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Criminal Case Law Update

2014 Summer District Court Judges' Conference

(Includes selected cases decided between October 4, 2013 and May 27, 2014)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to http://www.sog.unc.edu/casecompendium. To obtain the summaries automatically by email, go to http://www.sog.unc.edu/crimlawlistserv.

Investigation Issues

Seizures

Defendant was not seized nor in custody when wildlife officer asked whether he was a convicted felon after inspecting hunting license

State v. Price, __ N.C. App. __, 757 S.E.2d 309 (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __, (April 21, 2014). The trial court erred by granting the defendant's motion to suppress. A wildlife officer stopped the armed defendant and asked to see his hunting license. After the defendant showed his license, the officer asked whether the defendant was a convicted felon. The defendant admitted that he was. The officer seized the weapon and the defendant was later charged with being a felon in possession of a firearm. The court defined the issue as whether the officer exceeded the scope of a valid stop when he asked the defendant if he was a convicted felon. It concluded that the defendant was neither seized nor in custody when the officer asked about his criminal history and that therefore the trial court erred by granting the motion to suppress. The court further noted that the officer had authority to seize the defendant's rifle without a warrant under the plain view doctrine.

Remanding for further findings of fact as to whether two-hour detention converted an otherwise valid investigative stop into a de facto arrest

State v. Thorpe, __ N.C. App. __, 754 S.E.2d 213 (Feb. 18, 2014). Because the trial court failed to make adequate findings to permit review of its determination on the defendant's motion to suppress that the defendant was not placed under arrest when he was detained by an officer for nearly two hours, the court remanded for findings on this issue. The court noted that the officer's stop of the defendant was not a "de facto" arrest simply because the officer handcuffed the defendant and placed him in the front passenger seat of his police car. However, it continued, "the length of Defendant's detention may have turned the investigative stop into a de facto arrest, necessitating probable cause . . . for the detention." It added: "Although length in and of itself will not normally convert an otherwise valid seizure into a de facto arrest, where the detention is more than momentary, as here, there must be some strong justification for the delay to avoid rendering the seizure unreasonable."

As issue of first impression, officer's seizure of defendant was justified by "community caretaking" doctrine

State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (Jan. 21, 2014). In a case where the State conceded that the officer had neither probable cause nor reasonable suspicion to seize the defendant, the court decided an issue of first impression and held that the officer's seizure of the defendant was justified by the "community caretaking" doctrine. The officer stopped the defendant to see if she and her vehicle were "okay" after he saw her hit an animal on a roadway. Her driving did not give rise to any suspicion of impairment. During the stop the officer determined the defendant was impaired and she was

arrested for DWI. The court noted that in adopting the community caretaking exception, "we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion." It went on adopt the following test for application of the doctrine:

> [T]he State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

After further fleshing out the test, the court applied it and found that the stop at issue fell within the community caretaking exception.

Grounds for Stop

Anonymous Tips

911 call reporting that caller had been run off the road by a specific vehicle provided reasonable suspicion for stop where caller's eyewitness knowledge supported the tip's reliability and created reasonable suspicion of an ongoing crime

Navarette v. California, 572 U.S. __ (April 22, 2014). The Court held in this "close case" that an officer had reasonable suspicion to make a vehicle stop based on a 911 call. After a 911 caller reported that a truck had run her off the road, a police officer located the truck the caller identified and executed a traffic stop. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The defendants moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Even assuming that the 911 call was anonymous, the Court found that it bore adequate indicia of reliability for the officer to credit the caller's account that the truck ran her off the road. The Court explained: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." The Court noted that in this respect, the case contrasted with *Florida v. J. L.,* 529 U. S. 266 (2000), where the tip provided no basis for concluding that the tipster had actually seen the gun reportedly possessed by the defendant. It continued: "A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously." The Court noted evidence suggesting that the caller reported the incident soon after it occurred and stated, "That sort of contemporaneous report has long been treated as especially reliable." Again contrasting the case to *J.L.,* the Court noted that in *J.L.*, there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event. The Court determined that another indicator of veracity is the caller's use of the 911 system, which allows calls to be recorded and law enforcement to verify information about the caller. Thus, "a reasonable officer could conclude that a false tipster would think twice before using such a system and a caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." But the Court cautioned, "None of this is to suggest that tips in 911 calls are per se reliable."

The Court went on, noting that a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity is afoot. It then determined that the caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. It stated:

> The 911 caller . . . reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving. (Citations omitted).

Tip from anonymous informant was insufficient to provide reasonable suspicion for traffic stop

State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (Oct. 15, 2013). Officers did not have reasonable suspicion to stop the defendant based on an anonymous tip from a taxicab driver. The taxicab driver anonymously contacted 911 by cell phone and reported that a red Mustang convertible with a black soft top, license plate XXT-9756, was driving erratically, running over traffic cones and continuing west on a specified road. Although the 911 operator did not ask the caller's name, the operator used the caller's cell phone number to later identify the taxicab driver as John Hutchby. The 911 call resulted in a "be on the lookout" being issued; minutes later officers spotted a red Mustang matching the caller's description, with "X" in the license plate, heading in the direction and on the road indicated by the caller. Although the officers did not observe the defendant violating any traffic laws or see evidence of improper driving that would suggest impairment, the officers stopped the defendant. The defendant was charged with DWI. The court began: [T]he officers did not have the opportunity to judge Hutchby's credibility firsthand or confirm whether the tip was reliable, because Hutchby had not been previously used and the officers did not meet him face-to-face. Since the officers did not have an opportunity to assess his credibility, Hutchby was an anonymous informant. Therefore, to justify a warrantless search and seizure, either the tip must have possessed sufficient indicia of reliability or the officers must have corroborated the tip.

The court went on to find that neither requirement was satisfied.

Generally

Being in an area known for drug sales and walking away from a companion in presence of officer does not provide reasonable suspicion for stop.

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (May 20, 2014). Over a dissent, the court held that an officer had no reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in an area

known for illegal drug sales and where numerous drug-related arrests occurred; the defendant and a companion were standing together; when they saw the officer's car, they began walking in opposite directions, with the defendant entering a store, Kim's Mart; when the officer turned his car around and returned, the two men were again standing together in front of Kim's Mart; and when the officer pulled into the parking lot, the defendant and his companion again walked away from each other, with the defendant walking toward the officer. The court concluded that "the totality of the relevant circumstances . . . consists of nothing more than . . . being in an area known for drug sales and . . . walking away from a companion in the presence of an officer twice." The court noted that no evidence suggested that the defendant took any "evasive" action or engaged in behavior that could be construed as flight.

Traffic stop was not unduly prolonged and defendant's consent to search vehicle after purpose of initial stop was met was valid; consent was valid even though officer did not inform defendant of purpose of search

State v. Heien, __ N.C. __, 749 S.E.2d 278 (Nov. 8, 2013). The court per curiam affirmed the decision below, *State v. Heien*, __ N.C. App. __, 741 S.E.2d 1 (2013). Over a dissent the court of appeals had held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The court of appeals also had held, again over a dissent, that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

Purpose of commercial vehicle stop was not completed until officer finished a document check despite fact that officer had already written warning citation and handed it to driver

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (May 5, 2014). In a drug trafficking case, the trial court did not err by denying the defendant's motion to suppress drugs seized from a truck during a vehicle stop. The defendant argued that once the officer handed the driver the warning citation, the purpose of the stop was over and anything that occurred after that time constituted unconstitutionally prolonged the stop. The court noted that officers routinely check relevant documentation while conducting traffic stops. Here, although the officer had completed writing the warning citation, he had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of the commercial vehicle. Thus, "The purpose of the stop was not completed until [the officer] finished a proper document check and returned the documents to [the driver and the passenger, who owned the truck]." The court noted that because the defendant did not argue the issue, it would not address which documents may be properly investigated during a routine commercial vehicle stop.

