RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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NORTH CAROLINA SUPREME COURT

Short-Form Indictment for First-Degree Murder

United States Supreme Court's Ruling in *Apprendi v. New Jersey* Does Not Affect North Carolina Supreme Court's Ruling That Short-Form First-Degree Murder Indictment Is Constitutional

State v. Braxton, 352 N.C. 158, 531 S.E.2d 428 (13 July 2000). The court ruled that the United States Supreme Court's ruling in Apprendi v. New Jersey, 120 S. Ct. 2348, 147 L. Ed. 2d 435, 67 Crim. L. Rep. 483 (26 June 2000) [United States Constitution requires that any fact (other than fact of prior conviction) that increases punishment for crime beyond statutory maximum for that crime must be submitted to jury and proved beyond reasonable doubt] did not affect the North Carolina Supreme Court's ruling in State v . Wallace, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000) that the short-form first-degree murder indictment is constitutional.

No Requirement That First-Degree Murder Short Form Indictment Allege Aggravating Circumstances

State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807 (16 June 2000). The court ruled, relying on Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), that there is no requirement that a first-degree murder short form indictment must allege the aggravating circumstances to be proven at a capital sentencing hearing. [Note: The court also rejected the defendant's other argument concerning the indictment's validity—that the short form indictment is unconstitutional. The court noted its ruling in State v. Wallace, 351 N.C. 481, 528 S.E.2d 326 (5 May 2000), distinguishing Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (24 March 1999), that a first-degree murder short form indictment is constitutional, even though it does not allege all the elements of first-degree murder.]

Criminal Offenses and Procedure

Defendant Was Not Entitled to Discovery of Printout of Polygraph Test under G.S. 15A-903(e)

State v. Brewington, 352 N.C. 489, 532 S.E.2d 496 (25 August 2000). The defendant was convicted of two counts of first-degree murder. The state offered into evidence the defendant's statements to a polygraph examiner after she had informed the defendant that she did not believe that the defendant was telling the whole truth. The defendant sought to challenge the voluntariness of statements he had made in response to the examiner's statement. The court ruled, after discussing State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983) and the

inadmissibility of polygraph results, that a printout of the polygraph test (polygram) was not discoverable under G.S. 15A-903(e) ("physical or mental examinations"). The court also noted that the accuracy of the polygraph results had no bearing on whether the defendant's statements were voluntary.

Absence of Complete Transcript of Trial Proceedings Did Not Violate Defendant's Constitutional Rights to Appellate Review and Effective Assistance of Counsel on Appeal, Based on Facts in This Case

State v. Lawrence, 352 N.C. 1, 530 S.E.2d 807 (16 June 2000). A mechanical malfunction caused part of officer A's testimony and all of officer B's testimony not to be recorded. At the settlement conference for preparing the record on appeal, the state set out the unrecorded testimony in narrative form and the two officers testified that the state's summary was an accurate reflection of their trial testimony. The court reporter testified that, according to her handwritten notes, no objections were made to the omitted testimony and the defendant did not ask officer B any questions on cross-examination. The trial judge settled the record on appeal as proposed by the state. The court ruled, citing State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982) and other cases, that the state's narrative constituted an available alternative that was "substantially equivalent" to the complete transcript, and the record on appeal did not violate the defendant's constitutional rights to appellate review and effective assistance of counsel on appeal.

(1) Spanish-Speaking Prospective Juror's Responses Indicated Inability to Understand English That Made Him Unqualified to Serve as Juror under G.S. 9-3, and G.S. 9-3 Does Not Violate United States or North Carolina Constitutions
(2) Trial Judge Did Not Err in Explaining Direct Consequences of Guilty Pleas to Defendant, Based on Facts in This Case

State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (25 August 2000). The defendant pleaded guilty to first-degree murder and other offenses, a capital sentencing hearing was conducted, and he was sentenced to death. (1) The court ruled that a Spanish-speaking prospective juror's responses indicated an inability to understand English that made him unqualified to serve as juror under G.S. 9-3. The court also ruled that G.S. 9-3 does not violate the United States or North Carolina constitutions—the court noted that the determination that the prospective juror was not suitable as a juror was based on his limited ability to communicate in English, not on his country of origin. (2) The trial judge informed the defendant during the guilty plea hearing that the maximum punishment for first-degree murder was death or life imprisonment without parole. The defendant stated that he understood the nature of the charges against him and their elements and that he had discussed this and possible defenses with his lawyers. The court rejected the defendant's argument that the judge was required to explain to the defendant that he was pleading guilty to first-degree murder based on the theories of premeditation and deliberation and of felony murder, and his guilty pleas to the felonies other than murder would establish four aggravating circumstances and foreclose appellate argument on certain issues; the court distinguished State v. Barts, 321 N.C. 170, 362 S.E.2d 235 (1987). The court had no duty to expound further on the direct consequences of the guilty plea, absent an indication by the

defendant that he required such instruction. Nor did the court have any duty to ascertain whether defense counsel had in fact instructed the defendant on this matter.

(1) Trial Judge Had Inherent Authority to Change Venue to Conduct Jury Selection in Another County from Which Jurors in Special Venire Were To Be Selected
(2) Law Enforcement Officer's Personnel Files Were Not Subject to Statutory Discovery under G.S. 15A-903(d) Because They Were Not Within Possession, Custody, or Control of State and Such Files Are Not Within Statute's List of Discoverable Items

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (25 August 2000). The defendants were charged with several offenses committed in Cumberland County, including the murders of two law enforcement officers. (1) The trial judge ordered a special venire from Johnston County for the trial in Cumberland County. The court ruled that the trial judge had the inherent authority to change venue to conduct the jury selection in Johnston County. (2) The court ruled that the personnel files of one of the law enforcement officers who was a murder victim was not subject to discovery under G.S. 15A-903(d), because the files were not within the possession, custody, or control of the state and the list of discoverable items in the statute does not include personnel files. (Note: The defendant did not properly preserve an appellative argument that he had a constitutional right to discover the files for materially exculpatory evidence.)

Arrest, Search, and Confession Issues

(1) Officers Had Reasonable Suspicion to Stop Bicycle for Motor Vehicle Violation
(2) Warrantless Search and Seizure of Jail Inmate's Clothes Being Held by Jail Did Not Violate Fourth Amendment
(3) Officer's Taking Hair and Saliva Samples as Search Incident to Arrest for Murder Did Not Violate Fourth Amendment

State v. Steen, 352 N.C. 227, 536 S.E.2d 1 (13 July 2000). The defendant was convicted of first-degree murder and sentenced to death. (1) Officers responded to a call that a man was on a bicycle that was weaving on a street. Officers discovered the defendant on a bicycle on a street—weaving back and forth through heavy traffic—and stopped him. The court ruled that the officers had reasonable suspicion to stop the defendant; the defendant's dangerous operation of the bicycle constituted a motor vehicle offense (presumably, reckless driving under G.S. 20-140, which applies to a bicycle). (2) The defendant was arrested for possession of drug paraphernalia and stolen credit cards and taken to jail on February 29, 1996. His clothing was taken from him, and he was issued a standard jail jumpsuit. Under jail rules, his clothing would be returned to him when released from jail. On March 6, 1996, an officer who was investigating the defendant for a murder went to the jail and, without a search warrant, obtained the defendant's clothes to analyze them for blood and glass particles. Relying on United States v. Edwards, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974), the court ruled that the warrantless search and seizure of the defendant's clothes did not violate the Fourth Amendment. The defendant was in custody under a valid arrest, and the defendant's clothing had already been administratively taken from his possession. (3) The defendant was released from custody on March 14, 1996. He was arrested on March 16, 1996 for murder, and an officer took hair and saliva samples incident to the arrest.

Relying on State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991), the court ruled that neither a court order nor a search warrant was necessary to take the hair and saliva samples.

(1) Pretrial Motion to Suppress Is Insufficient to Preserve for Appeal Admissibility of Evidence If Defendant Did Not Object When Evidence Was Offered at Trial
(2) Officer's Asking Defendant for Biographical Information for Arrest Report After Defendant Had Asserted Right to Counsel Was Not Interrogation under *Miranda*
(3) Defendant Did Not Unambiguously Assert Right to Remain Silent under *Miranda* So Officer Did Not Violate Defendant's *Miranda* Rights By Continuing to Question Defendant

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (25 August 2000). The defendants were charged with several offenses, including the murders of two law enforcement officers. (1) The court ruled that because a pretrial motion to suppress is a type of motion in limine, a pretrial motion to suppress is insufficient to preserve for appeal the admissibility of evidence if a defendant did not object when the evidence was offered at trial. (2) After being advised of his *Miranda* rights, one of the defendants invoked his right to counsel. An officer told the defendant that he could not talk with him about the offenses because he had asserted his right to counsel, but he needed to obtain biographical and background information for the arrest report. After a conversation about biographical information and other matters, the defendant—believing (erroneously) there had been a video camera recording his killing of the law enforcement officers—asked why the officers wanted to talk about the offenses because it should have been videotaped. An officer responded that they still needed to know what happened (the officers knew there was no videotape but never indicated that fact to the defendant). The defendant then stated that he would tell the officers what had happened. The court ruled that the defendant's *Miranda* rights were not violated. Citing State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983) and other cases, the court noted that questions concerning biographical information necessary to complete the booking process that are not reasonably likely to elicit an incriminating response are not interrogation under *Miranda*. In addition, the defendant in this case initiated further discussion when he asked about the videotape, and the officer should not have believed that his answer to the question would elicit an incriminating response from the defendant. (3) During the interrogation of the other defendant about a shooting at a vehicle, the defendant said that he didn't want to say anything about it; he did not know who shot at the vehicle or he would have told the officer. The officer asked again, and the defendant stated that his codefendant shot at the vehicle. The court noted that Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), ruled that an officer is not required to stop interrogation when a defendant makes an ambiguous request for counsel, and that the Fourth Circuit in Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000) had ruled that the same rule applies when a defendant makes an ambiguous request to remain silent. The court ruled that the defendant in this case made an ambiguous request to remain silent, and the officer's continuing question did not violate the defendant's *Miranda* rights. The court stated that it was not unreasonable for the officer to believe that the defendant wanted to talk about what happened to the vehicle, because the defendant had indicated that had he known who the incident involved, he would have made a statement about it.

