

Criminal Procedure

Indictment Issues

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTQtMS5wZGY=>). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that a robbery indictment was not fatally defective. The indictment alleged that the defendant:

unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, A 2005 TOYOTA HIGHLANDER AUTOMOBILE (VIN: JTEDP21A250047971) APPROXIMATE VALUE OF \$18,000.00; AND AN LP FLIP PHONE, HAVING AN APPROXIMATE VALUE OF \$100.00: AND A BANK OF AMERICA ATM CARD, HAVING AN APPROXIMATE VALUE OF \$1.00; AND APPROXIMATELY \$700.00 IN U.S. CURRENCY of the value of \$18,801.00 dollars, from the presence, person, place of business, and residence of

_____. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, A SAWED OFF HARRINGTON & RICHARDSON TOPPER MODEL 158, 12 GAUGE SHOTGUN (SERIAL # L246386) AND AN EXCAM GT-27 .25 CALIBER SEMI-AUTOMATIC PISTOL (SERIAL # M11062) whereby the life of EVE MARIE CARSON was endangered and threatened.

The defendant argued that the indictment was defective because it failed to name the person from whose presence property was taken. The court reasoned that Carson's life could not have been endangered and threatened unless she was the person in the presence of the property.

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04NjktMS5wZGY=>). An indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment also charging the defendant with assault with a deadly weapon. G.S. 14-415.1(c) requires that possession of a firearm by a felon be charged in a separate indictment from other related charges.

Jury Selection

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTQtMS5wZGY=>). (1) In an appeal from a conviction obtained in the Eve Carson murder case, the trial court did not abuse its discretion by overruling the defendant's objections to the State's questions during jury selection. The defendant objected to questions about whether jurors could consider testimony by witnesses who had criminal records, had received immunity deals for their testimony, and/or were uncharged participants in some of the criminal activities described at trial. The defendant also objected to questions about the jurors' understanding of and feelings about the substantive law on felony murder. (2) The trial court did not abuse its discretion by denying three of the defendant's challenges for cause during jury selection. The

defendant failed to preserve for appellate review challenges as to two of the jurors. As to the third, his challenge was based on the juror's hearing problems. However, the trial court obtained a hearing device for the juror's use and tested its effectiveness in court.

Motions to Dismiss--Corpus Delicti Rule

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=>). The evidence was sufficient to sustain a juvenile's adjudication as delinquent for driving with no operator's license under the corpus delicti rule. The thirteen-year-old juvenile admitted that he drove the vehicle. Ample evidence, apart from this confession existed, including that the juvenile and his associates were the only people at the scene and that the vehicle was registered to the juvenile's mother.

Pleas

State v. Crawford, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NjUtMS5wZGY=>). There was a sufficient factual basis for the defendant's plea to felony breaking or entering where the State's summary of the evidence was sufficient under G.S. 15A-1022(c). The State indicated that BB&T owned a residence located at 128 Lake Drive in Candler as a result of a foreclosure and that the defendant broke into the house and was preparing to move in when she was discovered on the property.

Counsel Issues

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTQtMS5wZGY=>). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that counsel did not commit a *Harbison* error (unconsented to admission of guilt by counsel). Even taken out of context, the remark at issue did even approach a concession of guilt.

State v. Gray, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xNTMtMS5wZGY=>). The defendant was entitled to a new trial where the trial court proceeded to trial over the defendant's objection to continued representation by appointed counsel who had previously represented one of the State's witnesses. At a pretrial hearing the State informed the trial court that defense counsel had previously represented Mr. Slade, who the State intended to call as a trial witness. The defendant told the trial court that he was concerned about a conflict of interest and asked for another lawyer. Slade subsequently waived any conflict and the State Bar advised the trial court that since Slade had consented "the lawyer's ability to represent the current client is not affected" and that the current client's consent was not required. The trial court conducted no further inquiry. The court held that the trial court erred by failing to make any inquiry into the nature and extent of the potential conflict and whether the defendant wished to waive the conflict. It concluded:

[W]e believe that Defendant . . . was effectively forced to go to trial while still represented by his trial counsel, who had previously represented one of the State's witnesses and who acknowledged being in the possession of confidential information which might be useful for purposes of cross-examining that witness, despite having clearly objected to continued representation by that attorney. As a result, given that prejudice is presumed under such circumstances, Defendant is entitled to a new trial.

[Author's note: For more information about conflict of interest claims, see JESSICA SMITH, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IN NORTH CAROLINA CRIMINAL COURTS (UNC School of Government 2003).]

Motions to Suppress

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NTQtMS5wZGY=>). A trial court's order denying a motion to suppress is not invalid merely because the trial court did not make its findings immediately after the suppression hearing where the trial court later made the required findings.

