's suppression motion.

### **DWI Issues**

*State v. McKenzie*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00MzYtMS5wZGY=>). (1) Over a dissent the court held that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4. (2) Over a dissent the court held that the issue whether the defendant's one-year disqualification violated his due process rights was moot. However, it added: "[W]e believe [G.S.] 20-17.4 raises due process concerns because it does not afford defendants any opportunity for a hearing. Nonetheless, in the absence of a justiciable claim, it is the role of the state legislature, not this Court, to remedy constitutionally suspect statutes." The dissenting judge did not believe that the trial court had jurisdiction to consider the due process issue.

### **Jury Selection**

*State v. Broom*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0yMDktMS5wZGY=>). (1) In a case in which the defendant was charged with various crimes related to his shooting of his pregnant wife, the trial court did not err by limiting the defendant's voir dire of prospective jurors. The charges against the defendant included first-degree murder of his child, who was born alive after the defendant's attack on her mother but died one month later. Defense counsel attempted to ask prospective jurors about their views on abortion and when life begins, and whether they held such strong views on those subjects that they would be unable to apply the law. The trial court sustained the State's objection to this questioning. These questions apparently confused prospective jurors as several inquired about the relevancy of their opinions on abortion. The trial court did not abuse its discretion by sustaining the State's objection to questioning that was confusing and irrelevant. (2) The trial court did not abuse its

discretion by denying the defendant's request to be provided, prior to voir dire, with the trial court's intended jury instructions regarding the killing of an unborn fetus. The defendant wanted the instruction to "clarify the law" before questioning of the jurors. The trial court properly instructed the jury on the born alive rule and killing of an unborn fetus was not an issue in the case.

### **Jury Instructions**

*State v. Broom*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0yMDktMS5wZGY=>). In a case in which the defendant was charged with first-degree murder, the trial court did not err by denying the defendant's request for a second-degree murder charge where there was no evidence to negate the State's proof of every element of first-degree murder; the defendant's defense was simply an assertion that he did not shoot the victim.

### **Prayer for Judgment Continued**

*State v. Broom*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0yMDktMS5wZGY=>). When the trial court enters a PJC, there is no final judgment from which to appeal.

### **Sentencing**

#### **Prior Record Level**

*State v. Claxton*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NTYtMS5wZGY=>). (1) The evidence supported the trial court's determination that the defendant was in PRL V. The trial court based its determination on NC and NY DCI records. The defendant argued that the NY DCI record was not sufficient because it was inconsistent with the NC DCI record. The court found any inconsistencies to be minor clerical errors. (2) The trial court did not err by finding that a NY drug conviction for third-degree drug sale was substantially similar to a NC Class G felony under G.S. 90-95. Comparing the two states' statutes, the offenses were substantially similar, notwithstanding the fact that the states' drug schedules are not identical. The court noted: the requirement in G.S. 15A-1340.14(e) "is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.'"

*State v. Sanders*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NzYtMS5wZGY=>). In determining whether out-of-state convictions were substantially similar to NC offenses, the trial court erred by failing to compare the elements of the offenses and instead comparing their punishment levels.

*State v. Gardner*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NjQtMS5wZGY=>). (1) Distinguishing *State v. Hamby*, 129 N.C. App. 366, (1998), the court held that the defendant could appeal the trial

court's calculation of her prior record level even though she had stipulated to her prior convictions on the sentencing worksheet. (2) The trial court erred by assigning a PRL point under G.S. 15A-1340.14(b)(6) (one point if all the elements of the present offense are included in any prior offense). The trial court assigned the point because the defendant was convicted of felony speeding to elude (Class H felony) and had a prior conviction for that offense. However, the new felony speeding to elude conviction was consolidated with a conviction for assault with a deadly weapon on a governmental officer (AWDWOGO), a more serious offense (Class F felony). When offenses are consolidated, the most serious offense controls, here AWDWOGO. Analyzed in this fashion, all of the elements of AWDWOGO are not included in the prior felony speeding to elude conviction. The court rejected the State's argument that because both felonies were elevated to Class C felonies under the habitual felon law, assignment of the prior record level was proper.

### **Aggravated Sentences**

*State v. Wilkes*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0zODctMS5wZGY=>). The trial court erred by sentencing the defendant in the aggravating range without considering uncontradicted evidence of a mitigating factor. One judge declined to reach this issue.

### **Sex Offenders**

*In re Dunn*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NTYtMS5wZGY=>). Holding, in a case in which the trial court denied the defendant's motion to terminate his sex offender registration, that the superior court did not have jurisdiction to enter its order. Under G.S. 14-208.12A(a), a petition to terminate must be filed in the district where the person was convicted. Here, the defendant was convicted in Montgomery County but filed his petition to terminate in Cumberland County.

### **Habitual Felon**

*State v. Hoskins*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013) (<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTktMS5wZGY=>). During the habitual felon trial stage, the jury may consider evidence of a prior felony presented during the trial for the principal offense. Evidence of one prior conviction was presented during the trial for the principal offense; evidence of two prior convictions was introduced in the habitual felon phase. The defendant argued that the evidence was insufficient because the State did not introduce evidence of all three priors at the habitual phase. There is no need to reintroduce evidence presented during the trial for the principal offense at the habitual felon hearing; evidence presented during the trial for the principal offense can be used to prove the habitual felon charge.

### **Probation Violations**

*State v. Jones*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05OTItMS5wZGY=>). The trial court did not abuse its discretion by revoking the defendant's probation under the Justice Reinvestment Act when the defendant was convicted of another criminal offense while on probation.