(1) Defendant Was Not in Custody under *Miranda* During Interaction With Polygraph Examiner
(2) Officer's Asking Defendant, Who Had Invoked Right to Counsel, Information to Complete Arrest Form Was Not Custodial Interrogation, and Defendant Later Reinitiated Interrogation, Based on Facts in This Case

State v. Brewington, 352 N.C. 489, 532 S.E.2d 496 (25 August 2000). The defendant was convicted of two counts of first-degree murder involving the murders of his grandmother and nephew. The offenses were committed with the assistance of his fiancée and a person he had hired. The victims were stabbed with knives and a fire was started in their home. (1) The defendant drove himself to the sheriff's department where he agreed to a polygraph examination by an SBI agent. The agent told him that the test was voluntary and he could leave at any time. The defendant signed a polygraph examination consent form that reaffirmed that the defendant was not in custody and was taking the examination voluntarily. The defendant was not handcuffed or restrained during at time. At the conclusion of the examination, the agent told the defendant that she did not believe he was telling the whole truth. The defendant stated that he had been present when the fire started, but blamed the fire on his nephew. The agent left the room and reported this statement to investigating officers. On her return to the room, the defendant made an additional incriminating statement. The court noted, citing Stansbury v. California, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994), that the definitive inquiry concerning custody under *Miranda* is whether there was a formal arrest or restraint on the defendant's freedom of movement of the degree associated with a formal arrest. The court ruled that the defendant was not in custody during the entire interview with the agent. (2) While investigating officers were giving the defendant his *Miranda* warnings, he stated, "I believe I need to talk to a lawyer." An officer responded, "I believe you do too." An officer then asked the defendant questions to complete the defendant's personal history arrest form: date of birth, social security number, address, height, and weight. During this process, the defendant asked the officers, "What if I know who did it?" One officer informed the defendant that he could not talk to him because he had not waived his rights. He could not say anything to the defendant and he should say nothing to him. If the defendant wanted to talk to him, he had to initiate it, and then the officer would be required to re-advise the defendant of his *Miranda* rights and obtain a waiver stating that the defendant did not wish to have an attorney. As the defendant continued to ask questions of the officers about the case, one officer explained that he had invoked his right to counsel and they could not talk with him. The defendant then indicated that he had changed his mind and wanted to talk with them. One officer again informed the defendant that he had invoked his right to counsel and any decision to talk had to be his. Again, the defendant stated that he wanted to talk. He was then given *Miranda* warnings and waived them. The court ruled, citing Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980) and State v. Ladd, 308 N.C. 272, 302 S.E.2d 164 (1983), that the officer's questions to complete the arrest form were not custodial interrogation in violation of the defendant's assertion of his right to counsel under Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). The court also ruled that the defendant reinitiated interrogation after his assertion of the right to counsel, based on the facts in this case.

Capital Case Issues

Trial Judge Erred in Not Granting Defense Counsel's Motion for Continuance in Capital Trial, Based on Facts in This Case

State v. Rogers, 352 N.C. 119, 529 S.E.2d 671 (16 June 2000). The court ruled that the trial judge erred in not granting defense counsel's motion for a continuance in a capital trial. Two lawyers were appointed to the case that involved multiple incidents in multiple locations over a two-day period for which the lawyers had only thirty-four days to prepare (see the opinion for additional facts, including another lawyer's prior involvement in representing the defendant). The court stated that it was unreasonable to expect that any lawyer, no matter his or her level of experience, could have adequately prepared to conduct a bifurcated capital trial for a case that was complex and involved many witnesses. The court concluded, citing State v. Maher, 305 N.C. 544, 290 S.E.2d 694 (1982) and other cases, that prejudice to the defendant was presumed because one cannot be certain how trial counsel might have been able to perform if they had had adequate time to prepare for trial.

(1) Victim Impact Testimony Was Properly Admitted at Capital Sentencing Hearing
(2) Prosecutor's Jury Argument Was Improper
(3) Fact That Accomplice Did Not Receive Death Sentence Was Not Mitigating Circumstance

State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (25 August 2000). The defendant pleaded guilty to first-degree murder and other offenses, a capital sentencing hearing was conducted, and he was sentenced to death. (1) The court ruled that the following victim impact testimony of the murder victim's brother was properly admitted at the capital sentencing hearing: "The impact has been, No. 1, that I've lost a confidant[e]. No. 2, that I feel like she was taken from me at a stage in our lives where we needed each other and we were still learning about life, as if a predator had come and taken one of two sibling birds out of the nest." The court ruled that this testimony was restrained, described the emotional or psychological effect of his sister's death on him, was well within the parameters of G.S. 15A-833, and was constitutional under Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) and other cases. (2) The court found parts of the prosecutor's jury argument to be improper. The court stated that the prosecutor's maligning the mental health expert's profession rather arguing the law, the evidence, and its inferences was improper. Also, the prosecutor's scatological references to a witness's testimony were improper. (3) The court ruled, citing State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982) and State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994), that an accomplice's punishment is not an aspect of the defendant's character or record and therefore is not a mitigating circumstance. Thus the trial judge properly did not instruct on the proposed mitigating circumstance that the codefendant did not receive a death sentence. [Note: *Williams*, *Ward*, and other cases have ruled that an accomplice's sentence is not a mitigating circumstance. On the other hand, in State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000), the court stated in dicta that the jury may consider an accomplice's sentence as a mitigating circumstance under the "catchall" jury instruction under G.S. 15A-2000(f)(9). However, that dicta may have been indirectly disavowed in State v. Meyer, 353 N.C. 92, 540 S.E.2d 1 (21 December 2000).]

Trial Judge Did Not Err in Excluding Testimony of Defense Mental Health Expert in Capital Sentencing Hearing, Because Defense Violated Discovery Order by Failing to Timely Provide Expert's Report to State

State v. Braxton, 352 N.C. 158, 531 S.E.2d 428 (13 July 2000). The defendant was convicted of first-degree murder and sentenced to death. The trial judge on October 14 (during jury selection) ordered the defendant to furnish the state with a copy of a defense expert report (as required by reciprocal discovery under G.S. 15A-905) within five working days of the witness's testimony. The judge told defense counsel to inform him if the deadline became onerous. The state received a fax of a report by a defense mental health expert in the evening of November 18, the day that the state had concluded its evidence at the capital sentencing hearing. Defense counsel informed the judge that it had received the report on the morning of November 18 and had not decided to call the expert as a witness until November 17, the day of the guilty verdict. According to the expert, the report was prepared in September and defense counsel had contacted her on November 17 to inform her that she would be needed as a witness and to request that the report be faxed to the state. Based on these and other facts, the trial judge prohibited the expert witness from testifying because defense counsel had violated the judge's discovery order. The court concluded that the trial judge properly exercised his inherent authority to order a report within five working days of the witness's testimony. The court also ruled that the trial judge did not err in prohibiting the expert witness's testimony. The court noted that the defendant had two other mental health experts available to testify through which to introduce mitigation evidence. The court also stated that the defendant clearly made a tactical decision not to disclose the expert's report until after the guilty verdict; therefore, the defendant cannot show that he was prejudiced by the trial judge's ruling.

Trial Judge Did Not Err in Submitting Aggravating Circumstance G.S. 15A-2000(e)(2) (Prior Capital Felony Conviction) for 1966 North Carolina First-Degree Murder Conviction Because First-Degree Murder Was Punishable By Death in 1966

State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (6 October 2000). The defendant was sentenced to death for first-degree murder. The court ruled, distinguishing State v. Bunning, 338 N.C. 483, 450 S.E.2d 462 (1994) (first-degree murder conviction in Virginia was not capital felony because death penalty was not in effect then), that the trial judge did not err in submitting aggravating circumstance G.S. 15A-2000(e)(2) (prior capital felony conviction) for a 1966 North Carolina first-degree murder conviction because the death sentence could have been imposed for first-degree murder in 1996. Although the defendant pleaded guilty in 1966 under a statute which precluded the death penalty as a punishment if the solicitor agreed to the plea and it was approved by the presiding judge, the court noted that the test for determining the existence of this aggravating circumstance is not the punishment imposed, but the punishment that may be imposed. A crime that is considered a "capital felony" under this aggravating circumstance maintains that status even if a defendant's case is not tried as a "capital case." The court stated that the defendant's plea to first-degree murder did not alter the classification of the offense as a capital felony. The court also rejected the defendant's argument that there was not a constitutional death penalty statute when the defendant entered his guilty plea because the statute was later ruled to be unconstitutional—the court stated that the ruling did not affect the validity

of the defendant's conviction of a capital crime, but merely affected the imposition of the death sentence.

