

Criminal Procedure

Initial Appearance Procedure

[State v. Caudill](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The trial court did not err by denying the defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2) (arrested person must be taken before a judicial official without unnecessary delay). After a consensual search of his residence produced controlled substances, the defendant and three colleagues were arrested for drug possession. The defendant, who previously had waived his *Miranda* rights, was checked into the County jail at 11:12 am. After again being informed of his rights, the defendant was interviewed from 1:59 pm to 2:53 pm and made incriminating statements about a murder. After the interview the defendant was taken before a magistrate and charged with drug offenses and murder. The defendant argued that the delay between his arrival at the jail and his initial appearance required suppression of his statements regarding the murder. The court noted that under G.S. 15A-974(2), evidence obtained as a result of a substantial violation of Chapter 15A must be suppressed upon timely motion; the statutory term "result" indicates that a causal relationship between a violation of the statute and the acquisition of the evidence to be suppressed must exist. The court concluded that the delay in this case was not unnecessary and there was no causal relationship between the delay and defendant's incriminating statements made during his interview. The court rejected the defendant's constitutional arguments asserted on similar grounds.

Collateral Estoppel

[State v. Macon](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant's refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the instruction was not supported by the evidence. Citing *State v. Harris*, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial. It concluded that on retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, it concluded, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.

Jury Instructions

[State v. Macon](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In a DWI case, an officer's testimony supported an instruction that the jury could consider the defendant's refusal to take a breath test as evidence of her guilt.

[State v. Vaughn](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court committed plain error by instructing the jury that the defendant was not entitled to the benefit of self-defense if she was the aggressor when no evidence suggested that the defendant was the aggressor.

Verdict

[*State v. Heavner*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). Although the trial court erred by admitting in a motion for appropriate relief (MAR) hearing a juror's testimony about the impact on his deliberations of his conversation with the defendant's mother during trial, the trial court's findings supported its determination that there was no reasonable possibility the juror was affected by the extraneous information. After the defendant was found guilty it came to light that his mother, Ms. Elmore, spoke with a juror during trial. The defendant filed a MAR alleging that he did not receive a fair trial based on this contact. At the MAR hearing, the juror admitted that a conversation took place but said that he did not take it into account in arriving at a verdict. The trial court denied the MAR. Although it was error for the trial court to consider the juror's mental processes regarding the extraneous information, the judge's unchallenged findings of fact supported its conclusion that there was no reasonable possibility that the juror could have been affected by the information. The court noted that the juror testified that Elmore said only that her son was in trouble and that she was there to support him; she never said what the trouble was, told the juror her son's name, or specified his charges.

Sentencing

Prior Record Level

[*State v. Threadgill*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) Where the defendant stipulated to the worksheet's classification of a South Carolina conviction as a Class I felony, the trial court correctly assigned two points for that conviction. The court reasoned that the defendant knew of the worksheet's contents and had ample opportunity to object to them. It thus concluded that the defendant's silence regarding the worksheet's classification of the conviction as a Class I felony constituted a stipulation. Moreover, it reasoned, because Class I is the default classification for an out-of-state felony the State met its burden and was required to prove nothing further in support of that classification. (2) The court rejected the defendant's argument that the trial court violated his rights under the ex post facto clause when it assigned points to his prior record level based upon a conviction that was entered after the date of the offenses for which he was sentenced in the present case. The court noted that the conviction for the prior was entered more than a year before entry of judgment in the present case and G.S. 15A-1340.11(7) (defining prior conviction) was enacted prior to the date of the present offense.

Extraordinary Mitigation

[*State v. Williams*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The trial court did not put the burden on the State to disprove extraordinary mitigating factors. After the defendant presented evidence of mitigating factors, the trial court asked the State to respond to the defendant's evidence by explaining why it believed these factors were not sufficient reasons for finding extraordinary mitigation. The trial court did not presume extraordinary mitigating factors and then ask the State to present evidence to explain why they did not exist. (2) The trial court erred by finding extraordinary mitigation. The trial court found ten statutory mitigating factors and four extraordinary factors. Two extraordinary factors were the same as corresponding normal statutory mitigating factors and thus were insufficient to

support a finding of extraordinary mitigation. The third factor was not a proper factor in support of mitigation; the fourth was not supported by the evidence.