Officer had reasonable suspicion to stop and frisk defendant who made suspicious movements in high crime area

State v. Sutton, __ N.C. App. __, 754 S.E.2d 464 (Mar. 4, 2014), *temporary stay allowed*, __ N.C. __, __S.E.2d __ (Mar. 31, 2014). An officer had reasonable suspicion to stop and frisk the defendant when the defendant was in a high crime area and made movements which the officer found suspicious. The defendant was in a public housing area patrolled by a Special Response Unit of U.S. Marshals and the DEA concentrating on violent crimes and gun crimes. The officer in question had 10 years of experience and was assigned to the Special Response Unit. Many persons were banned from the public housing area—in fact the banned list was nine pages long. On a prior occasion the officer heard shots fired near the area. The officer saw the defendant walking normally while swinging his arms. When the defendant turned and "used his right hand to grab his waistband to clinch an item" after looking directly at the officer, the officer believed the defendant was trying to hide something on his person. The officer then stopped the defendant to identify him, frisked him and found a gun in the defendant's waistband.

Checkpoints

DWI checkpoint was not unconstitutional

State v. Kostick, __ N.C. App. __. 755 S.E.2d 411 (Mar. 18, 2014). In a DWI case, the court rejected the defendant's argument that the checkpoint at issue was unconstitutional. The court first found that the checkpoint had a legitimate primary programmatic purpose, checking for potential driving violations. Next, it found that the checkpoint was reasonable.

No error to conclude that lack of written policy at time of defendant's stop at checkpoint constituted substantial violation of G.S. 20-16.3A and warranted suppression

State v. White, __ N.C. App. __, 753 S.E.2d 698 (Feb. 4, 2014), *temporary stay allowed*, __ N.C. __, 755 S.E.2d 49 (Feb. 26, 2014). The trial court did not err by granting the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. Specifically, the trial court did not err by concluding that a lack of a written policy in full force and effect at the time of the defendant's stop at the checkpoint constituted a substantial violation of G.S. 20-16.3A (requiring a written policy providing guidelines for checkpoints). The court also rejected the State's argument that a substantial violation of G.S. 20-16.3A could not support suppression; the State had argued that evidence only can be suppressed if there is a Constitutional violation or a substantial violation of Chapter 15A.

Searches

Officers lacked probable cause to conduct a warrantless search of a passenger in a vehicle based on, among other things, odor of marijuana on driver's side of vehicle

State v. Malunda, __ N.C. App. __, 749 S.E.2d 280 (Nov. 5, 2013). The trial court erred by concluding that the police had probable cause to conduct a warrantless search of the defendant, a passenger in a stopped vehicle. After detecting an odor of marijuana on the driver's side of the vehicle, the officers conducted a warrantless search of the vehicle and discovered marijuana in the driver's side door. However, officers did not detect an odor of marijuana on the vehicle's passenger side or on the defendant. The court found that none of the other circumstances, including the defendant's location in

an area known for drug activity or his prior criminal history, nervousness, failure to immediately produce identification, or commission of the infraction of possessing an open container of alcohol in a motor vehicle, when considered separately or in combination, amounted to probable cause to search the defendant's person.

District court exceeded authority by ordering general search of defendant's person, vehicle and residence for unspecified "weapons" as provision of DVPO; Court rejected State's contention that DVPO served as valid search warrant or that other warrant exception applied

State v. Elder, __ N.C. App. __, 753 S.E.2d 504 (Jan. 21, 2014), *writ allowed,* __ N.C. __, 755 S.E.2d 607 (Mar. 6, 2014). (1) The district court exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence for unspecified "weapons" as a provision of the ex parte DVPO under G.S. 50B-3(a)(13). Thus, the resulting search of the defendant's home was unconstitutional. (2) The court rejected the State's argument the ex parte DVPO served as a valid search warrant. (3) The court rejected the State's argument that exigent circumstances (the need to perform a "protective sweep" of the defendant's home) supported the warrantless search. The trial court made no findings as to any exigent circumstances or the need for a protective sweep and the State did not contend, nor did the trial court conclude, that the officers had probable cause to suspect any particular criminal activity when they approached the defendant's home. (4) Finally, the court rejected the State's argument that the good faith exception applied. The court noted that the good faith exception might have applied if the defendant challenged the search only under the US Constitution; here, however the defendant also challenged the search under the NC Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the state Constitution.

Search warrant for defendant's apartment was not supported by probable cause where anonymous citizen reported drug activity at apartment and an individual who had recently visited apartment was found to be in possession of marijuana, cash, and incriminating text messages during vehicle stop

State v. McKinney, __ N.C. App. __, 752 S.E.2d 726 (Jan. 7, 2014), *temporary stay allowed*, __ N.C. __, 753 S.E.2d 682 (Feb. 11, 2014). The trial court erred by denying the defendant's suppression motion where the search warrant, authorizing a search of the defendant's apartment, was not supported by probable cause. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Foushee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court acknowledged that this evidence established probable cause that Foushee had been involved in a recent drug transaction. However, it found the evidence insufficient to establish probable cause of illegal drugs at the defendant's apartment.

Search warrant was not supported by probable cause where no facts supported assertion in affidavit that confidential informant was reliable

State v. Benters, __ N.C. App. __, 750 S.E.2d 584 (Dec. 3, 2013), *temporary stay allowed, writ allowed,* __ N.C. __, 755 S.E.2d 655 (Jan. 7, 2014). Over a dissent, the court held in this drug case that the trial court properly suppressed evidence after finding that no probable cause supported the search warrant. According to the affidavit, a confidential informant told the police that the defendant was growing marijuana indoors at a specified address. An officer, who knew that the defendant owned the premises,

obtained power bills for the property. The bills showed power usage consistent with an indoor growing operation. Additionally, officers observed the premises from an open field and saw growing items, such as potting soil and starting fertilizer, and an unused greenhouse that was in disrepair. The court noted, among other things, that although the affidavit asserted that the informant was reliable, no facts supported that assertion.

Search warrant authorizing search of apartment of defendant's girlfriend to find defendant was supported by probable cause based on various circumstances, although court would not consider evidence introduced at a suppression hearing that was not before the issuing magistrate; a common sense reading of an affidavit for a second search warrant of the apartment sufficiently connected marijuana to the apartment; discovery of a partially smoked marijuana cigarette at the apartment was sufficient to provide probable cause to search for firearms and ammunition

State v. Inyama, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this drug and felon in possession of a firearm case, the court held that the search warrants were supported by probable cause. The first warrant authorized officers to search the defendant's girlfriend's apartment to find the defendant. The defendant argued that the affidavit did not contain any statements supporting a belief that the defendant was inside the apartment. Rejecting the State's suggestion that it could consider evidence introduced at the suppression hearing but not before the magistrate when the warrant was issued, the court nevertheless found the affidavit sufficient. Specifically, it indicated that an identified vehicle that the defendant had been driving when previously stopped by an officer was parked outside of his girlfriend's apartment. A second vehicle registered to the defendant's girlfriend was also in the parking lot. Although the defendant's girlfriend told police that no one should be inside the apartment and the defendant was last there a few days earlier, the police heard several male voices inside the apartment. This constituted sufficient evidence from which the magistrate could find probable cause to believe the defendant was inside the apartment. After the officers entered the apartment on the first warrant, they found a partially smoked marijuana cigarette. They then applied for and obtained a second warrant to search the apartment for drugs, firearms, ammunition, and other identified material relating to the drug possession. The following statement of facts provided the basis to establish probable cause: "While executing a search warrant for a wanted person marijuana was in [sic] observed in plain view. Based on this discovery it is my reasonable belief that more narcotics will be located upon a further search." The defendant argued that the affidavit was defective because it failed to connect the marijuana to the apartment to be searched. Although the affidavit did not state that the search warrant for the defendant was executed at the address identified to be searched, the court found that "it is clear from a common sense reading of the affidavit that the place to be searched was the same place 8searched during the execution of the prior search warrant" and thus that the affidavit was not fatally defective. Finally, the defendant argued that the trial court erred in concluding there was probable cause to believe firearms and ammunition would be found at the apartment based on the discovery of the partially smoked marijuana cigarette. The court disagreed, concluding that "Where criminal activity has been discovered at the apartment, we find the trial court did not err in concluding there was a reasonable basis for the magistrate to believe firearms would be found."