(1) Defendant's Confiscated Note Indicating That Murders Were Racially Motivated Was Admissible under Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Evidence Was Sufficient to Support Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(3) Trial Judge Did Not Err in Submitting Both G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest) and G.S. 15A-2000(e)(8) (Murder Committed Against Officer Performing Official Duties)

State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (25 August 2000). Two defendants were both convicted of the first-degree murders of two law enforcement officers and sentenced to death for both murders. (1) The court ruled that a note of one of the defendants that was confiscated by an officer outside the courtroom was properly admitted against that defendant because the note indicated that the murders were racially motivated—such evidence was admissible under aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). (2) The court ruled that the evidence was sufficient to support aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel) against defendant A. Defendant B shot an officer, causing him to become incapacitated. Defendant A was therefore able to shake himself free of the officer's grasp and retrieve the officer's pistol. He then shot the officer multiple times as he lay on the ground moaning. Because the officer had the presence of mind to attempt to grab defendant A after he had been shot, this evidence was showed that the officer was aware of his fate and unable to prevent his impending death. (3) The court ruled, relying on State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), that the trial judge did not err in submitting both G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest) and G.S. 15A-2000(e)(8) (murder committed against officer performing official duties). The two circumstances were directed at distinct aspects of the charged crimes. The (e)(4) circumstance was supported by the defendants' motivation to avoid arrest for a theft of a vehicle. The (e)(8) circumstance involved the officers' official duties: one officer who stopped one of the defendants for not wearing a seat belt and the other officer who was assisting the first officer.

Prosecutor's Jury Argument at Capital Sentencing Hearing about Defendant's Future Dangerousness to Prison Personnel Was Proper

State v. Steen, 352 N.C. 227, 536 S.E.2d 1 (13 July 2000). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Richmond, 347 N.C. 412, 495 S.E.2d 677 (1998) and State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999), that the prosecutor's jury argument at the capital sentencing hearing about the defendant's future dangerousness to prison personnel was proper. A prosecutor may argue that the death penalty would specifically deter the defendant from committing future crimes. However, the court clearly indicated that a prosecutor may not, in an argument on future dangerousness, point out that a defendant may escape from prison when serving a life sentence without parole.

(1) Trial Judge Erred in Failing to Submit Nonstatutory Mitigating Circumstance That Defendant Did Not Set Out to Kill Victim When He Entered Victim's Home
(2) Trial Judge Did Not Err in Submitting Statutory Mitigating Circumstance, G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799 (13 July 2000). The defendant was convicted of first-degree murder, which he committed in April 1996, and was sentenced to death. (1) The defendant broke into a house and stole some personal property. When the victim later arrived at the house, the defendant hid in the house as she entered it and then murdered her. A portion of the defendant's statement to law enforcement officers tended to show that the defendant did not intend to kill the victim when he broke into the house. The court ruled, relying on State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994), that the trial judge erred in failing to submit the nonstatutory mitigating circumstance that the defendant did not set out to kill the victim when he entered the victim's home. (2) The defendant's prior criminal history included evidence of drug abuse and a conviction of an armed robbery committed in 1989 in which he struck the robbery victim in the head with his gun. Based on this evidence, the court ruled that the trial judge did not err in submitting the statutory mitigating circumstance, G.S. 15A-2000(f)(1) (no significant prior criminal history). The court also rejected, citing State v. Ball, 344 N.C. 290, 474 S.E.2d 345 (1996), the defendant's argument that this mitigating circumstance should not have been submitted because the court also submitted the statutory aggravating circumstance, G.S. 15A-2000(e)(3) (prior violent felony conviction).

(1) Defendant Was Entitled to Discovery under G.S. 15A-1415(f) Because Capital Case Motion for Appropriate Relief Was Pending on June 21, 1996
(2) G.S. 15A-1415(f) Does Not Permit Discovery of Attorney General Office's Files When That Office Did Not Prosecute or Participate in Prosecution of Capital Case

State v. Sexton, 352 N.C. 336, 532 S.E.2d 179 (13 July 2000). (1) The court ruled that, based on the facts in this case, the defendant's capital case motion for appropriate relief was pending on June 21, 1996—see State v. Green, 350 N.C. 400, 514 S.E.2d 724 (1999)—and therefore the defendant was entitled to discovery under G.S. 15A-1415(f). (2) The court ruled that the G.S. 15A-1415(f) does not permit the discovery of the Attorney General Office's files when that office did not prosecute or participate in the prosecution of the capital case.

Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel) When Defendant Planned Murders Although He Was Not Present During Their Commission

State v. Brewington, 352 N.C. 489, 532 S.E.2d 496 (25 August 2000). The defendant was convicted of two counts of first-degree murder involving the murders of his grandmother and nephew. The murders were committed by his fiancée and a person he had hired. Although the defendant was not present during the commission of the murders, he planned the manner in which they were to be carried out: stabbing the victims and setting fire to their home. Based on the plan, it was reasonable to infer that the deaths of one or both victims would not be instantaneous. The court ruled that there was sufficient evidence of the aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel).

Evidence

(1) Murder Victim's Testimony at Civil Domestic Violence Protective Order (50B) Hearing Was Admissible under Rule 803(3) (Then-Existing State of Mind) at Murder Trial
(2) Defendant's Objections to Testimony of Witnesses Before They Testified Were Insufficient to Preserve Appellative Review of Objections When Defendant Failed to Object During Their Testimony

State v. Thibodeaux, 352 N.C. 570, 532 S.E.2d 797 (25 August 2000). The defendant was convicted of first-degree murder of his wife, which occurred on or about April 13, 1998. The evidence showed that the defendant violently assaulted her, resulting in her death. (1) The court ruled that the trial judge did not err in admitting the murder victim's testimony (through a transcript and audio recording) at a civil domestic violence protective order (50B) hearing concerning the defendant's violent assault on her in February 1997. The evidence was properly admitted under Rule 803(3) (then-existing state of mind). (2) The court ruled that the defendant's objections to the testimony of witnesses before they testified were insufficient to preserve appellative review of the objections when the defendant failed to object during their testimony. The court ruled that the defendant's objections were similar to motions in limine, for which a defendant must object to the evidence when it is actually introduced at trial; see State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998).

(1) Testimony of Prison Officers About Events Surrounding Homicide Was Relevant in First-Degree Murder Trial and Admissible as Shorthand Statements of Fact
(2) Prosecutor's Questions of Defendant under Rule 609 Were Proper
(3) Prosecutor's Questions of Defendant under Rule 608(b) Were Proper

State v. Braxton, 352 N.C. 158, 531 S.E.2d 428 (13 July 2000). The defendant, a prison inmate, was convicted of the first-degree murder of another prison inmate. The defendant repeatedly stabbed the victim in a prison shower. (1) Several correctional officers and officials who responded to the stabbing testified at trial. Officer A testified that, at the time of the murder, he heard "shrill screaming" that sounded "like somebody is fearing for their life." Officer A also testified that the crime scene was worse than any hog killing he had ever seen. Officer B testified that he searched the defendant because defendant "looked guilty" as he came out of the shower area holding his hands in the air. Prison officials C and D testified that the defendant appeared calm and relaxed immediately following the murder, as though he had no problems or as if nothing unusual had happened. Further, official C testified that the defendant showed no remorse for killing the victim. The court ruled that this testimony was relevant to negate the defendant's claim of self-defense as well as to establish his state of mind and intent to kill. The court also ruled that this evidence was not improper opinion testimony. Instead, it was properly admitted as shorthand statements of fact. (2) The defendant testified about his prior convictions on direct examination. The court examined the prosecutor's cross-examination of the defendant under Rule 609 (see the discussion in the opinion), which included questions about the weapons the defendant had used in his robberies. The court ruled, distinguishing State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (1993), that the cross-examination was proper, considering that the defendant on direct examination had tended to minimize the seriousness of his criminal

involvement. The prosecutor's questions concerned the factual elements of the crimes and were necessary to jog the defendant's memory. (3) The defendant testified on direct examination about the living conditions he had endured in lockup and maximum security but never explained why he was confined in this manner. On cross-examination, the prosecutor questioned the defendant about the weapon possession infraction that had placed him in lockup and thus revealed that the defendant had not been mistreated by the prison system. The court ruled that the prosecutor's inquiry was proper under Rule 608(b), because it showed the defendant's character for untruthfulness in his testimony on direct examination.

Admission of Co-Defendant's Redacted Confession at Joint Trial Did Not Violate *Bruton v. United States* or *Gray v. Maryland*

State v. Brewington, 352 N.C. 489, 532 S.E.2d 496 (25 August 2000). The defendant was convicted of two counts of first-degree murder involving the murders of his grandmother and nephew. The offenses were committed with the assistance of his fiancée and a person he had hired (McKeithan). The defendant was tried jointly with McKeithan, and McKeithan's redacted confession was introduced at the joint trial. The court ruled, after discussing the facts in this case (see the detailed analysis in the opinion), that the redacted confession did not directly or indirectly identify or implicate the defendant in violation of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) or Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). See also State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (25 August 2000) (similar ruling).

Trial Judge Did Not Err in Prohibiting Defense Expert Witness from Testifying about Drug Investigation Procedures, Based on Facts in This Case

State v. Mackey, 352 N.C. 650, 535 S.E.2d 555 (6 October 2000), *affirming,* 137 N.C. App. 734, 530 S.E.2d 306 (2 May 2000). The defendant was tried and convicted of several drug offenses, including selling cocaine to a retired police officer who was operating in an unpaid, undercover capacity for a sheriff. The defendant offered to present expert testimony about the standards of undercover operations and proper investigative techniques to challenge the credibility of the retired police officer. The court stated that the proposed testimony did not address the elements of the offenses or a defense and was irrelevant. It also violated the rule prohibiting expert testimony concerning a witness's credibility; see, for example, State v. Huang, 99 N.C. App. 658, 394 S.E.2d 279 (1990). The court ruled that the trial judge did not err in prohibiting the defense expert witness from testifying, based on facts in this case.

