

Criminal Procedure

Charging Documents

[State v. Allen](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). A citation charging transporting an open container of spirituous liquor was not defective. The defendant argued that the citation failed to state that he transported the fortified wine or spirituous liquor in the passenger area of his motor vehicle. The court declined the defendant's invitation to hold citations to the same standard as indictments, noting that under G.S. 15A-302, a citation need only identify the crime charged, as it did here, putting the defendant on notice of the charge. The court concluded: "Defendant was tried on the citation at issue without objection in the district court, and by a jury in the superior court on a trial *de novo*. Thus, once jurisdiction was established and defendant was tried in the district court, he was no longer in a position to assert his statutory right to object to trial on citation." (quotation omitted).

[State v. Hill](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). (1) By failing to raise fatal variance issues with respect to a larceny indictment at trial, they were waived on appeal. (2) Exercising discretion to consider those issues, the court found them to warrant reversal of the conviction. Harmonizing prior case law, the court stated: "there is no fatal variance between an indictment and the proof at trial if the State establishes that the alleged owner of stolen property had lawful possession and custody of the property, even if it did not actually own the property." Here, the charging document alleged that the property belonged to Tutti Frutti, LLC. However, the evidence showed that it belonged to Jason Wei, the son of the sole member of that limited liability company. Additionally, the State failed to show that Tutti Frutti, LLC was in lawful custody and possession of Wei's property at the time it was stolen. (3) There was no fatal variance with respect to an injury to real property indictment. An indictment charging injury to real property need only identify the real property itself, not its owner. Thus, any variance between the allegation as to the property's ownership and the proof at trial was not fatal.

Jury Instructions

[State v. Godwin](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this DWI case, the trial court did not err by denying the defendant's request for a jury instruction concerning Intoximeter results. The defendant's proposed instruction would have informed the jury that Intoximeter results were sufficient to support a finding of impaired driving but did not compel such a finding beyond a reasonable doubt. Citing prior case law, the court rejected the defendant's argument that by instructing the jury using N.C.P.J.I. 270.20A, the trial court impressed upon the jury that it could not consider evidence showing that the defendant was not impaired.

Post-Conviction

[State v. Howard](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). (1) Because the trial court did not have subject matter jurisdiction to rule on the defendant's MAR claim alleging a violation of the post-conviction DNA statutes, the portion of the trial court's order granting the MAR on these grounds is void. The court noted that the General Assembly has provided a statutory scheme, outside of the MAR

provisions, for asserting and obtaining relief on, post-conviction DNA testing claims. (2) The State could appeal the trial court's order granting the defendant's MAR. (3) The trial court erred by failing to conduct an evidentiary hearing before granting the MAR. An evidentiary hearing "is not automatically required before a trial court grants a defendant's MAR, but such a hearing is the general procedure rather than the exception." Prior case law "dictates that an evidentiary hearing is mandatory unless summary denial of an MAR is proper, or the motion presents a pure question of law." Here, the State denied factual allegations asserted by the defendant. The trial court granted the MAR based on what it characterized as "undisputed facts," faulting the State for failing to present evidence to rebut the defendant's allegations. However, where the trial court sits as "the post-conviction trier of fact," it is "obligated to ascertain the truth by testing the supporting and opposing information at an evidentiary hearing where the adversarial process could take place. But instead of doing so, the court wove its findings together based, in part, on conjecture and, as a whole, on the cold, written record." It continued, noting that given the nature of the defendant's claims (as discussed in the court's opinion), the trial court was required to resolve conflicting questions of fact at an evidentiary hearing.

Implied Consent Issues

[*Farrell v. Thomas*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). (1) The DMV's findings support its conclusion that the officer had reasonable grounds to believe that Farrell was driving while impaired. During a traffic stop Farrell refused the officer's request to take a breath test after being informed of his implied consent rights and the consequences of refusing to comply. Officers obtained his blood sample, revealing a blood alcohol level of .18. Because Farrell refused to submit to a breath test upon request, the DMV revoked his driving privileges. The Court of Appeals found that "DMV's findings readily support its conclusion." Among other things, Farrell had glassy, bloodshot eyes and slightly slurred speech; during the stop Farrell used enough mouthwash to create a strong odor detectable by the officer from outside car; and Farrell lied to the officer about using the mouthwash. The court held: "From these facts, a reasonable officer could conclude that Farrell was impaired and had attempted to conceal the alcohol on his breath by using mouthwash and then lying about having done so." (2) Over a dissent, the court rejected Farrell's argument that the State's dismissal of his DWI charge barred the DMV from pursuing a drivers license revocation under the implied consent laws. This dismissal may have been based on a Fourth Amendment issue. The majority determined that even if Farrell's Fourth Amendment rights were violated, the exclusionary rule would not apply to the DMV hearing. The dissent argued that the exclusionary rule should apply. A third judge wrote separately, finding that it was not necessary to reach the exclusionary rule issue.

