Criminal Procedure

Jury Selection

State v. McQueen, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant's *Batson* challenges in this capital case. The two victims and the eyewitness were Palestinian and the defendant was black. The State exercised a peremptory strike against Juror 2, a black male. When questioned about the death penalty, Juror 2 stated that he would not agree to the death penalty under any circumstances, elaborating that he was a pastor and that agreeing with the death penalty would make him a hypocrite; he added that he might hypothetically agree to the death penalty in one specified gruesome scenario. Reservations concerning ability to impose the death penalty constitute a racially neutral basis for exercising a peremptory challenge. The State exercised a peremptory strike against Juror 10, a black female. After the defendant raised a *Batson* challenge, the State provided reasons for the strike: Juror 10's thoughts about the death penalty; her failure to disclose her criminal charges; reservations about whether law enforcement treated her brother fairly; and her lack of eye contact when asked whether her brother's prosecution would affect her ability to be fair and impartial. These are racially neutral reasons for striking a juror. The State exercised a peremptory strike against Juror 11, a black male; it did not strike Juror 12, a white male. Jurors 11 and 12 were charged with writing worthless checks and driving while license revoked in the past and both knew a potential witness in the case. However, Juror 12 responded directly to questions about his criminal charges while Juror 11 minimized his criminal history; Juror 11 avoided questions regarding his family members' criminal charges; Juror 12 had a business relationship with the witness whereas Juror 11 spoke with him on multiple occasions and his grandniece worked for the witness. The trial court did not commit clear error in rejecting the defendant's *Batson* challenges

Jury Argument

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant final closing arguments in this DWI case. Rule 10 of the General Rules of Practice for the Superior and District Courts provides that "if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him." Here, the defendant did not call any witnesses or put on evidence but did cross-examine the State's only witness and sought to play a video of the entire traffic stop recorded by the officer's in-car camera during cross-examination. At issue on appeal was whether admitting the video of the stop during cross-examination constituted introducing evidence. Although the officer provided testimony describing the stop shown in the video, the video went beyond the officer's testimony and "is different in nature from evidence presented in other cases that was determined not to be substantive." Playing the video allowed the jury to hear exculpatory statements by the defendant to the police beyond those testified to by the officer and introduced evidence of flashing police lights that was not otherwise in evidence to attack the reliability of the HGN test. The video was not merely illustrative. It allowed the jury to make its own determinations concerning the defendant's impairment apart from the officer's testimony and therefore was substantive evidence.

Sentencing

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by sentencing the defendant as a PRL IV offender. The State used the defendant's prior Michigan conviction at the default level as a Class I felony. On appeal the defendant argued that since the prior record level worksheet did not clearly show that the Michigan conviction was classified as a felony in Michigan and the State did not present any evidence regarding the conviction or its classification there, it was improperly treated as a felony. The worksheet clearly indicated that the offense would be classified as a Class I felony and the defendant stipulated to this classification.

Sex Offenders

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The defendant was properly required to register as a sex offender and submit to SBM. Although the trial court mistakenly found that the defendant had been convicted of an offense against a minor, the error was clerical where other findings were made that would require the defendant to register and submit to SBM and the defendant did not dispute these findings.

Arrest, Search & Investigation

Vehicle Stops

State v. Eldridge, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court erred by denying the defendant's motion to suppress where a stop was based on an officer's mistake of law that was not objectively reasonable. An officer stopped a vehicle registered in Tennessee for driving without an exterior mirror on the driver's side of the vehicle. The officer was not aware that the relevant statute—G.S. 20-126(b)—does not apply to vehicles registered out-of-state. A subsequent consent search led to the discovery of controlled substances and drug charges. On appeal, the State conceded, and the court concluded, following *Heien v. North Carolina*, 135 S. Ct. 530 (2014), that the officer's mistake of law was not reasonable. Looking for guidance in other jurisdictions that have interpreted *Heien,* the court noted that cases from other jurisdictions "establish that in order for an officer's mistake of law while enforcing a statute to be objectively reasonable, the statute at issue must be ambiguous." "Moreover," the court noted, "some courts applying *Heien* have further required that there be an absence of settled case law interpreting the statute at issue in order for the officer's mistake of law to be deemed objectively reasonable." The concluded that the statue at issue was clear and unambiguous; as a result "a reasonable officer reading this statute would understand the requirement that a vehicle be equipped with a driver's side exterior mirror does not apply to vehicles that—like Defendant's vehicle—are registered in another state."