Supreme Court Adopts Dissenting Opinion in North Carolina Court of Appeals That in Assault Trial Evidence of Prior Assault on Victim Was Properly Admitted under Rule 404(b) to Show He Committed Assault Intentionally

State v. Elliott, 352 N.C. 663, 535 S.E.2d 32 (6 October 2000), *reversing*, 137 N.C. App. 282, 528 S.E.2d 32 (4 April 2000). The court reversed the opinion of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion. The defendant was tried for two assaults (assault on a female and assault inflicting serious injury) arising from a single incident that occurred on July 17, 1997. During the trial, the victim testified about the defendant's assault of

her in 1994. The dissenting opinion in the court of appeals, relying on State v. Wilborn, 23 N.C. App. 99, 208 S.E.2d 232 (1974), stated that the 1994 assault was admissible to show the defendant's intent in committing the July 17, 1997 assault. Although the assault offenses being tried were not specific intent crimes, the state still was required to show that the assaults were committed intentionally, and the evidence of the prior assault was relevant under these circumstances.

State Has Authority under G.S. 148-76 to Subpoena Defendant's Prison Records

State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (6 October 2000). The court ruled that the state has the authority under G.S. 148-76 to subpoena a defendant's prison records. The court noted that the statute specifically makes the records available to the state, and therefore the state did not engage in prosecutorial misconduct in subpoenaing the records.

NORTH CAROLINA COURT OF APPEALS

Arrest, Search, and Confession Issues

Officer's Asking Defendant His Date of Birth During Booking Process Violated *Miranda* Because Officer Knew or Should Have Known Question Would Elicit Incriminating Response

State v. Locklear, 138 N.C. App. 549, 531 S.E.2d 853 (20 June 2000). The defendant was arrested for statutory rape under G.S. 14-27.7A(a). He was not given *Miranda* warnings. During the booking process, the officer used a form that—among other things—required the entry of the defendant's date of birth. The officer asked the defendant his date of birth, and he stated it was August 2, 1976. At trial, the officer testified—over the defendant's objection on *Miranda* grounds—about the defendant's date of birth based on the defendant's statement during the booking process. This testimony was the only evidence of the defendant's age, which is an element of the crime under G.S. 14-27.7A(a). The court noted that *Miranda* does not apply to the gathering of biographical data necessary to complete the booking process; however, *Miranda* applies if the questions are designed to elicit a response that the officer knows or should know is reasonably likely to be incriminating. The court stated that the officer, in addition to booking the defendant, was also the investigating officer concerning the defendant's alleged violation under G.S. 14-27.7A(a). The court then ruled that "[s]ince defendant's age was an essential element of the crime charged, . . . [the officer] . . . knew or should have known her question regarding defendant's date of birth would elicit an incriminating response," and therefore the defendant's rights under *Miranda* were violated and the defendant's response was inadmissible. [Note: The court's ruling is questionable. In State v. Banks, 322 N.C. 753, 370 S.E.2d 398 (1988), the supreme court ruled that the defendant's date of birth given during the booking process was routine information and was admissible without *Miranda* warnings, even if his age was an essential element of the crimes for which he was being booked. Citing *Banks* but not discussing it, the court in this case apparently would distinguish that ruling because the officer in this case was also the investigating officer. However, a defendant's date of birth is routine information that officers seek to obtain after every arrest.]

Wildlife Law Enforcement Officers Did Not Violate Fourth Amendment by Stopping Motor Vessel on Lake to Conduct Safety Inspection, Even Though Officers Did Not Have Reasonable Suspicion to Conduct Stop

State v. Pike, 139 N.C. App. 96, 532 S.E.2d 543 (18 July 2000). Wildlife law enforcement officers were patrolling Badin Lake in Stanly County at night and were stopping every vessel for a safety inspection. They saw a pontoon boat on the lake and signaled the operator to stop, which the defendant did immediately. The officers activated their take down lights, announced their presence and informed the defendant that they were going to conduct a safety check of the vessel. They did so without boarding the vessel. [After the safety inspection, the defendant was arrested for operating a motor vessel while impaired in violation of G.S. 75A-10(b1)(2).] Relying on Schenekl v. State, 996 S.W.2d 305 (Tex. Ct. App. 1999), the court ruled that the officers did not violate the Fourth Amendment by stopping the vessel, even though the officers did not have reasonable suspicion to conduct the stop. The court found that the government's interest in maintaining, for its citizens, safety on its lakes and rivers substantially outweighed this defendant's reasonable expectation of privacy in his vessel. [Note: The court did not decide whether the officers could have boarded the motor vessel without reasonable suspicion or probable cause; see Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).]

Officer Had Reasonable Suspicion to Stop Vehicle for DWI Investigation, Based on Facts in This Case

State v. Bonds, 139 N.C. App. 627, 533 S.E.2d 855 (15 August 2000). On December 27, 1997, an officer saw the defendant's vehicle stopped at an intersection. He noticed that the defendant's driver-side window was rolled down all the way, even though it was 28 degrees outside. The officer saw that the defendant had "a blank look on his face" and never turned his head to make eye contact with the officer. After the light changed, the officer followed the defendant's vehicle for about a half mile. The speed limit was 40 m.p.h., but the defendant's vehicle never exceeded 30 m.p.h. The officer stopped the vehicle to investigate the driver for DWI. The court ruled that these facts supported reasonable suspicion to stop the vehicle. The court noted that this officer had been specifically trained to look for certain indicators of intoxication, including some of the indicators in this case, and he had ten years of experience and had made several arrests using these exact indicators. Citing State v. Thompson, 296 N.C. 703, 252 S.E.2d 776 (1979), the court stated that an officer's training and experience must be considered in determining whether reasonable suspicion exists. The court noted that the National Highway Traffic Safety Administration in its publication, "The Visual Detection of DWI Motorists," states that driving ten miles per hour or more under the speed limit, plus staring ahead with fixed eyes, indicates a fifty percent chance of being legally intoxicated. The court cited the publication's website address: http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm. The court stated that this fifty percent statistic lends objective credibility to the officer's suspicions, demonstrating that his suspicions were in fact reasonable—something more than just a "hunch." The court rejected the defendant's argument that weaving, or some other form of aberrant driving, is required to satisfy the reasonable suspicion standard.

(1) Driver's Consent to Search Vehicle Allowed Officer to Order Passenger Out of Vehicle Without the Necessity of Showing Reasonable Suspicion of Criminal Activity
(2) Reasonable Suspicion Supported Frisk of Passenger

State v. Pulliam, 139 N.C. App. 437, 533 S.E.2d 280 (1 August 2000). Officers were conducting a driver's license checkpoint. The driver gave consent to a search of his vehicle. When the officer asked who his passenger was, the driver asserted that he did not know the defendant's name. The officer ordered the defendant-passenger—whom the officer knew to be a convicted drug trafficker—to get out of the vehicle. The defendant became belligerent, saying that the officer had no right to make him get out. The defendant smelled of alcohol, was loud and argumentative, and used profanity. When the defendant finally got out of the vehicle, he was unsteady on his feet and appeared to be intoxicated. The officer saw a large bulge, one inch wide and six or seven inches long, in the defendant's front pants pocket. He patted that place and discovered a utility razor knife. (1) The court ruled, relying on Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) (officer who has made traffic stop may order passengers as well as driver to exit vehicle) and other cases, that the driver's consent to search his vehicle allowed the officer to order the passenger out of vehicle without the necessity of showing reasonable suspicion of criminal activity. (2) Based on the facts set out above, the court ruled that the officer had reasonable suspicion that the defendant was armed and dangerous to justify the frisk.

Reasonable Suspicion Existed to Stop Vehicle in Area Where Recent Break-In Had Occurred

State v. Covington, 138 N.C. App. 688, 532 S.E.2d 221 (5 July 2000). At approximately 3:00 a.m. on December 23, 1996, two Asheboro police officers received a call reporting that two males had broken into an apartment building in Asheboro and were leaving the apartment building heading toward Morgan Avenue. The officers drove to an intersection about 300 yards from the reported break-in and separated. Officer A went to the apartment building and officer B remained at the intersection. Officer A ordered officer B to stop any pedestrians or vehicles entering the area. Two vehicles entered the area, and officer B stopped them both by waving his flashlight. Officer B asked the driver of the first vehicle for his license, spoke with the driver and passengers briefly and allowed them to proceed. The defendant's vehicle approached the intersection next, and officer B again waved his flashlight. The defendant stopped and rolled down his window. Officer B explained that he was investigating a possible break-in in the area and was stopping all pedestrians and vehicles as part of the investigation. Without being asked to do so by officer B, the defendant got out of his vehicle, staggering and talking about what he would do if someone had broken into his house. He was eventually arrested for DWI. The court ruled, citing State v. Tillett, 50 N.C. App. 520, 274 S.E.2d 361 (1981) and other cases, that officer B had reasonable suspicion to stop the defendant's vehicle, based on the facts in this case. The court stated that it was reasonable for officer B to stop and detain the defendant briefly to ascertain his identity and his possible involvement in criminal activity or to warn him as a resident.