Probation

[*State v. Tindall*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court lacked jurisdiction to revoke the defendant's probation on the basis of a violation that was not alleged in the violation report and of which she was not given notice. The violation reports alleged that the defendant violated two conditions of her probation: to "[n]ot use, possess or control any illegal drug" and to "participate in further evaluation, counseling, treatment or education programs recommended . . . and comply with all further therapeutic requirements." The specific facts upon which the State relied were that "defendant admitted to using 10 lines of cocaine" and that the defendant failed to comply with treatment as ordered. However, the trial court found that the defendant's probation was revoked for "violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision."

[*State v. Webb*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The court rejected the defendant's argument that his revocation was improper because the attorney who represented him at the revocation hearing was not his appointed attorney and trial court made no findings about a substitute attorney. Any error that occurred was not prejudicial.

Evidence

Rule 606 (competency of juror as witness)

[*State v. Heavner*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). Although the trial court erred by admitting in a motion for appropriate relief (MAR) hearing a juror's testimony about the impact on his deliberations of his conversation with the defendant's mother during trial, the trial court's findings supported its determination that there was no reasonable possibility the juror was affected by the extraneous information. After the defendant was found guilty it came to light that his mother, Ms. Elmore, spoke with a juror during trial. The defendant filed a MAR alleging that he did not receive a fair trial based on this contact. At the MAR hearing, the juror admitted that a conversation took place but said that he did not take it into account in arriving at a verdict. The trial court denied the MAR. Although it was error for the trial court to consider the juror's mental processes regarding the extraneous information, the judge's unchallenged findings of fact supported its conclusion that there was no reasonable possibility that the juror could have been affected by the information. The court noted that the juror testified that Elmore said only that her son was in trouble and that she was there to support him; she never said what the trouble was, told the juror her son's name, or specified his charges.

Arrest Search and Investigation

Stops and Searches

[*In Re V.C.R.*](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) An officer had reasonable suspicion that a juvenile was violating G.S. 14-313(c) (unlawful for person under 18 to accept receipt of cigarettes) and

thus the officer's initial stop of the juvenile was proper. (2) The officer's actions of approaching the juvenile a second time in response to her loud yelling of an obscenity, telling her companions to leave, and questioning the juvenile constituted a seizure as a reasonable person would not feel free to leave. (3) Referencing the offense of disorderly conduct, the court found this seizure "permissible, given [the juvenile's] loud and profane language." (4) The officer's subsequent conduct of ordering the juvenile to empty her pockets constituted a search. (5) This search was illegal; it was not incident to an arrest nor consensual. The district court thus erred by denying the juvenile's motion to suppress.

Search Warrants

[State v. Torres-Gonzalez](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In a drug trafficking case, a search warrant was supported by probable cause. The affiant was an officer with more than 22 years of experience and who had been involved in numerous drug investigations. The affidavit included background on the circumstances of the detective's dealings with the defendant's accomplice; detailed that the person who acquired the cocaine went to the house identified in the search warrant; stated that that the same person then delivered the cocaine to the detective; included the fact that a phone registered to the defendant repeatedly called the accomplice after the accomplice was arrested; and stated that the defendant resided at the house that was the subject of the search warrant.

Criminal Offenses

Participants

[State v. Greenlee](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In a case involving charges of obtaining property by false pretenses arising out of sales to a pawn shop in which another person told the shop that the items were not stolen, the evidence was insufficient to show that the defendant was acting in concert. Assuming that the State sufficiently established the other elements of acting in concert, there was no evidence that the defendant was either actually present or near enough to render assistance as needed to his alleged accomplice.

General Crimes

[State v. Torres-Gonzalez](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The evidence was sufficient to support a charge of conspiracy to traffic in cocaine by possession. A detective arranged for a cocaine sale. The defendant and an individual named Blanco arrived at the preset location and both came over to the detective to look at the money. The defendant and Blanco left together, with the defendant telling Blanco to wait at a parking lot for delivery of the drugs. Later, the defendant told Blanco to come to the defendant's house to get the drugs. Blanco complied and completed the sale. (2) The court rejected the defendant's argument that verdicts finding him guilty of conspiracy to commit trafficking by possession but not guilty of trafficking by possession were legally inconsistent because both crimes required the defendant to have possession. Because conspiracy to traffic by possession does not include possession as an element, the fact that the defendant was convicted of that crime and not convicted of trafficking by possession does not present any inconsistency, legal or otherwise.

