

Criminal Procedure

Pre-Indictment Delay

[State v. Floyd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). The trial court did not err by denying the defendant's motion to dismiss on grounds of excessive pre-indictment delay. A challenge to a pre-indictment delay is predicated on an alleged violation of the due process clause. To prevail, a defendant must show both actual and substantial prejudice from the delay and that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage. Here, the defendant failed to show that he sustained actual and substantial prejudice as a result of the delay.

Indictment Issues

[State v. Pierce](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). (1) In a failing to register case the indictment was not defective. The indictment alleged that the defendant failed to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office." The defendant allegedly moved from Burke to Wilkes County. The court rejected the defendant's argument that the indictment was fatally defective for not alleging that he failed to provide "in-person" notice. It reasoned that the defendant was not prosecuted for failing to make an "in person" notification, but rather for failing to give 10 days of written notice, which by itself is a violation of the statute. The court also rejected the defendant's argument that an error in the indictment indicating that the Wilkes County Sheriff's Office was the "the last registering sheriff" (in fact the last registering sheriff was the Burke County sheriff), invalidated the indictment. (2) The trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

Pleas

[State v. Myers](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). Because there was an insufficient factual basis to support an *Alford* plea that included an admission to aggravating factors, the court vacated the plea and remanded for proceedings on the original charge. The defendant was charged with the first-degree murder of his wife. He entered an *Alford* plea to second-degree murder, pursuant to a plea agreement that required him to concede the existence of two aggravating factors. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced the defendant for second-degree murder in the aggravated range. The court found that there was not a sufficient factual basis to support the aggravating factor that the offense was especially heinous, cruel, and atrocious. The record did not show excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects. The court rejected the State's argument that the aggravating factor was supported by the fact that the victim was killed within the "sanctuary" of her home. On this issue, the court distinguished prior case law on grounds that in those cases the defendant was not lawfully in the

victim's home; here the crime occurred in a home that the defendant lawfully shared with the victim. The court also rejected the State's argument that the mere fact that the victim did not die instantaneously supported the aggravating factor. The court also found an insufficient factual basis to support the aggravating factor that the defendant took advantage of a position of trust or confidence, reasoning that "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where [t]here was no evidence showing that defendant exploited his wife's trust in order to kill her." (quotation omitted). Here, there was no evidence that the defendant so exploited his wife's trust.

Absolute Impasse

[State v. Floyd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). The trial court erred by failing to adequately address an impasse between the defendant and defense counsel regarding the questioning of a prosecution witness. The record "clearly reveals" that the defendant and counsel "reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination." In the face of the defendant's repeated statements that his trial counsel refused to ask questions that the defendant wanted posed, the trial court instructed the defendant, "that's between you and [counsel]" and stated that it was not the trial court's place "to interject" in the matter. As such, the trial court failed to inquire into the nature of the impasse and order defense counsel to comply with the defendant's lawful instructions. [Author's note: For a discussion of absolute impasse and the required procedure for the trial court, see my judges' benchbook chapter [here](#)]

Verdict Issues

[State v. Crockett](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). In a failure to register (change of address) case, the court rejected the defendant's argument that the trial court violated his right to a unanimous verdict because it was not possible to determine the theory upon which the jury convicted. The trial court instructed the jury, in part, that the State must prove "that the defendant willfully changed his address and failed to provide written notice of his new address in person at the sheriff's office not later than three days after the change of address to the sheriff's office in the county with which he had last registered." The defendant argued that, based on this instruction, it was impossible to determine whether the jury based his conviction on his failure to register upon leaving the county jail, failure to register upon changing his address, registering at an invalid address, or not actually living at the address he had registered. The court concluded: "because any of these alternative acts satisfies the . . . jury instruction — that Defendant changed his address and failed to notify the sheriff within the requisite time period — the requirement of jury unanimity was satisfied."

Sentencing

[State v. Jarman](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). (1) The trial court did not err by ordering the defendant to serve a habitual felon sentence consecutive to sentences already being

served. The defendant argued that the trial court “misapprehend[ed]” the law “when it determined that it did not have the discretion to decide” to run the defendant’s sentence concurrently with his earlier convictions. The court noted that G.S. 14-7.6 “has long provided” that habitual felon sentences “shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.” (2) The court rejected the defendant’s argument that the trial court did not appreciate that a resentencing hearing must be de novo.

Evidence

[State v. Taylor](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). Over a dissent, the court held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, “seemed to be telling me the truth.” The challenged testimony constituted an impermissible vouching for Ms. Medina’s credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant.

Arrest, Search and Investigation

Vehicle Stops

[State v. Shaw](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). When determining whether an officer had reasonable suspicion to stop the defendant’s vehicle, the trial court properly considered statements made by other officers to the stopping officer that the defendant’s vehicle had weaved out of its lane of travel several times. Reasonable suspicion may properly be based on the collective knowledge of law enforcement officers. [Author’s note: For more information about warrantless stops, including the “collective knowledge” doctrine, see my judges’ benchbook chapter [here](#)]

Criminal Offenses

Assaults

[State v. Floyd](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant’s motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the State’s argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: “The fact that Defendant’s attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis.” The court also rejected the State’s argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons

noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

Sex Offenders

[State v. Crockett](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). There was sufficient evidence that the defendant violated the sex offender registration statutes by failing to notify authorities of a change of address. The defendant listed his address as 945 North College Street, the address of the Urban Ministry Center, a non-profit organization that provides services to the homeless community. The court found that “Urban Ministry is not a valid address at which Defendant could register . . . because Defendant could not live there.” It explained:

Critical to our holding . . . that Defendant did not “live” at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to “reside” at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his “residence” because he cannot “live” there.

Urban Ministry’s operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is “to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary.” Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute. (citation omitted).

[State v. Pierce](#), ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). In a failing to register case there was sufficient evidence that the defendant changed his address from Burke to Wilkes County. Among other things, a witness testified that the defendant was at his ex-wife Joann’s home in Wilkes County all week, including the evenings. The court concluded: “the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address in Wilkes County.” (quotation omitted). It explained:

[T]he evidence . . . showed that defendant still received mail, maintained a presence, and engaged in some “core necessities of daily living,” at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann’s in Wilkes County. Specifically, [witnesses] testified that defendant was often at Joann’s all week. Furthermore, [a witness] testified that defendant engaged in activities that only someone living at Joann’s would do. Thus . . . the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann’s in Wilkes County. Although defendant may have considered the house

in Burke County his “home,” . . . his subjective belief and even the fact that he was “in and out” of the Burke County house does not prevent him from having a second, temporary residence. (citations omitted).