Contemnor's Assertion of Fifth Amendment and Refusal to Testify in Civil Contempt Proceeding Was Abandonment of Her Defense to Contempt Charge

McKillop v. Onslow County, 139 N.C. App. 53, 532 S.E.2d 594 (18 July 2000). McKillop was ordered to comply with a county ordinance regulating adult sexually-oriented businesses. A show cause hearing was later held to determine whether she should be held in civil contempt. After the county presented evidence, she refused to present evidence on her behalf on the Fifth Amendment ground that she might incriminate herself in a pending criminal case. The court ruled, relying on Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993) and Gray v. Hoover, 94 N.C. App. 724, 381 S.E.2d 472 (1989), that her assertion of the Fifth Amendment was an abandonment of her defense to the contempt charge.

Trial Judge Did Not Err in Dismissing Plaintiff's Civil Action When Plaintiff Asserted Fifth Amendment During Deposition, Based on Facts in This Case

Sugg v. Field, 139 N.C. App. 160, 532 S.E.2d 843 (18 July 2000). Plaintiff brought a civil action against defendants for various torts. During the defendants' deposition of the plaintiff, the plaintiff asserted the Fifth Amendment and refused to answer questions on matters that were relevant and material to his claims. The trial judge ruled that the plaintiff's refusal to provide the information was prejudicial to the rights of the defendant and their ability to defend themselves, and the judge dismissed the civil action. The court ruled, relying on Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996), that the judge did not err in dismissing the civil action.

Criminal Offenses and Procedure

Defendant's Conduct Resulted in Forfeiture of His Right to Counsel, and Trial Judge Was Not Required to Make Determination Under G.S. 15A-1242 Before Requiring Him to Proceed Pro Se, Based on Facts in This Case

State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66 (20 June 2000). The defendant was arrested for armed robbery on January 4, 1997. He appeared in district court on January 7, 1997, and was appointed an assistant public defender. In February 1997, the defendant's family retained a private lawyer. On the defendant's request, the private lawyer made a motion to withdraw that was granted on August 26, 1997. On September 9, 1997, the public defender was appointed as defendant's counsel. On December 12, 1997, a private attorney (Duncan) filed a notice of appearance as the defendant's counsel. The case was set for trial on February 16, 1998; a judge denied the defendant's motion for a continuance from that trial setting. On February 16, 1998, the defendant appeared with Duncan and again moved for a continuance. Duncan stated that the defendant no longer wished to be represented by him. The judge denied Duncan's motion to withdraw. Duncan advised the judge that he was prepared to proceed, but that the defendant's witnesses had refused to meet with him. The judge denied the motion for a continuance and advised the defendant that he had a right to represent himself, to proceed with Duncan, or to retain another lawyer, but he was not entitled to the appointment of another lawyer. The following day, the defendant appeared with Duncan, repeated his objection to Duncan's representation, and disrupted the court with profanity, resulting in a 30-day jail sentence for contempt. On February 23, 1998, Duncan again moved to withdraw as counsel at

the defendant's request and, when the motion was denied, the defendant again became disruptive and was again sentenced to 30 days' imprisonment for contempt. The judge set the defendant's trial for February 25, 1998. On that date, before jury selection began the defendant's girlfriend cursed Duncan and the defendant threw water in Duncan's face. Both the defendant and his girlfriend were found in contempt and each were sentenced to 30 days' imprisonment. The defendant was also charged with simple assault. The judge permitted Duncan to withdraw as counsel and continued the defendant's trial until March 30, 1998. The judge said the defendant would have an opportunity to hire an attorney, but he would not have an attorney appointed for him. On April 6, 1998, the defendant appeared before a judge. An attorney (Frazier) also appeared and informed the judge that he had been appointed to represent the defendant in the simple assault case and the defendant required representation in the armed robbery case. The judge refused to appoint Frazier as the defendant's counsel, but permitted him to serve as standby counsel. At the defendant's trial, Frazier made opening and closing statements, examined and cross-examined witnesses, and made motions and objections. The defendant was convicted of armed robbery.

The defendant argued on appeal that the trial judge erred in failing to conduct the inquiry under G.S. 15A-1242 before requiring him to proceed pro se. The court quoted from State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977) that "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial." The court stated the correct term to use in this case is the "forfeiture" of the right to counsel, not a waiver of that right. The court ruled, citing cases from other jurisdictions, that the facts in this case showed that the defendant, by his conduct, forfeited his right to counsel and the trial judge was not required to determine, under G.S. 15A-1242, that the defendant had knowingly, understandingly, and voluntarily waived this right before requiring him to proceed pro se.

(1) Habitual Misdemeanor Assault (G.S. 14-33.2) Is Substantive Felony Offense and May Be Used as Felony Offense to Establish Habitual Felon Status
(2) No Ex Post Facto Violation in Using Offenses to Prove Habitual Misdemeanor Assault That Occurred Before Enactment of Statute Creating Habitual Misdemeanor Assault

State v. Smith, 139 N.C. App. 209, 533 S.E.2d 518 (1 August 2000). The defendant was convicted of two counts of habitual misdemeanor assault and was sentenced as a habitual felon. (1) The court ruled, relying on State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994) (habitual DWI is a substantive felony offense), that habitual misdemeanor assault is a substantive felony offense, and a conviction of that offense may be used as one of the three felonies to establish habitual felon status. (2) The court ruled, relying on State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985) and State v. Mason, 126 N.C. App. 318, 488 S.E.2d 818 (1997), that there is no ex post facto violation in using offenses to prove habitual misdemeanor assault that occurred before the enactment of the statute creating the habitual misdemeanor assault offense.

Double Jeopardy Clause Barred Prosecution for Domestic Criminal Trespass after Finding of Criminal Contempt for Same Conduct, Based on Facts in This Case

State v. Dye, 139 N.C. App. 148, 532 S.E.2d 574 (18 July 2000). The defendant and her husband divorced and several years later entered into a civil consent order that the defendant "shall not

come to the residence of [the husband]." The defendant later came to the husband's residence. After a hearing, a judge found the defendant in criminal contempt "for going to the residence of [the husband]." Thereafter, the defendant was prosecuted for and convicted of domestic criminal trespass based on the same incident that had resulted in the criminal contempt finding. The court ruled, relying on its double jeopardy analysis in State v. Gilley, 135 N.C. App. 519, 522 S.E.2d 111 (1999) (there must be a comparison of the elements of the offense actually considered to have been violated in the criminal contempt proceeding with the elements of the substantive offense), that double jeopardy barred the prosecution for domestic criminal trespass. The court ruled that the phrase "shall not come to the residence" in the consent order was equivalent to the domestic criminal trespass element of "enter[ing] . . . upon the premises" for purposes of double jeopardy. The court distinguished its ruling in *Gilley* (contempt for violating order that defendant "stay away" from residence did not bar later prosecution for domestic criminal trespass).

(1) G.S. 15A-534.1 (Only Judge May Set Pretrial Release Conditions Within 48 Hours After Arrest for Domestic Violence Crime) Is Not Facially Violative of North Carolina Constitution's Due Process and Double Jeopardy Provisions
(2) G.S. 15A-534.1, As Applied in This Case, Did Not Violate Defendant's Federal or State Constitutional Rights
(3) Judge Who Makes Determinations under G.S. 15A-534.1 Is Not Required to Make Written Findings of Fact

State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94 (29 August 2000). The defendant was convicted of second-degree kidnapping and assault on a female. The defendant was arrested on September 27, 1997, for assault on a female and released on bond. He was arrested at 9:14 p.m., October 30, 1997, for second-degree kidnapping, which was based on the same incident as the assault on a female charge. The magistrate erroneously believed that the kidnapping charge was subject to G.S. 15A-534.1 (only judge may set pretrial release conditions within 48 hours after arrest for domestic violence crime) and ordered him held without bond until 9:00 a.m. the next day. The defendant was brought before the judge the next morning, who authorized the defendant's release at 2:00 p.m. that day on an unsecured bond. (1) The court ruled that G.S. 15A-534.1 is not facially violative of the North Carolina Constitution's due process and double jeopardy provisions. See State v. Thompson, 349 N.C. 483, 508 S.E.2d 277 (1998) (G.S. 15A-534.1 does not facially violate federal constitutional due process or double jeopardy provisions). (2) The court ruled that G.S. 15A-534.1, as applied in this case (albeit erroneously applied), did not violate the defendant's federal or state constitutional rights. The defendant was brought before the judge at the first opportunity. Also, the judge's delay of the defendant's release until 2:00 p.m. that same day (approximately five hours from when the judge set that condition) under G.S. 15A-534.1(a) was not an unconstitutional application of that statute. The court also ruled that the detention until the next day to appear before the judge and the five-hour delayed release by the judge did not bar on double jeopardy grounds the later kidnapping prosecution. (3) The court ruled that a judge who makes determinations under G.S. 15A-534.1 is not required to make written findings of fact.