Search warrant was supported by probable cause: (1) information in affidavit that defendant had previously shown victim pornographic images was not stale where items to be searched for had enduring utility to defendant; (2) officer's mistakes in affidavit were not result of false and misleading information and affidavit was sufficient to provide probable cause absent mistaken information; (3) fact that magistrate considered officer's sworn testimony but did not record it was not basis for suppressing evidence

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In this child sex case, the trial court did not err by denying the defendant's motion to suppress evidence obtained pursuant to a search warrant authorizing a search of his house. The victim told the police about various incidents occurring in several locations (the defendant's home, a motel, etc.) from the time that she was eight years old until she was eleven. The affidavit alleged that the defendant had shown the victim pornographic videos and images in his home. The affidavit noted that the defendant is a registered sex offender and requested a search warrant to search his home for magazines, videos, computers, cell phones, and thumb drives. The court first rejected the defendant's argument that the victim's information to the officers was stale, given the lengthy gap of time between when the defendant allegedly showed the victim the images and the actual search. It concluded: "Although [the victim] was generally unable to provide dates to the attesting officers . . . her allegations of inappropriate sexual touching by Defendant over a sustained period of time allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence." It went on to note that "when items to be searched are not inherently incriminating [as here] and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched." It concluded:

> There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before.

The court also rejected the defendant's argument that the affidavit was based on false and misleading information, concluding that to the extent the officer-affiant made mistakes in the affidavit, they did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause. Finally, the court held that although the magistrate violated G.S. 15A-245 by considering the officer's sworn testimony when determining whether probable cause supported the warrant but failing to record that testimony as required by the statute, this was not a basis for granting the suppression motion. Significantly, the trial court based its ruling solely on the filed affidavit, not the sworn testimony and the affidavit was sufficient to establish probable cause.

Exigent circumstances supported warrantless blood draw in DWI case

State v. Dahlquist, __ N.C. App. __, 752 S.E.2d 665 (Dec. 3, 2013). In this DWI case, the trial court properly denied the defendant's motion to suppress evidence obtained from blood samples taken at a hospital without a search warrant where probable cause and exigent circumstances supported the warrantless blood draw. Noting the U.S. Supreme Court's recent decision in *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient

to justify conducting a blood test without a warrant), the court found that the totality of the circumstances supported the warrantless blood draw. Specifically, when the defendant pulled up to a checkpoint, an officer noticed the odor of alcohol and the defendant admitted to drinking five beers. After the defendant failed field sobriety tests, he refused to take a breath test. The officer then took the defendant to the hospital to have a blood sample taken without first obtaining a search warrant. The officer did this because it would have taken 4-5 hours to get the sample if he first had to travel to a magistrate for a warrant. The court noted however that the "'video transmission' option that has been allowed by G.S. 15A-245(a)(3) [for communicating with a magistrate] . . . is a method that should be considered by arresting officers in cases such as this where the technology is available." It also advised: "[W]e believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the [magistrate's office] to obtain information regarding the wait times on that specific night, rather than relying on previous experiences."

Other Search and Investigation Issues

Consent of co-occupant to search premises was valid when given after an objecting co-occupant was arrested and removed from premises

Fernandez v. California, 571 U.S. __ (Feb. 25, 2014). Consent to search a home by an abused woman who lived there was valid when the consent was given after her male partner, who objected, was arrested and removed from the premises by the police. Cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph*, 547 U. S. 103 (2006), the Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court held that *Randolph* does not apply when the objecting occupant is absent when another occupant consents. The Court emphasized that *Randolph* applies only when the objecting occupant is physically present. Here, the defendant was not present when the consent was given. The Court rejected the defendant's argument that *Randolph* controls because his absence should not matter since he was absent only because the police had taken him away. It also rejected his argument that it was sufficient that he objected to the search while he was still present. Such an objection, the defendant argued should remain in effect until the objecting party no longer wishes to keep the police out of his home. The Court determined both arguments to be unsound.

Further findings of fact were necessary as to whether officer had lawful right of access to evidence in plain view

State v. Alexander, __ N.C. App. __, 755 S.E.2d 82 (Mar. 18, 2014). The court remanded for findings of fact as to the third element of the plain view analysis. Investigating the defendant's involvement in the theft of copper coils, an officer walked onto the defendant's mobile home porch and knocked on the door. From the porch, the officer saw the coils in an open trailer parked at the home. The officer then seized the coils. The court noted that under the plain view doctrine, a warrantless seizure is lawful if the officer views the evidence from a place where he or she has legal right to be; it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause; and the officer has a lawful right of access to the evidence itself. The court found that the officer viewed the coils from the porch, a location where he had a legal right to be. In the

course of its ruling, the court clarified that inadvertence is not a necessary condition of a lawful search pursuant to the plain view doctrine. Next, noting in part that the coils matched the description of goods the officer knew to be stolen, the court concluded that the trial court's factual findings supported its conclusion that it was immediately apparent to the officer that the coils were evidence of a crime. On the third element of the test however—whether the officer had a lawful right of access to the evidence—the trial court did not make the necessary findings. Specifically, the court noted:

> Here, the trial court failed to make any findings regarding whether the officer[] had legal right of access to the coils in the trailer. The trial court did not address whether the trailer was located on private property leased by defendant, private property owned by the mobile home park, or public property. It also did not make any findings regarding whether, assuming that the trailer was located on private property, the officer[] had legal right of access either by consent or due to exigent circumstances.

Licensed security officer was not state agent

State v. Weaver, __ N.C. App. __, 752 S.E.2d 240 (Dec. 17, 2013). In granting the defendant's motion to suppress in a DWI case, the trial court erred by concluding that a licensed security officer was a state actor when he stopped the defendant's vehicle. Determining whether a private citizen is a state actor requires consideration of the totality of the circumstances, with special consideration of the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, and knowledge about the nature of the citizen's activities; and the legality of the conduct encouraged by the police. Importantly, the court noted, once a private search or seizure has been completed, later involvement of government agents does not transform the original intrusion into a governmental search. In the alternative, the court held that even if the security officer was a state actor, reasonable suspicion existed for the stop. Separately, the court found that a number of the trial court's factual findings were not supported by the record.

Pretrial and Trial Procedure

Right to Counsel

Defendant denied right to counsel at resentencing hearing on pro se MAR

State v. Rouse, __ N.C. App. __, __ S.E.2d __ (May 20, 2014). The defendant was denied his constitutional right to counsel when the trial court held a resentencing hearing on the defendant's pro se MAR while the defendant was unrepresented. The court vacated the judgment and remanded for a new sentencing hearing.

Defendant forfeited right to counsel by waiving appointed counsel, firing private counsel, refusing to state wishes regarding representation, refusing to participate in trial, and absenting himself from courtroom

State v. Mee, __ N.C. App. __, 756 S.E.2d 103 (April 15, 2014). The defendant forfeited his right to counsel where he waived the right to appointed counsel, retained and then fired counsel twice, was

briefly represented by an assistant public defender, repeatedly refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction, would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial. The court rejected the defendant's argument that he should not be held to have forfeited his right to counsel because he did not threaten counsel or court personnel and was not abusive. The court's opinion includes extensive colloquies between the trial court and the defendant.

Counsel was not ineffective; contrary to defendant's assertion, hearsay elicited by counsel did not contradict claim of self-defense; no reasonable possibility that failing to object to evidence that defendant sold drugs on prior occasion affected outcome; failing to move to dismiss charges at close of evidence not ineffective assistance where no likelihood court would have granted motion

State v. Allen, __ N.C. App. __, 756 S.E.2d 852 (April 15, 2014). Considering the defendant's ineffective assistance of counsel claim on appeal the court rejected his contention that counsel was ineffective by eliciting hearsay evidence that conflicted with his claim of self-defense, concluding that the evidence did not contradict this defense. It also rejected his contention that counsel was ineffective by failing to object to evidence that the defendant sold drugs on a prior occasion, concluding that even if this constituted deficient representation, there was no reasonable possibility that the error affected the outcome of the case. Finally, the court rejected the defendant's contention that counsel was ineffective by failing to move to dismiss the charges at the close of the evidence, concluding that given the evidence there was no likelihood that the trial court would have granted the motion.