Assaults

[State v. Heavner](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The defendant was properly convicted of two counts of malicious conduct by a prisoner when he twice spit on an officer while officers were attempting to secure him. The defendant had argued that only conviction was proper because his conduct occurred in a continuous transaction. The court found that each act was distinct in time and location: first the defendant spit on the officer's forehead while the defendant was still in the house; five minutes later he spit on the officer's arm after being taken out of the house.

Sexual Assaults

[State v. Norman](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) In a second-degree rape and sexual offense case, the evidence sufficiently established use of force. The victim repeatedly declined the defendant's advances and told him to stop and that she didn't want to engage in sexual acts. The defendant pushed her to the ground. When he was on top of her she tried to push him away. (2) Because evidence of vaginal penetration was clear and positive, the trial court did not err by failing to instruct the jury on attempted rape.

Frauds

[State v. Greenlee](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In an obtaining property by false pretenses case based on the defendant having falsely represented to a pawn shop that items sold to the shop were not stolen, there was sufficient evidence that the items were stolen. As to the first count, the serial number of the item sold as shown on the shop's records matched the serial number reported by the theft victim; any variance between the model number reported by the victim and the model number reported on the shop's records was immaterial. With respect to the second count, the model number of a recorder sold as shown on the shop's records matched the model number of the item reported stolen by the victim, the item was uncommon and the victim identified it; any difference in the reported serial numbers was immaterial. As to a watch that was stolen with the recorder and described by the victim as a "Seiko dive watch with steel band," the fact that the defendant sold the watch along with the recorder was sufficient to establish that it was stolen.

Drug Offenses

[State v. Torres-Gonzalez](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The evidence was sufficient to support a charge of trafficking in cocaine by possession. A detective set up a cocaine sale. The defendant and an individual named Blanco arrived at the location and both came over to the detective to look at the money. The defendant and Blanco left together, with the defendant telling Blanco to wait at a parking lot for the drug delivery. Later, the defendant told Blanco to come to the defendant's house to get the drugs. Blanco complied and completed the sale.

Defenses

Entrapment

[State v. Thomas](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). In a drug trafficking case where the record failed to indicate that law enforcement officers utilized acts of persuasion, trickery or fraud to induce the defendant to commit a crime, or that the criminal design originated in the minds of law enforcement rather than with the defendant, the trial court did not err in failing to instruct the jury on the defense of entrapment.

Post-Conviction Issues

MAR Procedure

[State v. Williams](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) The trial court gave the State proper notice when it made a sua sponte oral MAR in open court one day after judgment had been entered. (2) The trial court did not violate the MAR provision stating that any party is entitled to a hearing on a MAR where the State did not request a hearing but merely requested a continuance so that the prosecutor from the previous day could be present in court.

Ineffective Assistance of Counsel

[State v. Gerald](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). Counsel was ineffective by failing move to suppress evidence obtained by a “patently unconstitutional seizure.” The State conceded that the evidence was obtained illegally but argued that counsel’s failure to move to suppress could have been the result of trial strategy. The court rejected this argument, noting in part trial counsel’s affidavit stating that he had no strategic reason for his failure. Trial counsel’s conduct fell below an objective standard of reasonableness and the defendant suffered prejudice as a result.

[In Re C.W.N.](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). (1) On direct appeal, the court rejected the juvenile’s assertion that counsel’s failure to make a closing argument in a delinquency proceeding was per se ineffective assistance. (2) In a delinquency case in which the juvenile was alleged to have assaulted another child, the court rejected the juvenile’s argument that he received ineffective assistance of counsel when defense counsel failed argue that the incident was an accident that occurred during horseplay. Given counsel’s cross-examination of the victim and other witnesses and direct examination of the juvenile, counsel’s conduct did not fall below an objective standard of reasonableness. Nor was prejudice established.

Judicial Administration

One Judge Overruling Another

[State v. Macon](#), __ N.C. App. __, __ S.E.2d __ (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant’s refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the

instruction was not supported by the evidence. Citing *State v. Harris*, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial. It concluded that on retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, it concluded, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.