State v. Reed, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). Applying *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), in this drug case, the court held, over a dissent, that trial court erred by denying the defendant's motion to suppress. After stopping the defendant's vehicle for speeding, the officer told the defendant to come with him to the patrol car. The officer frisked the defendant and found a

pocketknife. The defendant sat in the front passenger seat of the patrol car with the door open and one leg outside of the car. The officer's canine was in the backseat. The officer told the defendant to close the door; when the defendant hesitated the officer ordered him to do so and the defendant complied. The officer ran the defendant's New York license through record checks on his mobile computer asking the defendant about New York and where he was headed. The officer also asked the defendant about his criminal history, his living arrangements with his fiancée, a passenger in his car, and other questions. When the officer noticed that the rental agreement he had been given was for a different vehicle, he told the defendant to remain seated while he returned to the vehicle to get the correct rental agreement. The officer then approached the defendant's fiancé and asked for the rental agreement and about her travel plans and the nature of her trip. After the defendant's fiancé failed to locate the correct rental agreement, the trooper told her that he was would issue the defendant a speeding ticket and the two could be on their way. The officer then returned to the patrol car, explained that the defendant's fiancé couldn't find the correct rental agreement and continued to question the defendant about his trip. He then called the rental company and confirmed that everything was in order with the rental. The officer issued the defendant a warning ticket. The officer told the defendant he was "completely done with the traffic stop" but wanted to ask the defendant additional questions. The officer asked the defendant if he was carrying controlled substances, firearms, or illegal cigarettes. When the officer asked the defendant for consent to search the car, the defendant told him to ask his fiancée. The officer also asked the defendant's fiancé the same questions and for permission to search the car. The fiancé eventually gave consent to search. The officer's authority to seize the defendant for the speeding infraction ended when he issued the warning ticket. No reasonable suspicion supported extending the traffic stop beyond this point.

Search Warrants

State v. Gerard, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). In this sexual exploitation of a minor case, the information contained in an officer's affidavit was sufficient to provide probable cause for issuance of a search warrant for child pornography. In this case, an officer and certified computer forensic examiner identified child pornography through the use of a SHA1 algorithm; the officer downloaded and reviewed some of the images and compared SHA1 values to confirm that the files were child pornography. Although less detailed than the officer's testimony at the hearing, the affidavit went into technical detail regarding law enforcement methods and software used to identify and track transmissions of child pornography over the Internet. The court rejected the defendant's argument that the affidavit's identification of alleged pornographic images as known child pornography based upon computer information was insufficient and that the pictures themselves must be provided with the affidavit.

Arrest

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). An officer had probable cause to arrest the defendant for DWI. After the officer stopped the defendant's vehicle, he smelled a moderate odor of alcohol coming from the defendant and noticed that the defendant's eyes were red and glassy.

Upon administration of an HGN test the officer observed five of six indicators of impairment. The defendant was unable to provide a breath sample for an alco-sensor, which the officer viewed as willful refusal. The defendant admitted that he had consumed three beers, though he said his last consumption was nine hours prior. The officer arrested at the defendant for DWI. The court held: "Without even considering defendant's multiple failed attempts to provide an adequate breath sample on an alco-sensor device, we hold the trial court's findings support its conclusion that there was probable cause to arrest defendant for DWI."

Evidence

Rape Shield

State v. Mbaya, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). (1) In this sexual assault case, the trial court did not err by excluding the defendant's evidence that the victim had previously been sexually active that her parents punished her for this activity. The defendant did not argue that the victim's past sexual activity was admissible under one of the four exceptions to the Rape Shield statute. Rather, he argued that her past sexual activity and parental punishment for it was relevant to show that she had a motive to fabricate accusations against him. Here, the evidence showed that the victim had not engaged in sexual activity for several months prior to the incident at issue. The victim's parents knew that she had been sexually active for several years prior to the incident and the victim testified that she was not worried about being punished for engaging in sexual conduct. No evidence tied her past sexual activity or parental punishment to the incident in question. Additionally, unlike other cases where evidence of sexual activity was deemed admissible, this case did not turn primarily on the victim's testimony. Here, there was other "compelling physical evidence submitted by the State" including, among other things, DNA evidence and GPS records. (2) The trial court did not violate the defendant's constitutional right to present a defense by excluding irrelevant evidence.

Criminal Offenses

DWI

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2016). The trial court did not err by denying the defendant's motion to dismiss a DWI charge. Here, after the officer stopped the defendant's vehicle, he noticed a moderate amount of alcohol coming from the defendant's breath, the defendant had red and glassy eyes, the defendant admitting to consuming alcohol hours before, the officer noted five out of six indicators of impairment on the HGN test and the officer believed that the defendant was impaired.