

Criminal Procedure

Restraining the Defendant during Trial

[State v. Posey](#), __ N.C. App. __, __ S.E.2d __ (May 6, 2014). The trial court did not abuse its discretion by requiring the defendant to wear restraints at trial. The defendant, who was charged with murder and other crimes, objected to having to wear a knee brace at trial. The brace was not visible to the jury and made no noise. At a hearing on the issue, a deputy testified that it was “standard operating procedure” to put a murder defendant “in some sort of restraint” whenever he or she was out of the sheriff’s custody. Additionally, the trial court considered the defendant’s past convictions and his five failures to appear, which it found showed “some failure to comply with the [c]ourt orders[.]” The trial court also considered a pending assault charge that arose while the defendant was in custody. [Author’s note: My NC judges’ bench book chapter on Restraining the Defendant during Trial is available [here](#)]

Sentencing

[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. Alabama*, 567 U.S. __, __, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing and resentedenced 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.

[State v. Sterling](#), __ N.C. App. __, __ S.E.2d __ (May 6, 2014). The court declined to extend *Miller* to this felony-murder case, where the defendant turned 18 one month before the crime in question.

Probation Revocation

[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."

Evidence

Relevancy

[State v. Sterling](#), __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this felony-murder case, although the court was "uncertain of the relevance" of certain photos that the State introduced and questioned the defendant about regarding gang activity, the court found no plain error with respect to their introduction.

Arrest, Search & Investigation

[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

searched 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.”

Criminal Offenses

Homicide

[State v. Posey](#), __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this murder case where the trial court submitted jury instructions on both second-degree murder and voluntary manslaughter, the court rejected the defendant’s argument that the trial court erred by denying his motion to dismiss the second-degree murder charge. The defendant argued that there was insufficient evidence that he acted with malice and not in self-defense. The court noted that any discrepancy between the State’s evidence and the defendant’s testimony was for the jury to resolve.

[State v. Sterling](#), __ N.C. App. __, __ S.E.2d __ (May 6, 2014). In this felony-murder case the trial court did not err by denying the defendant’s request to instruct on second-degree murder. The underlying felony was armed robbery and the defendant’s own testimony established all the elements of that offense.

Weapons Offenses

[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.