(1) Trial Judge Did Not Err in Prohibiting Defense Counsel in Jury Argument of Substantive Felonies from Informing Jury of Punishment If Defendant Was Later Found to Be Habitual Felon
(2) When Defendant Is Found to Be Habitual Felon, Judge Must Sentence Defendant for Class C Felony for Substantive Felony

State v. Wilson, 139 N.C. App. 544, 533 S.E.2d 865 (15 August 2000). The defendant was convicted of felonious breaking or entering and felonious larceny and then found to be a habitual felon. (1) The court ruled that the trial judge did not err in prohibiting defense counsel in jury argument during the trial of felonious breaking or entering and felonious larceny from informing the jury of the punishment if the defendant was later found to be a habitual felon. The court noted, citing State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977), *aff'd*, 294 N.C. 311, 240 S.E.2d 628 (1978), that a defendant is only permitted to inform the jury of the punishment that may be imposed on the conviction of the crime for which he or she is being tried. The court also noted that the jury is not to be informed of the habitual felon indictment or procedure unless and until the defendant has been convicted of the substantive felonies. (2) The court ruled that the trial judge erroneously entered judgments for the convictions of felonious breaking or entering and felonious larceny as Class I felonies and then a separate judgment for habitual felon. The judge must enter only one judgment: Class C felonies for both convictions. Habitual felon is a status, not a crime, and no sentence should be entered for the finding of habitual felon status.

(1) Insufficient Evidence of Attempted First-Degree Rape
(2) No Plain Error, in Violation of Attorney-Client Privilege, When Defendant's Former Attorney Testified for State About Name of Defendant When He Represented Him

State v. Walker, 139 N.C. App. 512, 533 S.E.2d 858 (15 August 2000). The defendant was convicted of attempted first-degree rape and felonious assault involving an attack on a female victim in a women's restroom. He was also found to be a habitual felon. (1) The defendant threw the victim down on the restroom floor. While the victim was on her back, the defendant was straddling and laying on her. While she tried to scream, he kept hitting her in her head and face with his left hand. She eventually stopped screaming and asked him what he wanted. He told her that he wanted her to roll over onto her stomach. The defendant's hands moved from her head area. She then felt them touch her side. The victim began screaming again. The defendant got up and ran away. Relying on State v. Brayboy, 105 N.C. App. 370, 413 S.E.2d 590 (1992) and State v. Nicholson, 99 N.C. App. 143, 392 S.E.2d 748 (1990), the court ruled that there was insufficient evidence to support the attempted first-degree rape conviction. The court stated that the only suggestion of a sexual component in the defendant's attack was the defendant's persistent attempts to have the victim roll onto her stomach. The defendant's behavior permits speculation about why he wanted the victim prone rather than supine or on her side. However, this behavior is not substantial evidence that the defendant had an intent to gratify his passion on the victim despite her resistance. (2) During the trial of the substantive offenses—in which the defendant was charged under the name "Clarence Lee Walker"—the defendant admitted that he had a prior conviction under the name "Clarence Marshall." In the habitual felon hearing, the state called the defendant's former attorney for that conviction to testify that the defendant had been convicted under the name "Clarence Marshall." Although the court suggested another manner by which the prosecutor could have offered the testimony of the former attorney, the

court did not find a plain error violation of the attorney-client privilege in admitting this limited testimony.

G.S. 14-208.11, Requiring Sex Offender to Notify Sheriff of Change of Address, Was Unconstitutionally Applied to Defendant, An Adjudicated Incompetent, Based on Facts in This Case

State v. Young, 140 N.C. App. 1, 535 S.E.2d 380 (5 September 2000). The court ruled that G.S. 14-208.11, requiring a sex offender to notify the appropriate sheriff of a change of a address, was unconstitutionally applied to the defendant, an adjudicated incompetent, based on the facts in this case.

Restraint of Victim Through Fraudulent Representations Was Independent of Rape to Support Conviction of Second-Degree Kidnapping

State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614 (3 October 2000). The defendant was convicted of second-degree rape, second-degree kidnapping, and other offenses. The court noted that the unlawful restraint of the victim must be an act independent of the intended felony to support a kidnapping conviction—see State v. Mebane, 106 N.C. App. 516, 418 S.E.2d 245 (1992). However, the requisite restraint need not be accomplished by physical force, but may be accomplished by trickery or fraudulent representations—see State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971). In this case, the evidence supported a reasonable inference that the defendant fraudulently coerced the victim into remaining in the car so he could drive to a secluded place, get high on marijuana, and then sexually assault her. The court ruled that this evidence supported the defendant's second-degree kidnapping conviction.

Defendant Was Properly Convicted of First-Degree Burglary When Victim Had Exclusive Possession of Residence, Even Though Defendant Had Paid Rent and Recently Lived There

State v. Blyther, 138 N.C. App. 443, 531 S.E.2d 855 (20 June 2000). The defendant was convicted of first-degree murder and first-degree burglary. The defendant and his girlfriend moved into his grandmother's house and paid rent to her. However, one night the grandmother told them that she did not want them to stay there any more because of their use of drugs. A few days later, the defendant broke and entered his grandmother's house and murdered her. The court, relying on State v. Harold, 312 N.C. 787, 325 S.E.2d 219 (1985), State v. Singletary, 344 N.C. 95, 472 S.E.2d 895 (1996), and State v. Cox, 73 N.C. App. 432, 326 S.E.2d 100 (1985), rejected the defendant's argument that he cannot be guilty of burglarizing his house and ruled that he was properly convicted of burglary. The grandmother had exclusive possession of her residence when the defendant broke and entered it, and she had previously refused to allow the defendant to enter.

Sufficient Evidence of Intent to Permanently Deprive Armed Robbery Victim of Her Car, Even Though Defendant Abandoned Car a Short Distance Away, Based on Facts in This Case

State v. Hill, 139 N.C. App. 471, 534 S.E.2d 606 (15 August 2000). The defendant was convicted of armed robbery, first-degree kidnapping, and several sexual assaults. The defendant accosted the victim with a gun as she was about to get into her car, forced her to drive elsewhere, sexually assaulted her, and then forced her out of the car and drove a short distance away and abandoned the car. The court ruled that this evidence was sufficient to prove the element of intent to permanently deprive the victim of her car. The court noted the statement in State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966), that a person takes property with the intent to steal (animus furandi) when the person, in order to serve a temporary purpose, takes the property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances that makes it unlikely that the owner will ever recover his or her property and that disclose the person's total indifference to the owner's rights.

Purse Snatched from Victim's Shoulder Was Insufficient Evidence of Common Law Robbery, Based on Facts in This Case

State v. Robertson, 138 N.C. App. 506, 531 S.E.2d 490 (20 June 2000). The defendant and the victim were involved in a relationship. While they were on a bus, the defendant came up to her and stated that he had heard that she was engaged, to which she responded, "Yes." The defendant then snatched her purse from her shoulder, got off the bus, and ran. The court ruled that the defendant used neither actual nor constructive force to obtain possession of the victim's purse and therefore did not commit common law robbery. Relying on State v. John, 50 N.C. 163 (1857), the court stated that the victim must be induced to part with her property as a result of violence or the threat of violence. It is insufficient if the force was only used to obtain possession of the property.

(1) Insufficient Evidence to Support Conviction of Maintaining Dwelling to Keep or Sell Controlled Substances [G.S. 90-108(a)(7)]
(2) Sufficient Evidence to Prove Defendant's Constructive Possession of Marijuana
(3) Habitual Felon Indictment Was Valid Because Erroneous Allegation About Principal Felony Was Surplusage

State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (3 October 2000). The defendant was convicted of maintaining a dwelling to keep or sell controlled substances and possession of marijuana with intent to sell and deliver, and then was adjudicated a habitual felon and sentenced accordingly. When officers executed a search warrant for the dwelling, only the defendant was inside. He tried to flee from the officers. The officers found marijuana on his person and in the dwelling, and they also found drug paraphernalia there. (1) The court ruled that there was insufficient evidence to support a conviction of maintaining a dwelling to keep or sell controlled substances [G.S. 90-108(a)(7)]. The defendant was seen in and out of the dwelling 8-10 times over 2-3 days. Nobody else was seen entering the premises during this time. Men's clothing was found in one closet in the dwelling, although there was no evidence that the clothes belonged to the defendant. A law enforcement officer testified that he believed that the defendant lived at the

dwelling, but he did not offer a basis for that opinion and had not investigated to whom the dwelling was rented or who paid the utilities and telephone bills. (2) The court ruled that there was sufficient evidence to prove that the defendant had actual and constructive possession of marijuana to support the conviction of possession with intent to sell and deliver. The court noted that the defendant was found in the dwelling, he was seen there on several other occasions, he attempted to flee from the officers, 7.5 grams of marijuana were found on his person, and about 72.7 grams of marijuana were found in and about the house. (3) The habitual felon indictment alleged the three felony convictions properly but also alleged that the principal felony as felonious possession of marijuana, which was dismissed at trial. Because there is no requirement that the habitual felon indictment refer to the principal felony or felonies [State v. Patton, 342 N.C. 633, 466 S.E.2d 708 (1996)], the court ruled that the allegation of the principal felony was surplusage, it was not prejudicial to the defendant (he had proper notice that he was charged with being a habitual felon), and therefore the habitual felon indictment was valid. On the issue of surplusage in indictments, the court cited State v. Westbrooks, 345 N.C. 43, 478 S.E.2d 483 (1996) and State v. Sisk, 123 N.C. App. 361, 473 S.E.2d 348 (1996).

Without Deciding Whether Ruling in *Old Chief v. United States* Applies to Prosecution under G.S. 14-415.1, Court Finds No Plain Error in Trial Judge's Rejecting Defendant's Tendered Stipulation of Prior Felony Conviction Constituting Element of Offense

State v. Jackson, 139 N.C. App. 721, 535 S.E.2d 48 (29 August 2000), *reversed on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (8 June 2001). The defendant was convicted of possession of firearm by convicted felon, carrying a concealed weapon, and resisting a public officer. Without deciding whether the ruling in Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) (trial judge abused discretion in federal firearm prosecution in not accepting defendant's tendered stipulation to prior conviction, based on facts in that case) applies to a prosecution under G.S. 14-415.1, the court found no plain error in the trial judge's rejecting the defendant's tendered stipulation of a prior felony conviction constituting an element of this offense (see the discussion in the opinion).

