

Criminal Procedure

Motion to Continue

[*State v. King*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In this murder case the trial court did not abuse its discretion by denying the defendant's motion to continue. The defendant sought the continuance so that he could procure an expert to evaluate and testify regarding the State's DNA evidence. The court rejected the defendant's argument that by denying his motion to continue, the trial court violated his right to the effective assistance of counsel. The State provided discovery, including all SBI-generated reports and data 9 June 2011. It produced one DNA analysis report in hard copy and included a second on a CD containing other material. Defense counsel did not examine the CD until around 5 March 2012, when he e-mailed the prosecutor and asked if he had missed anything. The prosecutor informed him that the CD contained a second DNA report. Trial was set for 9 April 2012. However, after conferring with a DNA expert, the defendant filed a motion to continue on 16 March 2012. At a hearing on the motion, defense counsel explained his oversight and an expert said that he needed approximately 3-4 months to review the material and prepare for trial. The trial court denied defendant's motion to continue. The court concluded:

Although the trial court might have justifiably granted defendant's motion and could have avoided a potential question of ineffective assistance of counsel by doing so, we cannot say that where defendant had been provided the DNA report nearly a year before trial the trial court erred or violated defendant's constitutional rights in denying his motion to continue in order to secure an expert witness for trial.

The court went on to dismiss the defendant's claim of ineffective assistance without prejudice to him being able to raise it through a MAR.

Use of Defendant's Silence at Trial

[*State v. Bean*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). Without addressing the merits of the defendant's argument that the State impermissibly used her silence against her at trial, the court found itself unable to conclude that the challenged instances had a substantial or probable impact on the verdict.

Opening and Closing Statements

[*State v. Bean*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). Without addressing the merits of the defendant's claim that the State violated her right to plead not guilty by commenting during closing arguments that despite the evidence against her, the defendant could "still say I didn't do it. And that's what we've got here," the court held that given the trial court's instructions and the evidence against the defendant, these comments did not warrant a new trial.

Jury Instructions

[*State v. Phillips*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The court rejected the defendant's argument that by using the phrase "the victim" while instructing the jury the trial court expressed an opinion regarding a fact in violation of G.S. 15A-1232; the court found that the defendant failed to show prejudice.

[*State v. King*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The trial court did not err by denying the defendant's request for a special instruction concerning the effect of drug use on a witness's credibility where the trial court gave the general witness credibility instruction.

[*State v. Ingram*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The trial court did not err by declining to instruct the jury on second-degree murder as a lesser of the charged offense, first-degree murder where there was no evidence negating the elements of the greater charge.

Sentencing

[*State v. Phillips*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) Based on the elements of the two offenses, the trial court erred by concluding that a prior Ohio conviction was substantially similar to the North Carolina crime of assault with a deadly weapon with intent to kill. (2) The defendant had adequate notice and opportunity to be heard before the trial court imposed court costs.

Sex Offenders

[*In re Bunch*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) On the State's appeal from the trial court order terminating the defendant's sex offender registration, the court noted that when a defendant seeks to be removed from the registry because he was erroneously required to register, the more appropriate avenue for relief is a declaratory judgment; however, it found that a declaratory judgment is not the exclusive avenue for relief. It continued:

But we would caution that those who seek to terminate registration as a sex offender under N.C. Gen. Stat. § 14-208.12A, for any reason other than fulfillment of the ten years of registration and other requirements of N.C. Gen. Stat. § 14-208.12A in the future will probably not succeed if the State does raise any objection or argument in opposition to the request.

(2) The fact that a person has not actually registered for 10 years in NC does not deprive the trial court of jurisdiction to rule on a petition to terminate.

Evidence

[*Johnson v. Robertson*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The Rules of Evidence do not apply to DMV license revocation hearings pursuant to G.S. 20-16.2.

Arrest Search and Investigation

Breath Tests

[*State v. Cathcart*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). The trial court erred by granting the defendant's motion to suppress breath test results from an Intoximeter EC/IR II. The trooper administered the first breath test, which returned a result of .10. When the trooper asked for a second sample, the defendant did not blow hard enough and the machine produced an "insufficient sample" result. The machine then timed out and printed out the first test result ticket. The trooper reset the machine and asked the defendant for another breath sample; the trooper did not wait before starting the second test. The next sample produced a result of .09. The sample was printed on a second result ticket. The trial court granted the defendant's motion to suppress, concluding that the trooper did not follow the procedures outlined in N.C. Admin. Code tit. 10A, r. 41B.0322 (2009) and because he did not acquire two sequential breath samples on the same test record ticket. Following *State v. White*, 84 N.C. App. 111 (1987), the court held that the trial court erred by concluding that the breath samples were not sequential. With respect to the administrative code, the court held that it was not necessary for the trooper to repeat the observation period.

