

## **Criminal Procedure**

### **Double Jeopardy**

[State v. Miller](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ N.C. \_\_\_ (Feb. 2, 2016). No violation of double jeopardy occurred where the defendant was convicted of attempted larceny and attempted common law robbery when the offenses arose out of the same incident but involved different victims. The defendant committed the attempted larceny upon entering the home in question with the intent of taking and carrying away a resident's keys; he committed the attempted common law robbery when he threatened the resident's granddaughter with box cutters in an attempt to take and carry away the keys.

### **Sentencing**

[State v. Collins](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ N.C. \_\_\_ (Feb. 2, 2016). The trial court improperly sentenced the defendant in his absence. The trial court orally sentenced the defendant to 35 to 42 months in prison, a sentence which improperly correlated the minimum and maximum terms. The trial court's written judgment sentenced the defendant to 35 to 51 months, a statutorily proper sentence. Because the defendant was not present when the trial court corrected the sentence, the court determined that a resentencing is required and remanded accordingly.

[State v. Eury](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ N.C. \_\_\_ (Feb. 2, 2016). In calculating the defendant's prior record level, the trial court erred by assigning an additional point on grounds that all the elements of the present offense were included in a prior offense. The defendant was found guilty of possession of a stolen vehicle. The court rejected the State's argument that the defendant's prior convictions for possession of stolen property and larceny of a motor vehicle were sufficient to support the additional point. The court noted that while those offenses are "similar to the present offense" neither contains all of its elements. Specifically, possession of a stolen vehicle requires that the stolen property be a motor vehicle, while possession of stolen property does not; larceny of a motor vehicle requires proof of asportation but not possession while possession of a stolen vehicle requires the reverse.

### **Post-Conviction DNA Testing Motions**

[State v. Cox](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ N.C. \_\_\_ (Feb. 2, 2016). In this child sexual assault case, the trial court did not err by refusing to appoint counsel to litigate the defendant's pro se motion for post-conviction DNA testing. Under G.S. 15A-269(c), to be entitled to counsel, the defendant must establish that the DNA testing may be material to his wrongful conviction claim. The defendant's burden to show materiality requires more than a conclusory statement. Here, the defendant's conclusory contention that testing was material was insufficient to carry his burden. Additionally, the defendant failed to include the lab report that he claims shows that certain biological evidence was never analyzed. The court noted that the record does not indicate whether this evidence still exists and that after entering a guilty plea, evidence need only be preserved until the earlier of 3 years from the date of conviction or until the defendant is released.

## Arrest, Search & Investigation

### Strip Search

[State v. Collins](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ N.C. \_\_\_ (Feb. 2, 2016). In this drug case, the court held, over a dissent, that a strip search of the defendant did not violate the fourth amendment. When officers entered a residence to serve a warrant on someone other than the defendant, they smelled the odor of burnt marijuana. When the defendant was located upstairs in the home, an officer smelled marijuana on his person. The officer patted down and searched the defendant, including examining the contents of his pockets. The defendant was then taken downstairs. Although the defendant initially gave a false name to the officers, once they determined his real name, they found out that he had an outstanding warrant from New York. The defendant was wearing pants and shoes but no shirt. After the defendant declined consent for a strip search, an officer noticed a white crystalline substance consistent with cocaine on the floor where the defendant had been standing. The officer then searched the defendant, pulling down or removing both his pants and underwear. Noticing that the defendant was clenching his buttocks, the officer removed two plastic bags from between his buttocks, one containing what appeared to be crack cocaine and the other containing what appeared to be marijuana. The court held that because there was probable cause to believe that contraband was secreted beneath the defendant's clothing (in this respect, the court noted the crystalline substance consistent with cocaine on the floor where the defendant had been standing), it was not required to officially deem the search a strip search or to find exigent circumstances before declaring the search reasonable. Even so, the court found that exigent circumstances existed, given the observation of what appeared to be cocaine near where the defendant had been standing and the fact that the concealed cocaine may not have been sealed, leading to danger of the defendant absorbing some of the substance through his large intestine. Also, the court noted that the search occurred in the dining area of a private apartment, removed from other people and providing privacy.