Trial Judge Erred under Federal Due Process Clause in Failing to Conduct Competency Hearing Even Though Defendant Did Not Request Hearing, Based on Facts in This Case

State v. McRae, 139 N.C. App. 387, 533 S.E.2d 557 (1 August 2000). The defendant's first-degree murder trial ended in a mistrial. He was convicted at his second trial. Before his first trial, the defendant underwent six psychiatric evaluations at Dorothea Dix Hospital to determine his competency. In addition, the trial judge held three separate hearings before the defendant's first trial at which he was found incompetent to stand trial (but he eventually was found competent to stand trial). After the defendant's first trial, he underwent one more psychiatric evaluation; however, the trial judge did not conduct another hearing on the defendant's competency to stand trial. The court stated it need not decide in this case whether G.S. 15A-1002 required the trial judge to conduct a competency hearing even though the defendant did not request the hearing. Instead, the court ruled, relying on Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977), and other cases, that the trial judge's failure to conduct a competency hearing under the circumstances present in this case (see

the discussion in the opinion) violated the defendant's federal due process rights. The trial judge had a constitutional duty in this case to conduct a hearing on his own motion.

Trial Judge Did Not Err in Failing to Conduct In-Camera Review of Victim's Medical Records for Materially Exculpatory Information, Based on Defendant's Request in This Case

State v. Thompson, 139 N.C. App. 299, 533 S.E.2d 834 (1 August 2000). The defendant was tried and convicted of several child sexual assaults. The court ruled that the trial did not err in failing to conduct an in-camera review of the victim's medical records for materially exculpatory information, based on the defendant's request in this case. The defendant's counsel admitted to the trial judge, "[W]e are not specifically aware of any basis to say that there is exculpatory information there." The court stated that just because a defendant asks for an in-camera inspection does not automatically entitle a defendant to one. Citing State v. Phillips, 328 N.C. 1, 399 S.E.2d 293 (1991), the court noted that a defendant still must demonstrate that the evidence sought to be disclosed might be materially favorable to his or her defense. The court stated that although it might be a circular impossibility to ask a defendant to affirmatively establish that evidence not in his or her possession is material, a trial judge may require a defendant to at least have a substantial basis for believing such evidence is material. Otherwise, the court added, a defendant would be able to waste the time and resources of the judicial system by "forcing unwarranted fishing expeditions."

Defendant's Guilty Plea under *North Carolina v. Alford* Did Not Excuse Compliance with Probation Condition That He Complete Sex Offender Program in Which He Had to Admit to What He Had Done

State v. Alston, 139 N.C. App. 787, 534 S.E.2d 666 (29 August 2000). The court ruled, citing cases from other jurisdictions, that the defendant's guilty plea under North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (defendant may plead guilty without admitting commission of crime), did not excuse compliance with a probation condition that he successfully complete a sex offender program in which he had to admit to what he had done. Thus, the defendant's probationary sentence was properly revoked, based on the facts in this case. [Note: The court noted that other legal issues about this plea were not raised and therefore were not before the court. See the opinion for these issues.]

Trial Judge Erred in Failing to Provide Lawyer Summary Opportunity to Respond Before Holding Lawyer in Direct Criminal Contempt

Peaches v. Payne, 139 N.C. App. 580, 533 S.E.2d 851 (15 August 2000). The court ruled that, based on the facts in this case—holding a lawyer in direct criminal contempt and ordering him into custody—the trial judge erred in failing to prove a lawyer a summary opportunity to respond under G.S. 5A-14(b).

(1) Error in Defendant's Name on Verdict Sheet Was Not Prejudicial, Based on Facts in This Case
(2) Juror's Expression of Doubt About Verdict After Jurors Had Been Properly Polled Could Not Impeach Verdict, Based on Facts in This Case

State v. Gilbert, 139 N.C. App. 657, 535 S.E.2d 94 (29 August 2000). The defendant was convicted of second-degree kidnapping and assault on a female. (1) The jury returned its verdict on a verdict sheet captioned in the name of a different person than the defendant's. The court noted that the verdict sheet listed the proper file number for the case, and the proper charges listed were consistent with the evidence presented at trial and with the judge's instructions. The transcript and exhibits correctly named the defendant. After the verdict was returned, the jury was polled, and each juror affirmed his or her vote that the defendant was guilty. The court ruled, based on these facts, that the error in the defendant's name on the verdict sheet was not prejudicial. (2) After the error in the verdict sheet had been discovered, the trial judge reconvened the jury the next day to have the foreman sign a corrected verdict sheet and to allow the other jurors to review the sheet. [Note: As a result of the ruling in (1) above, this procedure was unnecessary.] While the form was being circulated to the jurors, one juror said, "I find myself having reasonable doubt about the verdict we passed. Is it too late to say that since we're reviewing this now?" The trial judge told her it was too late. The court upheld the trial judge. The court ruled, citing State v. Black, 328 N.C. 191, 400 S.E.2d 398 (1991), that a juror's post-conviction doubts about a verdict are insufficient to impeach the verdict.

Anonymous Phone Call to Defense Lawyer's Office about Alleged Juror Misconduct Did Not Require Judge to Question Juror, Based on Facts in This Case

State v. Aldridge, 139 N.C. App. 706, 534 S.E.2d 629 (29 August 2000). The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. During the trial, the defendant's lawyer informed the trial judge that a person (who reluctantly, when asked her name, said she was "Tina") had called his office and spoke with his secretary. The caller said that a particular juror (giving her name) had been talking about the case with her mother-in-law, who works with "Tina." The juror told her mother-in-law, on the day the juror was chosen, that she thought the defendant was guilty just by the look on his face. Based on these facts, the trial judge rejected the request by the defendant's lawyer to inquire about this juror's alleged misconduct. The court noted that an inquiry into alleged juror misconduct is not always required, especially then the allegation is nebulous or the when the witness did not overhear the juror or third party talk about the case; the court cited State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985). The court ruled, based on the facts in this case, the trial judge did not abuse his discretion in not inquiring about the alleged juror misconduct.

Trial Judge Did Not Abuse Discretion in Limiting Defense Questioning of Prospective Jurors, Based on Facts in This Case

State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566 (19 September 2000). The defendant was tried and convicted of first-degree murder and felonious assault. The defendant shot and killed one victim and shot and seriously wounded another victim. The trial judge sustained the state's objection to a defense counsel's question of a prospective juror about the types of hobbies,

television programs, and books she enjoyed. The defense counsel was permitted to ask the prospective juror whether she read literature involving crime, law enforcement officers, books written by John Gresham, and whether she had any particular interest in law enforcement or crime in general. The trial judge sustained the state's objections to defense counsel's questions of a prospective juror whether she was opposed to citizens owning and possessing firearms and whether she had any prejudicial feelings about the use or possession of firearms. The defense counsel was permitted to ask whether any of the panel of prospective jurors were members of any anti-gun organizations. The trial judge sustained the state's objection to a question of the panel whether any of them felt that drinking or using alcohol was a sin or evil thing to do. The defense counsel was permitted to ask the panel whether any believed that their decision about how they received evidence and how they might interpret testimony would be affected if there were evidence that the defendant had consumed some type of alcoholic beverage. The court ruled, citing State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980) and State v. Leroux, 326 N.C. 368, 390 S.E.2d 314 (1990), that the trial judge did not abuse his discretion in restricting defense counsel's questioning of prospective jurors in this case.

(1) Trial Court Had Authority Out-of-Term to Correct Clerical Error in Crediting Time Served Awaiting Trial
(2) Defendant May Not Receive Credit Against Sentence of Imprisonment for Time Spent under Electronic House Arrest Before Trial

State v. Jarman, 140 N.C. App. 198, 535 S.E.2d 875 (3 October 2000). The defendant spent time under electronic house arrest awaiting trial. The judgment entered for her convictions gave her no credit for time served awaiting trial. After she entered the prison system, she requested credit. A court clerk requested the sheriff's department to determine whether the defendant had spent time in custody awaiting trial. Based on information she received, she prepared an order crediting the defendant with 211 days. This credit included time spent under electronic house arrest. The trial court signed the order and the defendant was released from prison shortly thereafter. The district attorney's office learned that the defendant was no longer in prison and filed a motion to correct the pretrial credit calculation. The court held a hearing, struck the days spent under electronic house arrest from the pretrial credit calculation, and ordered the defendant's return to prison to serve the remaining term of her active sentence. (1) The court ruled that a trial court has the authority to correct a "clerical error," and the judge's action in signing the order prepared by the court clerk giving credit for time served was a clerical error resulting from inaccurate information inadvertently provided by the court clerk. Thus the trial court had the inherent authority to issue an order to correct the clerical error even though the term of court had expired. (2) The court ruled that house arrest while awaiting trial, whether or not accompanied by electronic monitoring, does not constitute confinement in a state or local facility and does not qualify as time that may be credited against a defendant's sentence under G.S. 15-196.1.

