

Criminal Procedure

Discovery

State v. Dorman, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05Ny0xLnBkZg==>). (1) The trial court erred by ordering dismissal with prejudice of murder charges as a sanction for discovery violations where the record did not reveal a basis for the determination that dismissal was an appropriate sanction. Additionally, because the defendant actually received the evidence the State initially failed to disclose pretrial, any harm is either speculative or moot. (2) The trial court erred by ordering suppression as a sanction for failing to document and disclose various communications between the police department and related agencies. The court began by noting that G.S. 15A-903 requires production already existing documents; it imposes no duty on the State to create or continue to develop additional documentation regarding an investigation. Thus, to the extent the trial court concluded that the State violated statutory discovery provisions because it failed to document various conversations, this was error. The trial court also erred by concluding that the State violated the discovery statutes by failing to provide other documented conversations. In addition to failing to make findings justifying the sanction on this basis, the defendant received the documentation prior to trial.

Motions to Dismiss

State v. Dorman, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05Ny0xLnBkZg==>). The trial court erred by dismissing murder charges against the defendant under G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice). The court first held that the trial court erred in finding that destruction of the purported bones of victim resulted in a flagrant violation of constitutional right to due process under *Brady*. An autopsy by the Medical Examiner's Office identified the victim and found that cause of death was blunt head trauma consistent with a shotgun wound. After the autopsy was complete, the Medical Examiner's officer released most of the victim's skeletal remains to the family and they were cremated. A partial fragment of the victim's skull was retained by that office. As to the *Brady* issue, the court concluded that even if, as the trial court found, there was evidence of bad faith on the part of the district attorney's office, the Durham Police Department, North Carolina Victim Compensation Services, and the Medical Examiner's Office and any bad faith on the part of those agencies can be attributable to the prosecution, bad faith standing alone is insufficient to support a dismissal under G.S. 15A-954(a)(4). Even if a flagrant violation of rights has occurred, there also must be irreparable prejudice to the defendant such that there is no remedy other than dismissal. In this respect, the court held:

[T]he trial court was premature in concluding that the alleged violations "caused such irreparable harm to [Defendant's] case as to require a dismissal with prejudice[.]" because Defendant cannot meet his burden of demonstrating his defense has been irreparably harmed. As explained above, the unavailability of the bones for independent testing makes it impossible to determine to what extent those bones would have been helpful to Defendant's case. Under the circumstances of this case as it has progressed

thus far, Defendant cannot meet his burden of demonstrating his defense has been actually, as opposed to potentially, prejudiced.

Furthermore, the court continued, the motion to dismiss and the trial court's order was premature given that no trial has occurred. It explained:

The defense has yet to engage any expert, and has failed to attempt to conduct any tests, whether for DNA or to attempt to replicate the photographic identification of the decedent using the radiographs of her teeth. It may well be that upon the hiring of an expert and analyzing the partial skull remains which still are being held by the [Medical Examiner's Office], Defendant's expert may concur in the [autopsy results] that the jaw bone is indeed that of [the victim]. Until it can be established that the partial remains are untestable or that the identification of the deceased is somehow flawed or incapable of repetition, we fail to see how the defense has been irreparably prejudiced.

The court also disagreed with the trial court's conclusion that dismissal was the only appropriate remedy, noting the trial judge's wide discretion in determining how to most fairly address any flagrant violation of rights. Second, the court held that the trial court erred by determining that the State's failure to disclose "the role its agents took in assisting, facilitating, and paying for the permanent destruction" of the remains and the failure by a doctor at the Medical Examiner's Office to produce the email records subject to subpoena flagrantly violated the defendant's constitutional rights. Because the defendant was provided with that information prior to trial, no *Brady* violation occurred. Third, trial court erred by concluding that three instances in which the State "fail[ed] to correct misrepresentations of material fact . . . flagrantly violated [the defendant's] constitutional rights[.]" Although the trial court cited *Napue v. Illinois*, 360 U.S. 264 (1959), in support of its ruling, the court found that case inapplicable given that no trial and no conviction had been obtained. Fourth, with respect to the trial court's conclusion that a flagrant violation of Eighth Amendment rights, the court rejected this basis for dismissal, stating: "Upon review of the trial court's order, we cannot determine the precise factual or legal basis for the trial court's specific conclusion that an Eighth Amendment violation occurred"

Motions to Suppress

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NDctMS5wZGY=>). The trial court did not impermissibly place the burden of proof on the defendant at a suppression hearing. Initially the burden is on the defendant to show that the motion to suppress is timely and in proper form. The burden then is on the State to demonstrate the admissibility of the challenged evidence. The party who bears the burden of proof typically presents evidence first. Here, the fact that the defendant presented evidence first at the suppression hearing does not by itself establish that the burden of proof was shifted to the defendant.