Habitual Felon

State v. Wilkins, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04NjktMS5wZGY=>). The trial court erred in sentencing the defendant as a habitual felon because the issue was neither submitted to the jury nor addressed by a guilty plea. A mere stipulation to the prior felonies is insufficient; there must be a jury verdict or a record of a guilty plea.

Mistrial

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MDktMS5wZGY=>). In a resist, delay and obstruct case arising out of an incident of indecent exposure, the trial court did not abuse its discretion by denying the defendant's mistrial motion when an officer testifying for the State indicated that the defendant said he was a convicted sex offender. The trial court sustained the defendant's objection, granted the defendant's motion to strike, and gave the jury a curative instruction.

Sentencing

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi03OTQtMS5wZGY=>). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that the defendant was entitled to a new sentencing hearing in accordance with G.S. 15A-1476 (recodified as G.S. 15A-1340.19A), the statute enacted by the North Carolina General Assembly to bring the State's sentencing law into compliance with *Miller v. Alabama*, __ U.S. __, 183 L. Ed. 2d 407 (2012) (Eighth Amendment prohibits a sentencing

scheme that requires life in prison without the possibility of parole for juvenile homicide offenders). The State conceded that the statute applied to the defendant, who was seventeen years old at the time of the murder and whose case was pending on direct appeal when the Act became law.

State v. Crawford, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NjUtMS5wZGY=>). The trial court did not err in calculating the defendant's prior record level. The trial court considered the defendant's two federal felony convictions as Class I felonies for purposes of calculating prior record level. Because the defendant made no showing that either conviction was substantially similar to a North Carolina misdemeanor, the trial court did not err by using the default Class I categorization.

Probation Revocations

State v. Boone, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NzUtMS5wZGY=>). The trial court erred by revoking the defendant's probation. The defendant pleaded guilty and was sentenced to 120 days confinement suspended for one year of supervised probation. The trial court ordered the defendant to perform 48 hours of community service, although no date for completion of the community service was noted on the judgment, and to pay \$1,385 in costs, fines, and fees, as well as the probation supervision fee. The schedule required for the defendant's payments and community service was to be established by the probation officer. The probation officer filed a violation report alleging that the defendant had willfully violated his probation by failing to complete any of his community service, being \$700 in arrears of his original balance, and being in arrears of his supervision fee. The defendant was found to have willfully violated and was revoked. The court concluded that absent any evidence of a required payment schedule or schedule for community service, the evidence was insufficient to support a finding of willful violation.

Evidence

Opinions

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MjctMS5wZGY=>). In a misdemeanor possession of marijuana case, the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana. The officer's testimony was substantial evidence that the substance was marijuana and therefore the trial court did not err by denying the defendant's motion to dismiss.

Arrest, Search & Investigation

Interrogations

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=>). (1) A thirteen-year-

old juvenile was not in custody within the meaning of G.S. 7B-2101 or *Miranda* during a roadside questioning by an officer. Responding to a report of a vehicle accident, the officer saw the wrecked vehicle, which had crashed into a utility pole, and three people walking from the scene. When the officer questioned all three, the juvenile admitted that he had been driving the wrecked vehicle. Noting that under *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011), a reviewing court must take into account a juvenile's age if it was known to the officer or would have been objectively apparent to a reasonable officer, the court nevertheless concluded that the juvenile was not in custody. (2) The court rejected the juvenile's argument that his statement was involuntary. The juvenile had argued that because G.S. 20-166(c) required him to provide his name and other information to the nearest officer, his admission to driving the vehicle was involuntary. The court rejected this argument, citing *California v. Byers*, 402 U.S. 424 (1971) (a hit and run statute requiring the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address did not violate the Fifth Amendment).

Searches

State v. Johnson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MjctMS5wZGY=>). In a drug case the court held that probable cause and exigent circumstances supported a roadside search of the defendant's underwear conducted after a vehicle stop and that the search was conducted in a reasonable manner. After finding nothing in the defendant's outer clothing, the officer placed the defendant on the side of his vehicle with the vehicle between the defendant and the travelled portion of the highway. Other troopers stood around the defendant to prevent passers-by from seeing him. The officer pulled out the front waistband of the defendant's pants and looked inside. The defendant was wearing two pairs of underwear—an outer pair of boxer briefs and an inner pair of athletic compression shorts. Between the two pairs of underwear the officer found a cellophane package containing several smaller packages. There was probable cause to search where the defendant smelled of marijuana, officers found a scale of the type used to measure drugs in his car, a drug dog alerted in his car, and during a pat-down the officer noticed a blunt object in the inseam of the defendant's pants. Because narcotics can be easily and quickly hidden or destroyed, especially after a defendant has notice of an officer's intent to discover whether the defendant was in possession of them, sufficient exigent circumstances justified the warrantless search. Additionally, the search was conducted in a reasonable manner. Although the officer did not see the defendant's private parts, the level of the defendant's exposure is relevant to the analysis of whether the search was reasonable. The court reasoned that the officer had a sufficient basis to believe that contraband was in the defendant's underwear, including that although the defendant smelled of marijuana a search of his outer clothing found nothing, the defendant turned away from the officer when the officer frisked his groin and thigh area, and that the officer felt a blunt object in the defendant's crotch area during the pat-down. Finally, the court concluded that when conducting the search the officer took reasonable steps to protect defendant's privacy.

