

Criminal Procedure

Jury Argument

[*State v. Dalton*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In this murder case in which the defendant asserted the insanity defense, the trial court committed prejudicial error by overruling the defendant's objection to the prosecutor's statement during closing argument that if the jury found the defendant not guilty by reason of insanity, it was "very possible" that she could be released from civil commitment in fifty days. This statement was improper because it was contrary to law. The court noted that if a jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant to be civilly committed. Within fifty days of the commitment, the trial court will provide hearing to the defendant; if the defendant shows that he or she no longer has a mental illness or is no longer dangerous to others, the court will release the defendant. The relevant statute provides in part: "Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others." Here, no evidence suggests that the defendant's release in fifty days was "very possible"; instead it shows the opposite. The defendant's expert testified that she would suffer from bipolar disorder and borderline personality disorder for the rest of her life thus making it unlikely that after fifty days she could show that she was no longer mentally ill. Also the State's uncontroverted evidence showed that the defendant committed a homicide and, under the statute, this constitutes prima facie evidence of dangerousness to others. Based on the evidence, "a quick release would appear to be virtually impossible."

Motion to Suppress Procedure – Appeal of Court's Order Denying Motion

[*State v. Harris*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In a case where the defendant pled guilty pursuant to a plea agreement without notifying the State of his intent to appeal the suppression ruling and failed to timely file a notice of intent to appeal, the court dismissed the defendant's untimely appeal and his petition for writ of certiorari. Acknowledging *State v. Davis*, ___ N.C. App. ___, 763 S.E.2d 585, 589 (2014), a recent case that allowed, with no analysis, a writ in this very circumstance, the court found itself bound to follow an earlier opinion, *State v. Pimental*, 153 N.C. App. 69, 77 (2002), which requires dismissal of the defendant's efforts to seek review of the suppression issue.

Probation

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). Under Justice Reinvestment Act (JRA) changes, the trial court erred by revoking the defendant's probation. After reviewing the requirements of the JRA, the court noted that the trial judge did not check the box on the judgment form indicating that it had made a finding that the defendant violated the statutory absconding provision, G.S. 15A-1343(b)(3a).

Arrest, Search & Investigation

[State v. Perry](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2015). In this drug case, no fourth amendment violation occurred when law enforcement officers obtained the defendant's cell site location information (CSLI) from his service provider, AT&T, without a warrant based on probable cause. The court noted that while courts have held that "real time" CSLI may be obtained only pursuant to a warrant supported by probable cause, the Stored Communications Act (SCA) allows for access to "historical" information upon a lesser showing. It continued: "The distinguishing characteristic separating historical records from "real-time" information is the former shows where the cell phone has been located at some point in the past, whereas the latter shows where the phone is presently located through the use of GPS or precision location data." The court concluded that the CSLI at issue was historical information:

[Officers] followed Defendant's historical travel by entering the coordinates of cell tower "pings" provided by AT&T into a Google Maps search engine to determine the physical location of the last tower "pinged." Defendant's cell phone was never contacted, "pinged," or its precise location directly tracked by the officers. The officers did not interact with Defendant's cell phone, nor was any of the information received either directly from the cell phone or in "real time." All evidence shows the cell tower site location information provided by AT&T was historical stored third-party records and properly disclosed under the court's order as expressly provided in the SCA.

The court found it significant that an officer testified that there was a 5- to 7-minute delay in the CSLI that he received from AT&T. The court went on to conclude that retrieval of the "historical" information was not a search under the fourth amendment. Noting that the U.S. Supreme Court has not decided whether "historical" CSLI raises a fourth amendment issue, the question is one of first impression North Carolina. The court distinguished the U.S. Supreme Court's recent decision in *United States v. Jones*, 132 S. Ct. 945 (2012) (the 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" within the meaning of the Fourth Amendment) in three respects. First, unlike in *Jones*, here, there was no physical trespass on the defendant's property. Second, the tracking in question here was not "real-time" the court reiterated: "officers only received the coordinates of historical cell tower 'pings' after they had been recorded and stored by AT&T, a third party." Third, the trespass in *Jones* was not authorized by a warrant or a court order of any kind whereas here a court order was entered. And, "[m]ost importantly," *Jones* did not rely on the third-party doctrine. Citing decisions from the Third, Fifth and Eleventh Circuits, the court held that obtaining the CSLI did not constitute a search under the fourth amendment. The court distinguished the recent Fourth Circuit opinion in *United States v. Graham*, on grounds that in that case the government obtained the defendant's historical CSLI for an extended period of time. Here, only two days of information were at issue. The court rejected the *Graham* court's conclusion that the third-party doctrine did not apply to CSLI information because the defendants did not voluntarily disclose it to their service providers. The court continued, concluding that even if it were to find that a search warrant based on probable cause was required, the good faith exception would apply.

One judge concurred in the final disposition but disagreed with the majority's characterization of the information as historical rather than real-time. That judge "believe[d that] allowing the majority's characterization of the information provided by AT&T to law enforcement, based on the facts in this

case, would effectively obliterate the distinction between 'historical' and 'real-time' cell site information." However, she agreed that the good faith exception applied.