Criminal Procedure

Appellate Procedure

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this DWI case, the superior court properly dismissed the State's notice of appeal from a district court ruling granting the defendant's motion to suppress where the State's notice of appeal failed to specify any basis for the appeal. Although such a notice may be sufficient for an appeal to the Court of Appeals, the State is required to specify the basis for its appeal to superior court.

Counsel Issues

State v. Faulkner, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). Because the trial court properly conducted the inquiry required by G.S. 15A-1242, the court rejected the defendant's argument that his waiver of counsel, in connection with a probation violation hearing, was not knowing and voluntary. In addition to finding that the trial court's colloquy with the defendant established that the waiver was knowing and voluntary, the court noted that its conclusion was consistent with G.S. 7A-457(a). That provision states that a waiver of counsel shall be effective only if the court finds that the indigent person acted with "full awareness of his rights and of the consequences of the waiver," and that in making such a finding the court must consider among other things the person's age, education, familiarity with the English language, mental condition and complexity of the crime charged. Here, the defendant was 23 years old, spoke English, had a GED degree, had attended college for one semester, and had no mental defects of record; additionally, there were no factual or legal complexities associated with the probation violation. The defendant described himself as a "Moorish National" and a "sovereign citizen." The court rejected the defendant's argument that certain responses to the judge's statements during the waiver colloquy indicated that the waiver was not knowing and voluntary. The court noted that a defendant's contention that he does not understand the proceedings is a common aspect of a sovereign citizen defense.

Dismissal of Charges

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this DWI case, the district court properly dismissed the charges *sua sponte*. After the district court granted the defendant's motion to suppress, the State appealed to superior court, which affirmed the district court's pretrial indication and remanded. The State then moved to continue the case, which the district court allowed until June 16, 2015, indicating that it was the last continuance for the State. When the case was called on June 16th the State requested another continuance so that it could petition the Court of Appeals for writ of certiorari to review the order granting the defendant's motion to suppress. The district court judge denied the State's motion to continue and filed the final order of suppression. The district court judge then directed the State to call the case or move to dismiss it. When the State refused to take any action, the district court, on its own motion, dismissed the case because of the State's failure to prosecute. Affirming, the court noted that when the case came on for final hearing on June 16th, the State had failed to seek review of the suppression motion. And, given that the prosecutor knew that there was no admissible evidence supporting the DWI charge in light of the suppression ruling, a State Bar Formal Ethics Opinion required dismissal of the charges. The court noted: the "State found itself in this position by its own in action."

Evidence

Experts

State v. Killian, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this DWI case, the trial court committed plain error by denying the defendant's motion to exclude an officer's Horizontal Gaze Nystagmus ("HGN") testimony and allowing the officer to testify about the results of the HGN test without qualifying him as an expert under Rule 702. Citing *State v. Godwin*, ___ N.C. App. ___, 786 S.E.2d 34, 37 (2016), the court held that it was error to allow the officer to testify without being qualified as an expert. The court went on to conclude that the error did not have a probable impact on the jury's verdict under the plain error standard.

Privileges

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). The trial court did not err by applying G.S. 8-57.1 (husband-wife privilege waived in child abuse) in this child abuse case. The defendant asserted that the trial court erred by admitting privileged evidence about consensual sexual activity between the defendant and his wife. Specifically, he argued that the trial court erroneously concluded that the marital communications privilege was waived by G.S. 8-57.1. The defendant argued that the statute does not completely abrogate the privilege and is limited to judicial proceedings related to a report pursuant to the Child Abuse Reporting Law. The court disagreed, holding that the privilege was waived under the statute.

404(b) Evidence

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this child abuse case, the trial court did not abuse its discretion by admitting evidence regarding consensual sexual activity between the defendant and his wife. Here, after the child described to the wife a sexual act performed by the defendant, the wife signed a statement indicating that she and the defendant had engaged in the same act. The act in question was to turn her over on her stomach and "hump" and ejaculate on her back. The wife's testimony was admissible to show common scheme or plan, pattern and/or common modus operandi and was sufficiently similar to the child's allegation of sexual abuse. The court distinguished this case from one involving "a categorical or easily-defined sexual act" such as anal sex. Here, the case involved "a more unique sexual act."

Arrest Search & Investigation

Traffic Stops

State v. Watson, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 15, 2016). In this drug case, the trial court erred by denying the defendant's motion to suppress drug evidence seized after a traffic stop where the officer had no reasonable suspicion to stop the defendant's vehicle. Officers received a tip from a confidential informant regarding "suspicious" packages that the defendant had received from a local UPS store. The informant was an employee of the UPS store who had been trained to detect narcotics; the informant had successfully notified the police about packages later found to contain illegal drugs and these tips were used to secure a number of felony drug convictions. With respect to the incident in question, the informant advised the police that a man, later identified as the defendant, had arrived at the UPS store in a truck and retrieved packages with a Utah a return address when in fact the packages had been sent from Arizona. After receiving this tip, the police arrived at the store, observed the defendant driving away, and initiated a traffic stop. During the stop they conducted a canine sniff, which led to the discovery of drugs inside the packages. Holding that the motion to suppress should have been granted, the court noted that there is nothing illegal about receiving a package with a return address

which differs from the actual shipping address; in fact there are number of innocent explanations for why this could have occurred. Although innocent factors, when considered together may give rise to reasonable suspicion, the court noted that it was unable to find any case where reasonable suspicion was based solely on a suspicious return address. Here, the trial court made no finding that the informant or the police had any prior experience with the defendant; the trial court made no finding that the origination city was known as a drug source locale; and the trial court made no finding that the packages were sealed suspiciously, had a suspicious weight based on their size, had hand written labels, or had a suspicious odor.