Counsel was ineffective where he made inexcusable mistake of law in failing to understand resources that state law made available to him for hiring expert witness

Hinton v. Alabama, 571 U.S. __ (Feb. 24, 2014). Defense counsel in a capital case rendered deficient performance when he made an "inexcusable mistake of law" causing him to employ an expert "that he himself deemed inadequate." Counsel believed that he could only obtain $1,000 for expert assistance when in fact he could have sought court approval for "any expenses reasonably incurred." The Court clarified:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

Slip Op. at 12 (citation omitted). The court remanded for a determination of whether counsel's deficient performance was prejudicial.

Trial court did not err by failing to inquire into potential conflict where defendant never asserted conflict but only that he was unhappy with counsel's performance

State v. Holloman, __ N.C. App. __, 751 S.E.2d 638 (Dec. 17, 2013). The trial court did not abuse its discretion by denying an indigent defendant's request for substitute counsel. The court rejected the defendant's argument that the trial court erred by failing to inquire into a potential conflict of interest between the defendant and counsel, noting that the defendant never asserted a conflict, only that he was unhappy with counsel's performance.

Pleadings

(1) Indictment charging obtaining property by false pretenses was defective; (2) Indictment charging trafficking in stolen identities was defective

State v. Jones, __ N.C. __, __ S.E.2d __ (Mar. 7, 2014). (1) Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that an indictment charging obtaining property by false pretenses was defective where it failed to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services. (2) The court also held that an indictment charging trafficking in stolen identities was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

District court improperly allowed charging document to be amended to charge different crime

State v. Carlton, __ N.C. App. __, 753 S.E.2d 203 (Jan. 21, 2014). The superior court lacked jurisdiction to try the defendant for possession of lottery tickets in violation of G.S. 14-290. An officer issued the defendant a citation for violating G.S. 14-291 (acting as an agent for or on behalf of a lottery). The district court allowed the charging document to be amended to charge a violation of G.S. 14-290. The defendant was convicted in district court, appealed, and was again convicted in superior court. The court held that the district court improperly allowed the charging document to be amended to charge a different crime.

G.S. 15A-928 does not apply to offense of felon in possession of firearm

State v. Alston, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). Following *State v. Jeffers*, 48 N.C. App. 663, 665-66 (1980), the court held that G.S. 15A-928 (allegation and proof of previous convictions in superior court) does not apply to the crime of felon in possession of a firearm.

Other Procedural Issues

Double jeopardy barred State's appeal from order dismissing charges for insufficiency of the evidence

Martinez v. Illinois, 572 U.S. __ (May 27, 2014). Double jeopardy barred the State's appeal of a trial court order dismissing charges for insufficiency of the evidence. After numerous continuances granted to the State because of its inability to procure its witnesses for trial, the defendant's case was finally called for

trial. When the trial court expressed its intention to proceed the prosecutor unsuccessfully asked for another continuance and informed the court that without a continuance "the State will not be participating in the trial." The jury was sworn and the State declined to make an opening statement or call any witnesses. The defendant then moved for a directed not-guilty verdict, which the court granted. The State appealed. The Court held that double jeopardy barred the State's attempt to appeal, reasoning that jeopardy attached when the jury was sworn and that the dismissal constituted an acquittal.

Trial court did not err by denying the defendant's *Knoll* motion

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In this DWI case, the trial court did not err by denying the defendant's *Knoll* motion. The defendant argued that the magistrate violated his rights to a timely pretrial release by setting a $500 bond and holding him in jail for approximately three hours and 50 minutes. The court found that evidence supported the conclusion that the magistrate properly informed the defendant of his rights and that the magistrate properly considered all of the evidence when setting the $500 bond.

State had jurisdiction over DWI on Indian land

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In this DWI case in which a State Highway Patrol officer arrested the defendant, a non-Indian, on Indian land, the court rejected the defendant's argument that the State lacked jurisdiction over the crime. The court noted that pursuant to the Tribal Code of the Eastern Band of the Cherokee Indians and mutual compact agreements between the Tribe and other law enforcement agencies, the North Carolina Highway Patrol has authority to patrol and enforce the motor vehicle laws of North Carolina within the Qualla boundary of the Tribe, including authority to arrest non-Indians who commit criminal offenses on the Cherokee reservation. Thus, the court concluded, "Our State courts have jurisdiction over the criminal offense of driving while impaired committed by a non-Indian, even where the offense and subsequent arrest occur within the Qualla boundary of the Cherokee reservation."

Retrial following dismissal due to fatal variance in charging instrument was not double jeopardy violation

State v. Chamberlain, __ N.C. App. __, 753 S.E.2d 725 (Feb. 4, 2014). No double jeopardy violation occurs when the State retries a defendant on a charging instrument alleging the correct offense date after a first charge was dismissed due to a fatal variance.

Not a violation of right to public trial to close courtroom during presentation of sexual images at issue in sexual exploitation of minor case

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not violate the defendant's constitutional right to a public trial by closing the courtroom during the presentation of the sexual images at issue.

(1) Trial court did not err by failing to conduct sua sponte competency hearing where defendant voluntarily ingested intoxicants with apparent intent of affecting his competency; (2) By such conduct, defendant waived right to be present

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). (1) Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during jury deliberations of his non-capital trial, the trial court did not err by failing to conduct a sua sponte competency hearing. The court relied on the fact that the defendant voluntarily ingested the intoxicants in a short period of time apparently with the intent of affecting his competency. (2) Defendant waived constitutional right to be present by engaging in such conduct.

Evidence

Confrontation Clause

Trial court did not violate defendant's confrontation rights by precluding cross-examination of two State's witnesses regarding criminal charges pending against them in different prosecutorial districts

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). The trial court did not violate the defendant's confrontation rights by barring him from cross-examining two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. The court noted that the Sixth Amendment right to confrontation generally protects a defendant's right to cross-examine a State's witness about pending charges in the same prosecutorial district as the trial to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a weapon to control the witness. However, the trial judge has wide latitude to impose reasonable limits on such cross-examination based on, for example, concern that such interrogation is only marginally relevant. Here, the defendant failed to provide any evidence of discussions between the district attorney's office in the trial county and district attorneys' offices in the other counties where the two had pending charges. Additionally, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. On these facts, the court concluded that testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant. Moreover, the court noted, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties.

(1) *Melendez-Diaz* did not impact "continuing vitality" of notice and demand statute; (2) Notice in this case was deficient, but issue was not preserved for appeal

State v. Whittington, __ N.C. __, 753 S.E.2d 320 (Jan. 24, 2014). (1) *Melendez-Diaz* did not impact the "continuing vitality" of the notice and demand statute in G.S. 90-95(g); when the State satisfies the requirements of the statute and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs. (2) The State's notice under the statute in this case was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request." However, the defendant did not preserve this issue for appeal. At trial he asserted only that the statute was unconstitutional under *Melendez-Diaz*; he did not challenge the State's notice under the statute. Justice Hudson dissented,

joined by Justice Beasley, arguing that the majority improperly shifts the burden of proving compliance with the notice and demand statute from the State to defendant.