Sex Offenders

State v. Thomas, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NjctMS5wZGY=>). (1) The trial court

erred by concluding that the defendant required the highest level of supervision and monitoring and ordering the defendant to enroll in SBM for ten years when the STATIC-99 risk assessment classified him as a low risk for reoffending and that the trial court's additional findings were not supported by the evidence. The trial court had made additional findings that the victim suffered significant emotional trauma, that the defendant took advantage of a position of trust, and that the defendant had a prior record for a sex offense. The trial court stated that these factors "create some concern for the court on the likelihood of recidivism." The finding that the victim suffered from trauma was based solely on unsworn statements by the victim's mother and thus were insufficient to support this finding. The defendant's prior record and likelihood of recidivism was already accounted for in the STATIC-99 and thus did not constitute additional evidence outside of the STATIC-99. However, because the State had presented evidence which could support a determination of a higher level of risk, the court remanded for a new SBM hearing. (2) The trial court erred by concluding that indecent liberties was an offense against a minor as defined by G.S. 14-208.6(1m). However, that offense may constitute a sexually violent offense, and could thus support a SBM order.

Evidence

Arrest Search and Investigation

Arrest

State v. Williams, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05NDctMS5wZGY=>). Officers had probable cause to arrest the defendant for impaired driving. An officer saw the defendant lying behind a car on the ground near the trunk. His shirt was pulled over his head, his head was in the shirt's sleeve hole, and he appeared unconscious. When the officer tried to arouse the defendant, he woke up and started chanting. His speech was slurred, he had a strong odor of alcohol, he fell back when he stood, he was unsteady on his feet and his eyes were bloodshot. The keys were in the ignition and the car was not running. Another officer searched the area and found no sign of anyone else.

Juveniles

In re D.A.C., __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi01NjgtMS5wZGY=>). The trial court did not err by denying a fourteen-year-old juvenile's motion to suppress his oral admissions to investigating officers. The motion had asserted that he was in custody and had not been advised of his rights under *Miranda* and G.S. 7B-2101. The court found that the juvenile was not in custody. Responding to a report of shots fired, officers approached the juvenile's home. After speaking with the juvenile's parents, the juvenile had a conversation with the officers during which he admitted firing the shots. Among other things, the court noted that the juvenile was asked—not instructed—to step outside the house, the officers remained at arm's length, one of the officers was in plain clothes, and the conversation took place in an open area of the juvenile's yard while his parents were nearby, in broad daylight, and lasted

about five minutes. The court rejected the notion that fact that the juvenile's parents told him to be honest with the officers compelled a different conclusion.

Criminal Offenses

Drugs

State v. Chisholm, __ N.C. App. __, __ S.E.2d __ (Feb. 19, 2013)

(<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05MDEtMS5wZGY=>). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of possession with the intent to sell or deliver a counterfeit controlled substance. The court rejected the notion that to be considered a counterfeit controlled substance, the State must prove all three factors listed in G.S. 90-87(6)(b); the statute simply sets out factors that can constitute evidence that the controlled substance was intentionally misrepresented as a controlled substance. (2) The court also found sufficient evidence of intent to sell or deliver the counterfeit controlled substance given its packaging and weight and the presence of other materials used for packaging drugs. (3) The trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell and deliver cocaine where there was sufficient evidence of constructive possession. Because the defendant did not have exclusive possession of the bedroom where the drugs were found, the State was required to show other incriminating circumstances. There was sufficient evidence of such circumstances where among other things, the defendant was sleeping in the bedroom, his dog was in the bedroom, his clothes were in the closet, and plastic baggies, drug paraphernalia, and an electronic scale containing white residue were also in the bedroom. Additionally, the nightstand contained a wallet with a Medicare Health Insurance Card and customer service card identifying the defendant, a letter addressed to defendant at the address, and \$600 in cash.