Criminal Procedure

Appeal Issues

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The court rejected the defendant's argument that she was entitled to a new trial due to the lack of a trial transcript. After being given numerous extensions, the court reporter failed to produce a trial transcript. The defendant claimed this failure violated her right to effective appellate review, effective assistance of counsel, due process of law, and equal protection. The court disagreed, concluding that the unavailability of a verbatim transcript does not automatically constitute error. Rather, the defendant must show that the missing record resulted in prejudice. The court noted that the absence of a complete transcript does not prejudice a defendant when alternates are available that fulfill the function of a transcript and provide the defendant with a meaningful appeal. Here, the parties were able to reconstruct the testimonial evidence than other trial proceedings. The narrative stipulated to by the parties contains sufficient evidence to understand all the issues presented on appeal.

State v. J.C., ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Because the State has no statutory right to appeal an order of expunction, the court granted the petitioner's motion to dismiss the appeal. The trial court had granted petitions for expunction pursuant to G.S. 15A-145.5 and 15A-146. The statute permitting an appeal by the State in a criminal case is G.S. 15A-1445, and the statute is strictly construed. Because that statute fails to include any reference to a right of the State to appeal from an order of expunction, the State had no right of appeal. The court noted that while it has on several occasions reviewed expunctions, it obtained jurisdiction to do so pursuant to the granting of the State's petition for writ of certiorari. Here the State did not file such a petition.

State v. Culbertson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). In a case where the defendant argued, and the State conceded, that certain indictments were fatally defective, the court held that the defendant had no right under G.S. 15A-1444 to appeal his conviction, entered upon a plea of guilty. Nor had he asserted any grounds under Appellate Rule 21 for the court to issue a writ of certiorari. However, the court exercised its discretionary authority under Appellate Rule 2 to suspend the requirements of the appellate rules and issue a writ of certiorari, finding that manifest injustice would occur if the convictions were allowed to stand on charges for which the trial court lacked jurisdiction to impose sentence.

Indictment Issues

State v. Culbertson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). As conceded by the State, indictments charging the defendant with possession with intent to sell and deliver marijuana and heroin within 1000 feet of a park under G.S. 90-95(e)(10) were fatally defective where they failed to allege that he was over the age of 21 at the time of the offenses.

Counsel Issues

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). (1) The court rejected the defendant's argument that trial counsel was deficient by failing to give notice to the State of the defendant's intention to offer an alibi witness. The defendant had argued that trial counsel's failure was a violation of the discovery rules and resulted in the trial court declining to give an alibi jury instruction. The court found however that the trial court's decision declining to give an alibi instruction was not due to ineffective assistance but rather to the trial court's error. A defendant only is required to give notice of

an alibi witness after being ordered to do so by the trial court. Here, no such order was entered. Therefore, counsel was not deficient in failing to disclose the defendant's intent to offer an alibi witness. The court went on to conclude that even if it were to find that counsel's performance was deficient, the defendant failed to show prejudice. Although the trial court declined to give an instruction on alibi, the alibi evidence--the defendant's own testimony that he was elsewhere with his girlfriend at the time of the offense--was heard and considered by the jury. (2) The court agreed with the defendant that a civil judgment imposing fees against him must be vacated because neither the defense counsel's total attorney fee amount nor the appointment fee were discussed in open court with the defendant. The court noted that on remand the State may apply for judgment in accordance with G.S. 7A-455, provided that the defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed for court-appointed counsel. Similarly, although the $60 appointment fee was vacated, that was without prejudice to the State again seeking an appointment fee on remand.

Pleas & Plea Agreements

State v. Culbertson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Having found that the defendant's convictions for drug offenses that were part of a plea agreement had to be vacated on grounds of fatal defects in the indictments, the court held that the entire plea agreement and the judgments entered on it must be set aside and the matter remanded to the trial court. The court expressly noted that nothing in its opinion binds either party to the vacated pleas or sentences or restricts the State from re-indicting the defendant.