Expert Opinion Testimony

(1) Trial court did not abuse its discretion by excluding expert testimony after concluding that testimony was not based on sufficient facts or data or the product of reliable principles and methods; (2) Trial court did not err by excluding testimony of different expert regarding victim's proclivity for violence

State v. McGrady, __ N.C. App. __, 753 S.E.2d 361 (Jan. 21, 2014). (1) In murder case involving a claim of self-defense, the court applied amended NC Evidence Rule 702 and held that the trial court did not abuse its discretion by excluding defense expert testimony regarding the doctrine of "use of force." The trial court concluded, among other things, that the expert's testimony was not based on sufficient facts or data or the product of reliable principles and methods. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules. (2) The trial court did not err by excluding defense expert testimony (from a different expert), characterized by the defendant as pertaining to the victim's proclivity toward violence. The court noted that where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when such character was known to the accused or the State's evidence is entirely circumstantial and the nature of the transaction is in doubt. The court concluded that the witness's testimony did not constitute evidence of the victim's character for violence. On voir dire, the witness testified only that that the victim was an angry person who had thoughts of violence; the witness admitted having no information that the victim actually had committed acts of violence. Additionally, the court noted, there was no indication that the defendant knew of the victim's alleged violent nature and the State's case was not entirely circumstantial. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

Other Evidence Issues

(1) Reversible error to allow complaint from wrongful death suit into evidence for purpose of proving fact alleged at criminal trial; (2) For similar reason, reversible error to allow child custody complaint into evidence at criminal trial; (3) Child's statements to daycare workers were relevant to identity of assailant and admissible as excited utterances; (4) Trial court did not err by instructing that Fifth Amendment right to remain silent does not extend to questions asked by civilians

State v. Young, __ N.C. App. __, 756 S.E.2d 768 (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Apr. 16, 2014). In this murder trial where the defendant was charged with killing his wife, various evidentiary issues arose: (1) The trial court committed reversible error by allowing into evidence a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim. Admission of this evidence violated G.S. 1-149 (providing that "[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it"). Although the State offered

several cases where civil pleadings and judgments were admitted in subsequent criminal trials, the court noted that none of them "[i]involve default judgments against a defendant, wrongful death judgments against a defendant, or non-testifying defendants." Slip Op. at 33. Additionally, it noted, "these cases involve admitting pleadings and/or judgments in a civil case at a subsequent criminal trial for a different purpose than as proof of a fact alleged in the criminal trial." *Id.* (2) For the same reason, the trial court committed reversible error by allowing into evidence a child custody complaint that included statements that the defendant had killed his wife. (3) statements by the couple's child to daycare workers were relevant to the identity of the assailant. The child's daycare teacher testified that the child asked her for "the mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over." The statemetns were admissible as excited utterances; (4) The trial court did not err by instructing the jury that "[e]xcept as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case" but that "this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim." The court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could consider his failure to speak with friends and family as substantive evidence of guilt, noting that the Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians.

Defendant's own statement was admissible as a statement of a party opponent

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The defendant's own statements were admissible under the hearsay rule. The statements were recorded by a police officer while transporting the defendant from Georgia to North Carolina. The court noted that "[a] defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption." Slip Op. at 8.

(1) Trial court did not abuse discretion by allowing State to impeach its own witness; (2) Evidence elicited by State of defendant's recent incarceration was not improper under Rule 404(b)

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). (1) The trial court did not abuse its discretion by allowing the State to impeach its own witness where the impeachment was not mere subterfuge to introduce otherwise inadmissible evidence. The court held that it need not decide whether the record showed that the State was genuinely surprised by the witness's reversal because the witness's testimony was "vital" to the State's case and the trial court gave a proper limiting instruction. (2) The court rejected the defendant's 404(b) challenge to evidence elicited by the State that a witness corresponded by mail with the defendant when he was in prison. The fact of "recent incarceration, in and of itself" does not constitute evidence of other crimes, wrongs, or acts within the meaning of the rule.

Not plain error to preclude defendant from questioning victim about unrelated first-degree murder charge pending against victim in another county because victim's credibility was otherwise impeached and victim's identification of defendant occurred before murder allegedly committed by victim

State v. Council, __ N.C. App. __, 753 S.E.2d 223 (Jan. 21, 2014). In a felony assault and robbery case, no plain error occurred when the trial court ruled that the defendant could not question the victim about an unrelated first-degree murder charge pending against him in another county at the time of trial. Normally it is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those at issue. In such a situation, cross-examination can impeach the witness by showing a possible source of bias in his or her testimony, to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. However, in this case the plain error standard applied. Given that the victim's "credibility was impeached on several fronts at trial" the court found that no plain error occurred. Moreover the court noted, the victim's most important evidence—his identification of the defendant as the perpetrator—occurred before the murder allegedly committed by the victim took place. As such, the court reasoned, his identification could not have been influenced by the pending charge. For similar reasons the court rejected the defendant's claim that counsel rendered ineffective assistance by failing to object to the State's motion in limine to bar cross-examination of the victim about the charge.

(1) Adult pornography found in defendant's home was admissible to establish motive or intent in child sex case; (2) Trial court did not err by allowing child witness to testify to sexual intercourse with defendant despite seven-year gap between incident with witness and incident with victim

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). (1) In a child sex case, the trial court did not err by admitting adult pornography found in the defendant's home to establish motive or intent where the defendant showed the victim both child and adult pornography. Furthermore the trial court did not abuse its discretion by admitting this evidence under Rule 403. The trial court limited the number of magazines that were admitted and gave an appropriate limiting instruction. (2) The trial court did not err by allowing a child witness, A.L., to testify to sexual intercourse with the defendant. The court found the incidents sufficiently similar, noting among other things, that A.L. was assaulted in the same car as K.C. Although A.L. testified that the sex was consensual, she was fourteen years old at the time and thus could not legally consent to the sexual intercourse. The court found the seven-year gap between the incidents did not make the incident with A.L. too remote.

(1) A party is not required to establish a prior conviction before cross-examining a witness about the offense; (2) While generally limited in scope, broader cross-examination under Rule 609 may be permissible when defendant opens the door; (3) No error to allow State to impeach defendant with prior convictions despite fact that defendant stipulated he was convicted felon for felon in possession charge

State v. Gayles, __ N.C. App. __, __ S.E.2d __ (April 1, 2014). (1) Under Rule 609, a party is not required to establish a prior conviction before cross-examining a witness about the offense. (2) Although cross-examination under Rule 609 is generally limited to the name of the crime, the time and place of the conviction, and the punishment imposed, broader cross-examination may be allowed when the defendant opens the door. Here that occurred when the defendant tried to minimize his criminal record. (3) The trial court did not err by allowing the State to impeach the defendant with prior convictions when the defendant had stipulated that he was a convicted felon for purposes of a felon in possession

of a firearm charge. The court declined to apply *Old Chief v. United States,* 519 U.S. 172 (1997), to this case where the defendant testified at trial and was subject to impeachment under Rule 609.

Fifth Amendment does not prohibit government from introducing evidence from court-ordered mental evaluation of defendant to rebut defendant's presentation of expert testimony in support of defense of voluntary intoxication

Kansas v. Cheever, 571 U.S. __ (Dec. 11, 2013). The Fifth Amendment does not prohibit the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of voluntary intoxication. It explained:

> [We hold] that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.

Slip Op. at 5-6 (citation omitted). The Court went on to note that "admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." *Id.* at

Crimes

Generally

Intimidating witnesses statute G.S. 14-226(a) applied to prospective witness

State v. Shannon, __ N.C. App. __, 750 S.E.2d 571 (Nov. 19, 2013). Over a dissent, the court extended G.S. 14-226(a) (intimidating witnesses) to apply to a person who was merely a prospective witness. The local DSS filed a juvenile petition against the defendant and obtained custody of his daughter. As part of that case, the defendant was referred to the victim for counseling. The defendant appeared at the victim's office, upset about a letter she had written to DSS about his treatment. The defendant grabbed the victim's forearm to stop her and stated, in a loud and aggravated tone, that he needed to speak with her. The defendant asked the victim to write a new letter stating that he did not require the recommended treatment; when the victim declined to do so, the defendant "became very loud." The victim testified, among other things, that every time she wrote a letter to DSS, she was "opening [her]self up to have to testify" in court. The court found the evidence sufficient to establish that the victim was a prospective witness and thus covered by the statute.

(1) In trafficking and possession with intent drug case, evidence was insufficient to establish that defendant knowingly possessed controlled substance found in secret compartment of truck driven by defendant but owned by passenger; (2) Evidence was insufficient to support trafficking by conspiracy conviction

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (May 5, 2014). (1) In a case involving trafficking and possession with intent charges, the evidence was insufficient to establish that the defendant Villalvavo knowingly possessed the controlled substance. The drugs were found in secret compartments of a truck. The defendant was driving the vehicle, which was owned by a passenger, Velazquez-Perez, who hired Villalvavo to drive the truck. The court found insufficient incriminating circumstances to support a conclusion that Villalvavo acted knowingly with respect to the drugs; while evidence regarding the truck's log books may have been incriminating as to Velazquez-Perez, it did not apply to Villalvavo, who had not been working for Velazquez-Perez long and had no stake in the company or control over Velazquez-Perez. The court was unconvinced that Villalvavo's nervousness during the stop constituted adequate incriminating circumstances. (2) For similar reasons, the court held that the evidence was insufficient to support trafficking by conspiracy convictions against both defendants.

Neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The evidence was sufficient to support convictions for murder, burglary, and armed robbery on theories of acting in concert and aiding and abetting. The court noted that neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement. The State's evidence showed that the defendant was present for the discussions and aware of the group's plan to rob the victim Wiggins; she noticed an accomplice's gun; she was sitting next to another accomplice in a van when he loaded his shotgun; she told the group that she did not want to go up to the house but remained outside the van; she walked toward the house to inform the others that two victims had fled; she told two accomplices "y'all need to come on;" she attempted to start the van when an accomplice returned but could not release the parking brake; and she assisted in unloading the goods stolen from Wiggins' house into an accomplice's apartment after the incident.

Trial court erred by dismissing charge of felon in possession as unconstitutional pursuant to *Britt* analysis

State v. Price, __ N.C. App. __, 757 S.E.2d 309 (April 1, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (April 21, 2014). The trial court erred by dismissing a charge of felon in possession of a firearm on the basis that the statute was unconstitutional as applied to the defendant under a *Britt* analysis. Here, the defendant had two felony convictions for selling a controlled substance and one for felony attempted assault with a deadly weapon. While the defendant was convicted of the drug offenses in 1989, he was more recently convicted of the attempted assault with a deadly weapon in 2003. Although there was no evidence to suggest that the defendant misused firearms, there also was no evidence that the defendant attempted to comply with the 2004 amendment to the felon in possession statute. The court noted that the defendant completed his sentence for the assault in 2005, after the 2004 amendment to the statute was enacted. Thus, he was on notice of the changes in the legislation, yet took no action to relinquish his hunting rifle on his own accord.

Evidence of defendant's intent to fraudulently use credit card numbers was sufficient to establish identity theft

State v. Jones, __ N.C. __, __ S.E.2d __ (Mar. 7, 2014). Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that the evidence was sufficient to establish identity theft. The case arose out of a scheme whereby one of the defendants, who worked at a hotel, obtained the four victim's credit card information when they checked into the premises. The defendant argued the evidence was insufficient on his intent to fraudulently use the victim's cards. However, the court found that based on evidence that the defendant had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed the four victim's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. The defendant argued further that the transactions involving other individuals' credit cards actually negated the required intent because when he made them, he used false names that did not match the credit cards used. He continued, asserting that this negates the suggestion that he intended to represent himself as the person named on the cards. The court rejected that argument, stating: "We cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information."

Defendant guilty of assault inflicting serious injury even if injuries he inflicted did not constitute "serious injury" where he acted in concert with others

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). In an assault inflicting serious injury case, the evidence was sufficient to show that the defendant acted in concert with other assailants and thus that he was guilty of the offense even if the injuries he personally inflicted did not constitute "serious injury."

Sufficient evidence of AWIK where defendant ignored instructions to drop gun, continued reloading it, and shot at officer

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). The evidence was sufficient to show an assault with intent to kill an officer when, after having fatally shot eight people, the defendant ignored the officer's instructions to drop his shotgun and continued to reload it. The defendant then turned toward the officer, lowered the shotgun, and fired one shot at the officer at the same time that the officer fired at the defendant.

Impaired Driving

Sufficient evidence of reckless driving where intoxicated defendant flipped vehicle off road

State v. Geisslercrain, __ N.C. App. __, 756 S.E.2d 92 (April 1, 2014). There was sufficient evidence of reckless driving where the defendant was intoxicated; all four tires of her vehicle went off the road; distinctive "yaw" marks on the road indicated that she lost control of the vehicle; the defendant's

vehicle overturned twice; and the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped.

Prosecution for DWI does not violate double jeopardy where defendant was previously subject to one-year disqualification of commercial driver's license

State v. McKenzie, __ N.C. __, 750 S.E.2d 521 (Oct. 4, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. McKenzie*, __ N.C. App. __, 736 S.E.2d 591 (Jan. 15, 2013), which had held, over a dissent, 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.

Weapons Offenses

State failed to produce sufficient evidence that defendant had constructive possession of rifle found in car registered to defendant but driven by his girlfriend

State v. Bailey, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In a possession of a firearm by a felon case, the State failed to produce sufficient evidence that the defendant had constructive possession of the rifle. The rifle, which was registered to the defendant's girlfriend was found in a car registered to the defendant but driven by the girlfriend. The defendant was a passenger in the car at the time. The rifle was found in a place where both the girlfriend and the defendant had equal access. There was no physical evidence tying the defendant to the rifle; his fingerprints were not found on the rifle, the magazine, or the spent casing. Although the gun was warm and appeared to have been recently fired, there was no evidence that the defendant had discharged the rifle because the gunshot residue test was inconclusive. Although the defendant admitted to an officer that he knew that the rifle was in the car, awareness of the weapon is not enough to establish constructive possession. In sum, the court concluded, the only evidence linking the defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat.

Sexual Offenses

Fact that victim was surprised by defendant's action of putting his hand up her skirt and penetrating her vagina did not preclude finding that act was by force and against victim's will

State v. Henderson, __ N.C. App. __, 756 S.E.2d 860 (April 15, 2014). The court affirmed a conviction for second-degree sexual offense in a case where the defendant surprised a Target shopper by putting his hand up her skirt and penetrating her vagina. The court rejected the defendant's argument that because his action surprised the victim, he did not act by force and against her will.

Act of downloading image from internet constitutes duplication for purposes of second-degree sexual exploitation of a minor; (2) court rejected argument that it was not legislature's intent to punish both receiving and possessing the same image in third-degree sexual exploitation cases

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). (1) Deciding an issue of first impression the court held that the act of downloading an image from the Internet constitutes a duplication for purposes of second-degree sexual exploitation of a minor under G.S. 14-190.17. (2) The court rejected the defendant's argument that in third-degree sexual exploitation of a minor cases, the General Assembly did not intend to punish criminal defendants for both receiving and possessing the same images.

(1) Evidence of intent in attempted first-degree statutory sex offense was sufficient where defendant placed penis on child's buttocks; (2) Multiple sex acts even in a single incident can support multiple indictments for indecent liberties

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014) (1) In a child sex case, the court held that the evidence was sufficient to support a charge of attempted first-degree statutory sexual offense. On the issue of intent to commit the crime, the court stated: "The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse." (2) The evidence was sufficient to support five counts of indecent liberties with a minor where the child testified that the defendant touched the child's buttocks with his penis "four or five times." The court rejected the defendant's argument that this testimony did not support convictions on five counts or that the contact occurred during separate incidents. Acknowledging that the child's testimony showed neither that the alleged acts occurred either on the same evening or on separate occasions, the court noted that "no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings." The court cited *State v. Williams*, 201 N.C. App. 161 (2009), for the proposition that unlike "mere touching" "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties."

Sex Offender Registration and Satellite-Based Monitoring

Social Networking Prohibition for Sex Offenders Unconstitutional

State v. Packingham, __ N.C. App. __, 748 S.E.2d 146 (Aug. 20, 2013), *review allowed*, __ N.C. __, 749 S.E.2d 842 (Nov. 7, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied.

See Jamie Markham, Social Networking Prohibition for Sex Offenders Facially Unconstitutional, North Carolina Criminal Law (August 20, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4424.

Adam Walsh Act defines offender status by the offense charged rather than by facts underlying case

State v. Moir, __ N.C. App. __, 753 S.E.2d 195 (Jan. 7, 2014). In considering a petition to terminate registration, the trial court erred by concluding that the defendant was not a Tier 1 offender under the Adam Walsh Act. The Act, the court explained, defines offender status by the offense charged, not by the facts underlying the case. Here, the trial court based its ruling on the facts underlying the plea, not on the pled-to offense of indecent liberties.