Arrest, Search and Investigation

***Miranda* Issues**

[*State v. Taylor*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). On remand from the NC Supreme Court the court held, in this murder case, that the defendant's Fifth Amendment rights were not violated. The defendant argued on appeal that the trial court erred in denying his motion to suppress

because he invoked his Fifth Amendment right to counsel during a custodial interrogation. The court disagreed, holding that the defendant never invoked his right to counsel. It summarized the relevant facts as follows:

[D]uring the police interview, after defendant asked to speak to his grandmother, Detective Morse called defendant's grandmother from his phone and then handed his phone to defendant. While on the phone, defendant told his grandmother that he called her to "let [her] know that [he] was alright." From defendant's responses on the phone, it appears that his grandmother asked him if the police had informed him of his right to speak to an attorney. Defendant responded, "An attorney? No, not yet. They didn't give me a chance yet." Defendant then responds, "Alright," as if he is listening to his grandmother's advice. Defendant then looked up at Detective Morse and asked, "Can I speak to an attorney?" Detective Morse responded: "You can call one, absolutely." Defendant then relayed Detective Morse's answer to his grandmother: "Yeah, they said I could call one." Defendant then told his grandmother that the police had not yet made any charges against him, listened to his grandmother for several more seconds, and then hung up the phone.

After the defendant refused to sign a *Miranda* waiver form, explaining that his grandmother told him not to sign anything, Morse asked, "Are you willing to talk to me today?" The defendant responded: "I will. But [my grandmother] said—um—that I need an attorney or a lawyer present." Morse responded: "Okay. Well you're nineteen. You're an adult. Um—that's really your decision whether or not you want to talk to me and kind-of clear your name or—" The defendant then interrupted: "But I didn't do anything, so I'm willing to talk to you." The defendant then orally waived his *Miranda* rights. The defendant's question, "Can I speak to an attorney?", made during his phone conversation with his grandmother "is ambiguous whether defendant was conveying his own desire to receive the assistance of counsel or whether he was merely relaying a question from his grandmother." The defendant's later statement —"But [my grandmother] said—um—that I need an attorney or a lawyer present"—"is also not an invocation since it does not unambiguously convey *defendant's* desire to receive the assistance of counsel." (quotation omitted). The court went on to note: "A few minutes later, after Detective Morse advised defendant of his *Miranda* rights, he properly clarified that the decision to invoke the right to counsel was defendant's decision, not his grandmother's."

Blood Draw

[*State v. Romano*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this DWI case, the court held that the trial court did not err by suppressing blood draw evidence, that an officer collected from a nurse who was treating the defendant. The trial court had found that no exigency existed justifying the warrantless search and that G.S. 20-16.2, as applied in this case, violated *Missouri v. McNeely*. The court noted that in *McNeely*, the US Supreme Court held "the natural metabolization of alcohol in the bloodstream" does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." Rather, it held that exigency must be determined based on the

totality of the circumstances. Here, the officer never advised the defendant of his rights according to G.S. 20-16.2 and did not obtain his written or oral consent to the blood test. Rather, she waited until an excess of blood was drawn, beyond the amount needed for medical treatment, and procured it from the attending nurse. The officer testified that she believed her actions were reasonable under G.S. 20-16.2(b), which allows the testing of an unconscious person, in certain circumstances. Noting that it had affirmed the use of the statute to justify warrantless blood draws of unconscious DWI defendants, the court further noted that all of those decisions were decided before *McNeely*. Here, under the totality of the circumstances and considering the alleged exigencies, the warrantless blood draw was not objectively reasonable. The court rejected the State's argument that the blood should be admitted under the independent source doctrine, noting that the evidence was never obtained independently from lawful activities untainted by the initial illegality. It likewise rejected the State's argument that the blood should be admitted under the good faith exception. That exception allows officers to objectively and reasonably rely on a warrant later found to be invalid. Here, however, the officers never obtained a search warrant.

Evidence

Opinions

[*State v. Godwin*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this appeal after a conviction for impaired driving, the court held that Rule 702 requires a witness to be qualified as an expert before he may testify to the issue of impairment related to Horizontal Gaze Nystagmus (HGN) test results. Here, there was never a formal offer by the State to tender the law enforcement officer as an expert witness. In fact, the trial court rejected the defendant's contention that the officer had to be so qualified. This error was prejudicial.

[*State v. Torrance*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). Following its opinion in *Godwin*, above, the court held, in this DWI case, that the trial court erred by admitting lay opinion testimony on the results of an HGN test and that a new trial was required.

[*State v. Hill*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). In this case involving breaking and entering and other charges, the trial court did not err by failing to exclude testimony of two law enforcement officers who identified the defendant in a surveillance video of the premises in question. The court rejected the defendant's argument that the officers were no better qualified than the jury to identify the suspect in the videos. It noted that the officers were familiar with the defendant (for reasons detailed in the court's opinion) and recognized distinct features of his face, posture and gait that would not have been evident to the jurors. Additionally, the defendant's appearance changed from the time of the crimes to the time of trial and the officers' testimony assisted the jury in understanding his appearance at the time of the crime and its similarity to the person in the surveillance videos.

Criminal Offenses

[*State v. Williams*](#), ___ N.C. App. ___, ___ S.E.2d ___ (April 19, 2016). The evidence was sufficient to support the defendant's conviction of unlawfully entering property operated as a domestic violence safe house by one subject to a protective order in violation of G.S. 50B-4.1(g1). The evidence showed that the defendant drove his vehicle to shelter, parked his car in the lot and walked to the front door of the building. He attempted to open the door by pulling on the door handle, only to discover that it was locked. The court rejected the defendant's argument that the State was required to prove that he actually entered the shelter building. The statute in question uses the term "property," an undefined statutory term. However by its plain meaning, this term is not limited to buildings or other structures but also encompasses the land itself.