Sentencing Related Issues

State v. Dail, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Because the trial court failed to consider evidence of the defendant's eligibility for conditional discharge pursuant to G.S. 90-96, the court vacated the judgment and remanded for resentencing. The defendant pleaded guilty to driving while impaired and possession of LSD. According to the plea agreement, the defendant stipulated to his prior record level for each offense, and that he would be placed on probation. In exchange, the State agreed to dismiss additional drug possession charges against the defendant. Pursuant to the plea agreement, the defendant received suspended sentences. On appeal, the defendant argued that the trial court erred by granting a suspended sentence rather than a conditional discharge. The trial court had denied this request, concluding that the defendant was asking for something beyond the scope of his plea agreement. The Court of Appeals agreed with the defendant, noting that defense counsel asked for such a discharge during the plea hearing and that the conditional discharge statute was mandatory for eligible defendants. The court rejected the State's argument that the defendant failed to present evidence that he was qualified for conditional discharge, concluding instead that the burden is on the State to establish that the defendant is not eligible for conditional discharge by proving the defendant's prior record. Here, the trial court did not afford either party the opportunity to establish whether or not the defendant was eligible for conditional discharge. The court therefore vacated the judgment and remanded for a new sentencing hearing, directing the trial court to follow the procedure for the consideration of eligibility for conditional discharge.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court erred in calculating the defendant's prior record level points. Specifically, it made an arithmetic error, finding that the points totaled 18 when in fact they totaled 17. This error lead the trial court to sentence the defendant as a prior record level VI offender instead of as a record level V offender. The State conceded the mathematical error but argued the error was harmless. The court agreed, noting that it has repeatedly

held that an erroneous prior record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct level, as it was here.

Evidence

Rule 702

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court did not commit plain error by allowing a trooper to testify at trial about the HGN test he administered on the defendant during the stop where the State never formally tendered the trooper as an expert under Rule 702. The court noted that during the pendency of the appeal the state Supreme Court decided *State v. Godwin*, ___ N.C. ___, ___ 800 S.E.2d 47, 48 (2017) (Evidence Rule 702(a1) does not require a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702 before the officer may testify to the results of a HGN test), which controls this case. As in *Godwin*, the defendant was not arguing that the officer was unqualified to testify as an expert, but only that he had to be formally tendered as such. Under *Godwin* "it was simply unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing."

Arrest, Search & Investigation

Stops

State v. Nicholson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Over a dissent, the court held that an officer lacked reasonable suspicion for a stop. The officer had approached a vehicle that was operated by another person and in which the defendant was a passenger. At the suppression hearing the officer testified that at the time of the seizure, he had no evidence of any criminal activity that he could identify. The only specific fact the officer identified was that the defendant was pulling a toboggan down over his head. The State pointed to several factors in support of its argument that reasonable suspicion existed, including the fact that the front passenger seat was empty and the defendant was sitting in the back, directly behind the driver; the vehicle was stationary in the middle of the road; the officer knew that the two had just been in a heated argument; the driver provided inconsistent answers when asked whether everything was okay; and the stop occurred in the early morning hours. However, the officer had already questioned the two individuals twice and released the driver so he could go to work after the officer assessed the situation. Moreover, when asked why he seized the defendant and inquired whether he was armed, the officer stated it was "just a common thing" that he asked everybody who is out in the early morning hours. The court noted that such a basis for seizure would make any individual in the area subject to seizure. Taken together the facts did not provide reasonable suspicion.

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Reasonable suspicion supported the traffic stop. At the time of the stop it was very late at night; the defendant's vehicle was idling in front of a closed business; the business and surrounding properties had experienced several break-ins; and the defendant pulled away when the officer approached the car. Considered together, this evidence provides an objective justification for stopping the defendant.

Criminal Offenses

Larceny

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). As conceded by the State, the evidence was insufficient to establish misdemeanor larceny where the defendant was in lawful

possession of the property at the time she removed it. After eviction proceedings were instituted against the defendant at one residence, she moved into a new home. Because the new home did not have appliances, she moved the appliances from her original home into the new home, having made plans to return them before the date she was required to be out the first residence. However she was arrested and charged with larceny of the appliances before that date expired.

Injury to Property Offenses

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court erred by denying the defendant's motion to dismiss a charge of misdemeanor injury to personal property. First, the State failed to present sufficient evidence showing that the defendant intended to cause injury to the personal property. The property in question was appliances, owned by the defendant's landlord, that the defendant was alleged to have damaged while moving them from one home to another. The only evidence on point was the defendant's own testimony, in which she acknowledged that the damage could have occurred during moving. This was insufficient to show that the defendant intentionally caused the damage. Second, the evidence was insufficient to establish that the defendant was the person who damaged the appliances.