Enrollment in lifetime SBM was not an unreasonable search and seizure

State v. Jones, __ N.C. App. __, 750 S.E.2d 883 (Dec. 3, 2013). The trial court did not err by requiring the defendant to enroll in lifetime SBM. The court rejected the defendant's argument that under *United States v. Jones* (U.S. 2012) (government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search"), SBM was an unreasonable search and seizure. The court found *Jones* irrelevant to a civil SBM proceeding.

A PJC entered upon a conviction for a reportable offense does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the registration statute

Walters v. Cooper, __ N.C. __, 748 S.E.2d 144 (Oct. 4, 2013). The court per curiam affirmed the decision below, *Walters v. Cooper,* __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), in which the court of appeals had held, over a dissent, that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

Sentencing and Probation

(1) Sentencing statute enacted in response to *Miller v. Alabama* upheld as constitutional; (2) trial court's findings supported a sentence to life in prison without the possibility of parole

State v. Lovette, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this case, arising from the defendant's conviction for first-degree murder of UNC student Eve Carson, the court upheld the constitutionality of the State's "*Miller* fix" statute and determined that the trial court's findings supported a sentence to life in prison without the possibility of parole. The defendant—who was 17 years old at the time of the murder—was originally sentenced to life in prison without parole. In his first appeal the court vacated the sentence and remanded for resentencing under G.S. 15A-1340.19A et. seq., the new sentencing statute enacted by the N.C. General Assembly in response to the U.S. Supreme Court's ruling in *Miller v. Alaba*ma, 567 U.S. ___, ___, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing and resentenced the defendant under the new sentencing statute to life imprisonment without parole after making extensive findings of fact as to any potential mitigating factors revealed by the evidence. Among other things, the court rejected the defendant's argument that the *Miller* fix statute was constitutionally infirm because it "vests the sentencing judge with unbridled discretion providing no standards." It also rejected the defendant's arguments that the evidence was insufficient to support the trial court's findings of fact in connection with the resentencing and that without findings of irretrievable corruption and no possibility of rehabilitation the trial court should not have imposed a sentence of life imprisonment without parole. It concluded:

> As noted by *Miller*, the "harshest penalty will be uncommon[,]" but this case is uncommon. *Miller*, 567 U.S. at ___, 183 L.E. 2d at 424. The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middleclass home, defendant chose to take the life of another for a small amount of money. Defendant was 17 years old, of a typical maturity level for his age, and had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record, and thus had already had the advantage of any rehabilitative programs offered by the juvenile court, to no avail, as his criminal activity had continued to escalate. Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards.

Trial court erred by allowing the defendant to proceed pro se at a probation revocation hearing without waiver of counsel

State v. Jacobs, __ N.C. App. __, __ S.E.2d __ (May 6, 2014). The trial court erred by allowing the defendant to proceed pro se at a probation revocation hearing without taking a waiver of counsel as required by G.S. 15A-1242. The defendant's appointed counsel withdrew at the beginning of the revocation hearing due to a conflict of interest and the trial judge allowed the defendant to proceed pro se. However, the trial court failed to inquire as to whether the defendant understood the range of permissible punishments. The court rejected the State's argument that the defendant understood the range of punishments because "the probation officer told the court that the State was seeking probation revocation." The court noted that as to the underlying sentence, the defendant was told only that, "[t]here's four, boxcar(ed), eight to ten." The court found this insufficient, noting that it could not assume that the defendant understood this legal jargon as it related to his sentence. Finally, the court held that although the defendant signed the written waiver form, "the trial court was not abrogated of its responsibility to ensure the requirements of [G.S.] 15A-1242 were fulfilled."

(1) Trial court lacked jurisdiction to revoke defendant's probation where there was no evidence that violation report was filed before termination of defendant's probation; (2) legality of a condition of probation can only be re-litigated if the issue is raised no later than the hearing at which probation is revoked

State v. Williams, __ N.C. App. __, 754 S.E.2d 826 (Nov. 19, 2013). (1) The trial court erred by revoking the defendant's probation where the State failed to present evidence that the violation report was filed before the termination of the defendant's probation. As a result, the trial court lacked jurisdiction to revoke. (2) The court declined to consider the defendant's argument that the trial court had no jurisdiction to revoke his probation in another case because the sentencing court failed to make findings supporting a probation term of more than 30 months. It reasoned that a defendant cannot re-litigate the legality of a condition of probation unless he or she raises the issue no later than the hearing at which his probation is revoked.

Trial court lacked jurisdiction to extend the defendant's probation after his original probation period expired

State v. High, __ N.C. App. __, 750 S.E.2d 9 (Nov. 5, 2013). The trial court lacked jurisdiction to extend the defendant's probation after his original probation period expired. Although the probation officer prepared violation reports before the period ended, they were not filed with the clerk before the probation period ended as required by G.S. 15A-1344(f). The court rejected the State's argument that a file stamp is not required and that other evidence established that the reports were timely filed.

G.S. 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (May 5, 2014). The trial court erred by ordering costs for fingerprint examination as lab fees. G.S. 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis.

(1) Trial court committed Blakely error by finding aggravating factor in DWI case; (2) State failed to provide notice of intent to seek aggravating factors as required by G.S. 20-179(a1)(1)

State v. Geisslercrain, __ N.C. App. __, 756 S.E.2d 92 (April 1, 2014). (1) In this DWI case the trial court committed a *Blakely* error by finding an aggravating factor. The trial court found the aggravating factor, determined that it was counterbalanced by a mitigating factor and sentenced the defendant at Level Four. If the aggravating factor had not been considered the trial court would have been required to sentence the defendant to a Level Five punishment. Thus, the aggravating factor, which was improperly found by the judge, increased the penalty for the crime beyond the prescribed maximum. (2) The State failed to provide notice that it intended to seek aggravating factors as required by G.S. 20-179(a1)(1).

Double jeopardy precluded convicting defendant of speeding and reckless driving offenses that served as aggravating factors raising a speeding to elude charge from a misdemeanor to a felony

State v. Mulder, __ N.C. App. __, 755 S.E.2d 98 (Mar. 18, 2014). Double jeopardy barred convicting the defendant of speeding and reckless driving when he also was convicted of felony speeding to elude arrest, which was raised from a misdemeanor to a felony based on the aggravating factors of speeding and driving recklessly. The court determined that the aggravating factors used in the felony speeding to elude conviction were essential elements of the offense for purposes of double jeopardy. Considering the issue of whether legislative intent compelled a different result, the court determined that the General Assembly did not intend punishment for speeding and reckless driving when a defendant is convicted of felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving. Thus, the court arrested judgment on the speeding and reckless driving convictions.

(1) Appellate court would examine merits of whether trial court lacked authority to revoke probation based on jurisdictional defects in underlying convictions; (2) District court lacked jurisdiction to accept felony pleas where no information was filed and no indictment was returned

State v. McColloch, __ N.C. App. __, 756 S.E.2d 361 (Mar. 18, 2014). (1) The court held that because it had authority to consider the validity of a jurisdictional challenge to the underlying conviction when reviewing a judgment revoking probation, it would examine on the merits whether the trial court lacked the authority to revoke probation based on jurisdictional defects in the underlying felony convictions.

(2) The district court lacked jurisdiction to accept the defendant's no contest pleas and enter the underlying probationary judgments where the relevant felonies were charged by way of arrest warrants. When a guilty or no contest plea to a Class H or I felony is entered in district court, the plea must be taken pursuant to either G.S. 7A-272(c)(1), which requires the filing of an information, or G.S. 7A-272(c)(2), which requires a transfer order entered pursuant to G.S. 15A-1029.1 and assumes that a bill of indictment has been returned. In this case, neither of the required charging instruments were ever returned or filed.

(1) Error to enter period of probation longer than 18 months without appropriate findings; (2) Appellate court lack authority to consider challenge to imposition of special condition of probation

State v. Sale, __ N.C. App. __, 754 S.E.2d 474 (Mar. 4, 2014). (1) The trial court erred by entering a period of probation longer than 18 months without making the findings that the extension was necessary. (2) The court held that it had no authority to consider the defendant's challenge to the trial court's imposition of a special condition of probation.