## **Evidence**

### **Confrontation**

*State v. Lanford*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02MjMtMS5wZGY=>). The trial court did not err by allowing a child victim to testify out of the defendant's presence by way of a closed circuit television. Following *State v. Jackson*, \_\_ N.C. App. \_\_, 717 S.E.2d 35 (Oct. 4, 2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; *Maryland v. Craig* survived *Crawford* and the procedure satisfied *Craig's* procedural requirements), the court held that no violation of the defendant's confrontation rights occurred. The court also held that the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence.

## **Criminal Offenses**

### **General Crimes**

*State v. Broom*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0yMDktMS5wZGY=>). The trial court did not err by denying the defendant's motion to dismiss a charge of attempted first-degree murder where the defendant shot the victim in the abdomen. The defendant removed the victim's cell phone from her reach, left the room, returned with a .45 caliber pistol, and shot her in the abdomen with a hollow point bullet. He then denied her medical assistance for approximately twelve hours.

### **Assaults**

*State v. Wilkes*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0zODctMS5wZGY=>). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of assault with deadly weapon with intent to kill, over the defendant's argument that there was insufficient evidence of an intent to kill. This charge was based on the defendant's use of a bat to assault his wife. The court determined that the nature and manner of the attack supported a reasonable inference that the defendant intended to kill, including that he hit her even after she fell to her knees, he repeatedly struck her head with the bat until she lost consciousness, she never fought back, and the wounds could have been fatal. Also, the circumstances of the attack, including the parties' conduct, provided additional evidence of intent to kill, including that the two had a volatile relationship and the victim had recently filed for divorce. (2) Over a dissent, the court held that the State presented substantial evidence supporting two separate assaults.

The defendant attacked his wife with his hands. When his child intervened with a baseball bat to protect his mother, the defendant turned to the child, grabbed the bat and then began beating his wife with the bat. The court concluded that the assaults were the result of separate thought processes, were distinct in time, and the victim sustained injuries on different parts of her body as a result of each assault.

*State v. Garrison*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01ODktMS5wZGY=>). In a habitual misdemeanor assault case, the trial court erred by failing to instruct the jury that the defendant's assault under G.S. 14-33 must have inflicted physical injury. However, given the uncontroverted evidence regarding the victim's injuries, the error did not rise to the level of plain error.

*State v. Lanford*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02MjMtMS5wZGY=>). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of attempted malicious castration of a privy member. The victim was the son of the woman with whom the defendant lived; a doctor found 33 injuries on the victim's body, including a 2.5 inch laceration on his penis. The defendant argued that there was insufficient evidence that he committed an assault with malice aforethought and specific intent to maim the victim's privy member. Although the victim gave conflicting evidence as to how the defendant cut his penis, the defendant's malice and specific intent to maim could be reasonably inferred from the numerous acts of humiliation and violence experienced by the victim prior to the defendant's assault on his penis. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of assault by strangulation on the same victim. The defendant argued that because his obstruction of the victim's airway was caused by the defendant's hand over the victim's nose and mouth, rather than "external pressure" applied to the neck, it was "smothering" not "strangling". Rejecting this argument, the court concluded:

We do not believe that the statute requires a particular method of restricting the airways in the throat. Here, defendant constricted [the victim's] airways by grabbing him under the chin, pulling his head back, covering his nose and mouth, and hyperextending his neck. Although there was no evidence that defendant restricted [the victim's] breathing by direct application of force to the trachea, he managed to accomplish the same effect by hyperextending [the victim's] neck and throat. The fact that defendant restricted [the victim's] airway through the application of force to the top of his neck and to his head rather than the trachea itself is immaterial.

(3) A defendant may be convicted of assault by strangulation and assault with a deadly weapon inflicting serious injury where two incidents occurred. The fact that these assaults were part of a pattern of chronic child abuse does not mean that they are considered one assault. (4) The State sufficiently proved two distinct incidents of assault with a deadly weapon inflicting serious injury supporting two convictions and three instances of felony child abuse supporting three such convictions. The fact that the assaults form part of chronic and continual abuse did not alter its conclusion.

## **Homicide**

*State v. Broom*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0yMDktMS5wZGY=>). (1) The trial court did not err by denying the defendant's motion to dismiss first-degree murder charges where the victim was in utero at the time of the incident but was born alive and lived for one month before dying. (2) The defendant's shooting of the victim's mother (the defendant's wife) while the victim was in utero was a proximate cause of the victim's death after being born alive. The gunshot wound necessitated the child's early delivery, the early delivery was a cause of a complicating condition, and that complicating condition resulted in her death. (3) The State presented sufficient evidence that the defendant acted with premeditation and deliberation where, among other things, the defendant did not want a second child and asked his wife to get an abortion, he was involved in a long-term extramarital affair with another woman who testified that the defendant was counting down the seconds until his first child would go to college so that he could leave his wife, the defendant had made plans to move out of his marital home but reacted angrily when his wife suggested that if the couple divorced she might move out of the state and take the children with her, and shortly before he shot his wife, he placed her cell phone out of her reach.

## **Post-Conviction**

### **Clerical Errors**

*State v. Jones*, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (Jan. 15, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05OTItMS5wZGY=>). A clerical error occurred where the trial court found that it could revoke the defendant's probation under the Justice Reinvestment Act because the defendant was convicted of another criminal offense while on probation but checked the box on the form indicating that the revocation was based on the fact that the defendant had twice previously been confined in response to violations. Remanding for correction.