Criminal Offenses

General Crimes

[*State v. Primus*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). Where the evidence showed that the defendant committed the completed crime of felony larceny, the evidence was sufficient to support a conviction of the lesser charged offense of attempted felony larceny.

Threats

[*State v. Hill*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In a communicating threats case, the State presented sufficient evidence that a detention officer believed that the defendant—an inmate—would carry out his threats against her.

Robbery

[*State v. Bell*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) Notwithstanding the defendant's testimony that the gun used in a robbery was unloaded, the trial court properly denied the defendant's motion to dismiss an armed robbery charge. The victim testified that the defendant entered her business, pointed a gun at her and demanded money. The defendant testified that he unloaded the gun before entering. He also testified that upon leaving he saw the police and ran into the woods where he left his hoodie and gun and jumped off of an embankment. On appeal, the defendant argued that the evidence was insufficient because it showed that the gun was unloaded. Because of the defendant's testimony, the mandatory presumption of danger or threat to life arising from the defendant's use of what appeared to the victim to be firearm disappeared. However, a permissive inference to that effect remained. Given the defendant's flight and attempt to hide evidence, the use of the permissive inference was not inappropriate. (2) The trial court did not err by declining to give a jury instruction regarding the mere possession of a firearm. The defendant argued that the trial court should have given

the instruction in footnote six to element seven of N.C.P.I.—Crim. 217.20. That footnote instructs that where use of a firearm is in issue, the trial court should instruct that mere possession of the firearm does not, in itself, constitute endangering or threatening the life of the victim. Here, however, the evidence showed that the defendant displayed and threatened to use the weapon by pointing it at the victim; the mere possession instruction therefore was not required.

Weapons Offenses

[*State v. Hill*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In a case where an inmate was charged with carrying a concealed weapon, there was sufficient evidence that the weapon was “concealed about his person.” Officers found one razor blade stuck to the underside of a table top in the day room adjoining the defendant’s cell, where the defendant had been seated earlier in the day. They found another on the ledge below the window in the defendant’s darkened cell, moments after he held such a blade in his hand while threatening an officer.

Drug Offenses

[*State v. Coleman*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). In a heroin trafficking case where the defendant argued that he did not know that the item he possessed was heroin, the trial court committed plain error by denying the defendant’s request for a jury instruction that the State must prove that the defendant knew that he possessed heroin (footnote 4 of the relevant trafficking instructions). The court noted that knowledge that one possesses contraband is presumed by the act of possession unless the defendant denies knowledge of possession and contests knowledge as disputed fact. It went on to reject the State’s argument that the defendant was not entitled to the instruction because he did not testify or present any evidence to raise the issue of knowledge as a disputed fact. The court noted that its case in chief the State presented evidence that the defendant told a detective that he did not know the container in his vehicle contained heroin; this constituted a contention by the defendant that he did not know the true identity of what he possessed, the critical issue in the case.

Post-Conviction

Habeas Corpus

[*State v. Leach*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) When a trial judge conducts an initial review of an application for the issuance of a writ of habeas corpus, the issues are whether the application is in proper form and whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged. In making this determination, the trial court is simply required to examine the face of the applicant’s application, including any supporting documentation, and decide whether the necessary preliminary showing has been made. Given the nature of the inquiry, there is no reason to require findings of fact and conclusions of law at this initial review stage. The decision whether an application should be summarily denied or whether additional proceedings should be conducted is a question of law and is reviewed de novo. (2) Where the trial court summarily denied the defendant’s application, it had no obligation to make findings of fact or

conclusions of law and thus its failure to do so does not provide a valid basis for overturning its order on appeal. (3) The trial court did not err by summarily denying the defendant's application where the defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest established by a MAPP contract.

DNA Testing

[*State v. Gardner*](#), __ N.C. App. __, __ S.E.2d __ (May 21, 2013). (1) The trial court did not err by failing to appoint counsel to represent the defendant on a motion for post-conviction DNA testing. The trial court is required to appoint counsel for a motion under G.S. 15A-269 only if the defendant makes a showing of indigence and that the DNA testing is material to defendant's claim of wrongful conviction. Here, the defendant did not make a sufficient showing of materiality, which requires more than a conclusory statement that the evidence is material. (2) The court adopted the following standard of review of a denial for post-conviction DNA testing: Findings of fact are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. (3) The trial court did not err by failing to make specific findings of fact when denying the defendant's request for post-conviction DNA testing under G.S. 15A-269. The statute contains no requirement that the trial court make specific findings of fact.