(1) Sampson County superior court judge had jurisdiction to revoke probation where defendant resided in that county; (2) probation violation report provided sufficient notice of State's intent to revoke probation; (3) trial court's failure to check box on AOC form was clerical error

State v. Lee, __ N.C. App. __, 753 S.E.2d 721 (Feb. 4, 2014). (1) A Sampson County superior court judge had jurisdiction to revoke the defendant's probation where the evidence showed that the defendant resided in that county. (2) A probation violation report provided the defendant with adequate notice that the State intended to revoke his probation on the basis of a new criminal offense. The report alleged that the defendant violated the condition that he commit no criminal offense in that he had several new pending charges which were specifically identified. The report further stated that "If the defendant is convicted of any of the charges it will be a violation of his current probation." (3) The trial court's failure to check a box on the "Judgment and Commitment Upon Revocation of Probation—Felony," AOC Form CR-607, was clerical and the court remanded for correction of the judgment.

(1) Appellate court assumed State presented correct version of Tennessee statutes to trial court for purposes of prior record level where defendant offered no relevant authority on point; (2) No error to conclude Tennessee offense of theft substantially similar to misdemeanor larceny; (3) Error to conclude Tennessee offense of domestic assault substantially similar to assault on female

State v. Sanders, __ N.C. App. __, 753 S.E.2d 713 (Feb. 4, 2014), *temporary stay allowed, writ allowed,* __ N.C. __, 755 S.E.2d 48 (Feb. 26, 2014). (1) Because the defendant presented no relevant Tennessee authority on point, the court concluded that it must assume that the State presented the correct versions of Tennessee statutes to the trial court when offering Tennessee convictions for purposes of prior record level. (2) The trial court did not err by finding the Tennessee offense of theft substantially similar to the North Carolina offense of misdemeanor larceny for purposes of prior record level points. The court rejected the defendant's argument that the out-of-state crime did not require an intent to permanently deprive. (3) Over a dissent, the court held that the trial court erred by finding the Tennessee offense of domestic assault substantially similar to the North Carolina offense of assault on a female. Among other things, the out-of-state crime is gender-neutral and applies to several categories of victims with special relationships with the defendant, whereas the in-state offense only applies to assaults on female victims.

(1) Trial court did not abuse discretion by failing to find two statutory mitigating factors; (2) Rejecting defendant's argument that trial court erred in defendant's sentencing by relying on evidence obtained during proceedings related to co-defendants where defense counsel relied on same evidence

State v. Dahlquist, __ N.C. App. __, 753 S.E.2d 355 (Jan. 7, 2014). (1) The trial court did not abuse its discretion by failing to find two statutory mitigating factors with respect to a 17-year-old defendant: G.S. 15A-1340.16(e)(4) (defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense") and G.S. 15A-1340.16(e)(18) ("defendant has a support system in the community"). (2) The court rejected the defendant's argument that the trial court erred in connection with her sentencing hearing by relying on evidence obtained during the trial of one of her co-defendants and during the sentencing hearing of another co-defendant. Citing G.S. 15A-1443 (a defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct), the court rejected the defendant's argument, noting that defense counsel repeatedly relied on this same evidence at the sentencing hearing.

(1) Trial court did not err by assigning PRL point for offense committed while on probation in absence of jury finding to that effect where context clearly indicated that such procedural requirement was inappropriate; (2) Trial court erred by sentencing defendant using probation PRL point where State failed to provide notice of intent to prove PRL point as required by G.S. 15A-1340.16(a6)

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). (1) The court rejected the defendant's argument that the trial court erred by sentencing the defendant as a PRL III offender without complying with G.S. 15A-1022.1 (procedure for admissions in connection with sentencing). At issue was a point assigned under G.S. 15A-1340.14 (b)(7) (offense committed while on probation). As a general rule, this point must be determined by a jury unless admitted to by the defendant pursuant to G.S. 15A-1022.1. However, the court noted, "these procedural requirements are not mandatory when the context clearly indicates that they are inappropriate" (quotation omitted). Relying on *State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 748 (2013), the court noted that the defendant stipulated to being on probation when he committed the crimes, defense counsel signed the PRL worksheet agreeing to the PRL, and at sentencing, the defendant stipulated that he was a PRL III. (2) The trial court erred by sentencing the defendant as a PRL III offender when State failed to provide the notice required by G.S. 15A-1340.16(a6) and the defendant did not waive the required notice.

Statute did not authorize certain jail fees where defendant received active sentence

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). The trial court erred by imposing jail fees of $2,370 pursuant to G.S. 7A-313. The trial court orally imposed an active sentence of 60 days, with credit for 1 day spent in pre-judgment custody. The written judgment included a $2,370.00 jail fee. Although the trial court had authority under G.S. 7A-313 to order the defendant to pay $10 in jail fees the statute did not authorize an additional $2,360 in fees where the defendant received an active sentence, not a probationary one.

Trial court did not violate law of the case doctrine at de novo resentencing

State v. Paul, __ N.C. App. __, 752 S.E.2d 252 (Dec. 17, 2013). On remand for resentencing, the trial court did not violate the law of the case doctrine. The resentencing was de novo and the trial court properly considered the State's evidence of an additional prior felony conviction when calculating prior record level.

Defendant not entitled to credit for time served pre-trial in federal custody

State v. Lewis, __ N.C. App. __, 752 S.E.2d 216 (Dec. 17, 2013). The trial court did not err by failing to grant the defendant credit for 18 months spent in federal custody prior to trial. After the defendant was charged in state court, the State dismissed the charges to allow for a federal prosecution based on the same conduct. After the defendant's federal conviction was vacated, the State reinstated the state charges. The defendant was not entitled to credit for time served in federal custody under G.S. 15-196.1 because his confinement was in a federal institution and was a result of the federal charge.

Prohibition on imposing more severe sentence after appellate review (G.S. 15A-1335) did not apply where higher initial sentence was statutorily mandated

State v. Powell, __ N.C. App. __, 750 S.E.2d 899 (Dec. 3, 2013). In a case where the trial court initially sentenced the defendant correctly but then erroneously thought it had used the wrong sentencing grid and re-sentenced the defendant to a lighter sentence using the wrong grid, the court remanded for imposition of the initial correct but more severe sentence. The court noted that G.S. 15A-1335 did not apply because the higher initial sentence was statutorily mandated.

Not abuse of discretion to order defendant's visits with daughter be supervised

State v. Allah, __ N.C. App. __, 750 S.E.2d 903 (Dec. 3, 2013), *temporary stay allowed*, __ N.C. __, 752 S.E.2d 145 (Dec. 18, 2013). The trial court did not abuse its discretion by ordering, as a condition of probation, that the defendant's visits with his daughter be supervised, where the offense of conviction involved an attack on the mother of his child.

Post Conviction

Trial court erred by concluding that sentence of life in prison with possibility of parole for non-homicide crimes by juvenile defendant violated Eighth Amendment; Defendant's Eighth Amendment claim was properly asserted under G.S. 15A-1415(b)(4) & (b)(8)

State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (Feb. 4, 2014). Over a dissent, the court held that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated the Eighth Amendment. In 1973, the 17-year-old defendant was charged with first-degree burglary and other offenses. After he turned 18, the defendant pleaded guilty to second-degree burglary and another charge. On the second-degree burglary conviction, he was sentenced to an active term for "his natural life." In 2011 the defendant filed a MAR challenging his life sentence, asserting, among other things, a violation of the Eighth Amendment. The trial court granted relief and the State appealed. The court began by noting that the defendant had properly asserted a claim in his MAR under G.S. 15A-1415(b)(8) (sentence invalid as a matter of law) and (b)(4) (unconstitutional sentence). On the substance of the Eighth Amendment claim, the court noted that under the statutes in effect at that time, prisoners with life sentences were eligible to have their cases considered for parole after serving 10 years. Although the record was not clear how often the defendant was considered for parole, it was clear that in 2008, after serving over 35 years, he was paroled. After he was convicted in 2010 of driving while impaired, his parole was revoked and his life sentence reinstated. Against this background, the

court concluded that the "defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense." The dissenting judge believed that the court lacked jurisdiction to consider the State's appeal.