Inevitable Discovery

State v. Wells, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00OTEtMS5wZGY=>). In a case in which the defendant was convicted of soliciting a child by computer and attempted indecent liberties on a child, the trial court erred by concluding that the defendant's laptop would have inevitably discovered. The trial court ordered suppressed the defendant's statements to officers during questioning. In those statements the defendant told officers that he owned a laptop that was located on his bed at the fire station. The trial court denied the defendant's motion to suppress evidence retrieved from his laptop, concluding that it would have been inevitably discovered. The court found that the State had not presented any evidence--from the investigating officers or anyone else--supporting this conclusion.

Identification

State v. Wilson, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NTQtMS5wZGY=>). The court rejected the defendant's argument that a photographic lineup was impermissibly suggestive because the defendant's photo was smaller than others in the array.

Criminal Offenses

Larceny and Related Offenses

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=>). The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for unauthorized use of a motor vehicle. Although the evidence showed that the juvenile was operating a motor vehicle registered to his mother, there was no evidence that he was using the vehicle without his mother's consent.

Assaults

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MTAtMS5wZGY=>). There was sufficient evidence of an intent to kill when during a robbery the defendant fired a gun beside the store clerk's head and the clerk testified that he thought the defendant was going to kill him.

Sexual Assaults

State v. Banks, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01MzEtMS5wZGY=>). Because a defendant cannot be convicted of statutory rape of a 13, 14 or 15 year old and second-degree rape based on a single act of intercourse, the trial court erred by denying the defendant's MAR alleging that trial counsel was ineffective by failing to object to the judgment sentencing him for both offenses. Although the court concluded that no violation of double jeopardy had occurred, it considered *State v. Ridgeway*, 185 N.C. App. 423 (2007) (although the trial court properly allowed the jury to review

evidence of both statutory rape and first-degree rape arising out of a single act, the defendant could not be convicted of both offenses), and concluded that the legislature intended to prohibit conviction for both offenses when based on the same incident. Because *Ridgeway* was decided prior to the defendant's trial, trial counsel was ineffective by failing to raise the issue.

Kidnapping

State v. Stokes, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MTAtMS5wZGY=>). The evidence was insufficient to establish removal when during a robbery the defendant ordered the clerk to the back of the store but the clerk refused. The defendant also ordered the clerk to get in a car. Although the clerk walked about five feet, he then refused to go further, never leaving the area of the store near the register.

Resist, Delay & Obstruct

State v. Smith, __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MDktMS5wZGY=>). (1) In a resisting, delaying, obstructing case, the trial court did not err by instructing the jury that an arrest for indecent exposure would be a lawful arrest where the defendant never claimed at trial that he was acting in response to an unlawful arrest, nor did the evidence support a reasonable inference that he did so. Although the defendant argued on appeal that the arrest was not in compliance with G.S. 15A-401, the evidence indicated otherwise. (2) The court rejected the defendant's argument that the evidence was insufficient to establish that he willfully resisted arrest. Responding to a call about indecent exposure, the officer found the defendant in his car with his shorts at his thighs and his genitals exposed. When the defendant exited his vehicle his shorts fell to the ground. The defendant refused to give the officer his arm or put his arm behind his back. According to the defendant he was merely trying to pull up his pants.

Motor Vehicle Offenses

In re A.N.C., __ N.C. App. __, __ S.E.2d __ (Feb. 5, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi00ODItMS5wZGY=>). The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for reckless driving under G.S. 20-140(b). The evidence showed that the juvenile was driving a vehicle registered to his mother at the time of the wreck and that the vehicle that he was driving collided with a utility pole. However there was no evidence showing that the collision resulted from careless or reckless driving. The court concluded that the "mere fact that an unlicensed driver ran off the road and collided with a utility pole does not suffice to establish a violation of [G.S.] 20-140(b)."