Evidence

Defendant's Prior Traffic Convictions Were Properly Admitted Under Rule 404(b) to Prove Malice in Second-Degree Vehicular Murder Prosecution

State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861 (20 June 2000). The defendant was convicted of two counts of second-degree murder. A trooper clocked the defendant traveling 77 m.p.h. in a 55 m.p.h. zone. The defendant failed to stop when the trooper activated his blue light and siren, and a 16.7 mile chase ensued (with the defendant traveling 90-95 m.p.h.). After running a stop sign and a red stop light to pass stopped traffic, the defendant then went through an intersection at 80-85 m.p.h. and struck a truck, killing its two passengers. A test of the defendant's blood revealed a 0.15 alcohol concentration. The court concluded, relying on State v. Grice, 131 N.C. App. 48, 505 S.E.2d 166 (1998) and State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (2000), that the trial judge did not err in admitting evidence of the defendant's prior traffic convictions (occurring within eight years before the accident) under Rule 404(b) to prove malice: reckless driving; operating an uninsured motor vehicle; speeding violations; failing to possess license and registration; a safety belt violation; operating vehicle with signs on windshield; driving while license revoked; and passing on the crest of a hill. In addition, evidence was admitted concerning the revocation of the defendant's driver's license by the Virginia Department of Motor Vehicles based on its determination that the defendant was a habitual offender.

Evidence of Rapes of Other Women Was Admissible in Rape Trial under Rule 404(b) to Show Common Plan or Scheme, But Was Not Admissible under Rule 404(b) to Show Lack of Consent, Based on Facts in This Case

State v. Harris, 140 N.C. App. 208, 535 S.E.2d 614 (3 October 2000). The defendant was convicted of the rape of A, which was committed on July 24, 1996. The state offered evidence of two prior rape convictions through the testimony of victims B and C, who each testified to being raped by the defendant in 1991 and 1994, respectively. The court ruled that the testimony of victims B and C was admissible under Rule 404(b) to show a common plan or scheme. The defendant displayed similar behavior in the rape being tried compared with the two prior rapes. He befriended the women, took them to a secluded place, pinned the women down, became aggressive with them, sexually assaulted and raped them, and afterwards acted as if nothing had happened. The two- and five-year time spans between the prior rapes and the rape being tried were not remote, especially since the defendant spent some of that time in prison. The court ruled, however, that this evidence was not admissible under Rule 404(b) to show the victim's lack of consent—the court relied on State v. Bailey, 80 N.C. App. 678, 343 S.E.2d 434 (1986) and State v. Pace, 51 N.C. App. 79, 275 S.E.2d 254 (1981). The court ruled that because the evidence was admissible for a proper purpose (common plan or scheme), the trial judge's error in admitting that same evidence for an improper purpose (lack of consent) was not prejudicial to the defendant.

(1) Defendant's Criminal Conduct Committed after Burglary Being Tried Was Admissible under Rule 404(b) to Show Intent and Motive for Committing Burglary
(2) Trial Judge Erred in Instructing on Defendant's Flight When Instruction Was Not Supported by Evidence

State v. Hutchinson, 139 N.C. App. 132, 532 S.E.2d 569 (18 July 2000). The defendant was convicted of first-degree burglary committed on March 20, 1997. There was evidence that the defendant was looking for money to buy crack cocaine. (1) The trial judge admitted under Rule 404(b) statements made by the defendant to a detective on May 20 and 21, 1997 in which he admitted involvement in (i) shoplifting a vacuum cleaner from a department store on April 25, 1997; (ii) breaking and entering and larceny from a business on May 12, 1997, and (iii) a car theft on May 21, 1997. In addition, the defendant told the detective that he had used some of the proceeds from the sale of stolen property to buy drugs. The court ruled that the trial judge did not err in admitting this evidence under Rule 404(b) to show whether the defendant possessed the intent and motive for the burglary being tried. (2) The court ruled that there was insufficient evidence to support the trial judge's jury instruction on the defendant's flight. The defendant remained on the back porch of the residence after being confronted by one of the burglary victims. Even after being told that the police had been called, the defendant walked away but did not attempt to hide or flee. When the police arrived, the defendant did not attempt to avoid them.

State Was Improperly Allowed to Introduce Evidence under Rule 404(b) Because (1) Defendant Had Been Acquitted of Offense, and (2) "Absence of Mistake" Reason in Rule 404(b) Was Inapplicable

State v. Fluker, 139 N.C. App. 768, 535 S.E.2d 68 (29 August 2000). The defendant was convicted of misdemeanor larceny of various items from a J.C. Penney department store. The defendant's defense was that she was going to the store to exchange these items. The trial judge permitted the state to introduce evidence of the defendant's alleged prior theft (two years ago) of items from a Hecht's department store under Rule 404(b) to show the defendant's "absence of mistake" in committing the offense being tried. The court ruled that the state was improperly allowed (for two independent reasons) to introduce this evidence under Rule 404(b). (1) The defendant had been found not guilty of the alleged theft from Hecht's—see State v. Scott, 331 N.C. 39, 413 S.E.2d 787 (1992). (2) The "absence of mistake" reason in Rule 404(b) refers to the *defendant's* absence of mistake, not the *state's* absence of mistake in prosecuting a defendant. In this case, the defendant did not assert that she made a mistake, but in fact lawfully possessed the items. Thus, the state could not offer this evidence under "absence of mistake" in Rule 404(b). The court cited United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996) and other cases.

Officer's Testimony in DWI Trial about Habit in Running Simulator Test Was Sufficient under Rule 406 to Prove that Simulator Test Was Run

State v. Tappe, 139 N.C. App. 33, 533 S.E.2d 262 (18 July 2000). The defendant, a Virginia resident, was arrested for DWI in 1988 but was not tried until 1998 (he apparently returned for trial in North Carolina when he was unable to renew his Virginia driver's license because of the pending DWI in North Carolina). Evidence was admitted at the DWI trial that the defendant registered a 0.34 alcohol concentration on the Breathalyzer 900 instrument. The defendant

argued on appeal that the test result was inadmissible because the state failed to show that a simulator test had been run on the instrument. Due to the destruction of pertinent documents in accordance with State Highway Patrol standard procedures in the ten-year period from the defendant's arrest to his trial, the arresting officer and chemical test analyst were unable to recall the specific details surrounding the defendant's Breathalyzer and simulator tests. However, the trial judge allowed the chemical analyst to testify about the customary and required procedures he followed in administering Breathalyzer tests, including performance of a simulator test before obtaining a breath sample. The court ruled, relying on Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993) and other cases, that the chemical analyst's testimony was sufficient under evidence Rule 406 ("[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit") to prove that the simulator test was properly run in compliance with G.S. 20-139.1(b).

Officer's Testimony about Murder Victim's Statement to Another Person, Who Did Not Testify, Was Admissible under Two Rules of Evidence, Rule 803(3) and Rule 804(b)(5)

State v. Parker, 140 N.C. App. 169, 539 S.E.2d 656 (3 October 2000). The court ruled that the trial judge did not err in permitting a law enforcement officer to testify about the murder victim's statement to another person (Hammel), who had died before trial. The statement by the victim to Hammel was admissible under Rule 803(3). The statement by Hammel to the law enforcement officer was admissible under Rule 804(b)(5), the residual hearsay exception. See the facts and legal analysis set out in the court's opinion.

Work-Product Privilege Protecting Witness's Notes Was Waived When Witness Testified, To Extent That Notes Related to Subject Matter of Witness's Testimony

North Carolina State Bar v. Harris, 139 N.C. App. 822, 535 S.E.2d 74 (29 August 2000). This case involved a disciplinary hearing in which the North Carolina State Bar (hereafter, state bar) sought to discipline a licensed attorney. The attorney unsuccessfully sought an order from the hearing committee to require the state bar to produce the notes of a state bar investigator concerning his interviews with witnesses or potential witnesses. The investigator later testified concerning conversations and other matters that were allegedly addressed in his notes. The court ruled, relying on United States v. Nobles, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (requiring disclosure of defense investigator's report to government before allowing investigator to testify to impeach prosecution witness did not violate Fifth or Sixth Amendments or work-product privilege), that the work-product privilege protecting the notes of the State Bar investigator was waived when the investigator testified, to the extent that the notes related to the subject matter of the investigator's testimony.

Sentencing

Statutory Aggravating Factor of Knowingly Creating Great Risk of Death to More Than One Person By Means of Hazardous Device [G.S. 15A-1340.16(d)(8)] Was Properly Found for Second-Degree Vehicular Murder Conviction

State v. Fuller, 138 N.C. App. 481, 531 S.E.2d 861 (20 June 2000). The defendant was convicted of two counts of second-degree murder. A trooper clocked the defendant traveling 77 m.p.h. in a 55 m.p.h. zone. The defendant failed to stop when the trooper activated his blue light and siren, and a 16.7 mile chase ensued (with the defendant traveling 90-95 m.p.h.). After running a stop sign and a red stop light to pass stopped traffic, the defendant then went through an intersection at 80-85 m.p.h. and struck a truck, killing its two passengers. A test of the defendant's blood revealed a 0.15 alcohol concentration. The court ruled that the trial judge properly found the statutory aggravating factor of knowingly creating a great risk of death to more than one person by means of a weapon or device that would normally be hazardous to the lives of more than one person. (1) Relying on State v. Ballard, 127 N.C. App. 316, 489 S.E.2d 454 (1997), the court ruled that the defendant's operation of the motor vehicle did not constitute one of the elements of second-degree murder, and thus the finding of this aggravating factor was not barred because it constituted an element of this offense. (2) Relying on State v. McBride, 118 N.C. App. 316, 454 S.E.2d 840 (1995) and State v. Garcia-Lorenzo, 110 N.C. App. 319, 430 S.E.2d 290 (1993), the court ruled that judge properly found that the defendant's automobile, under the circumstances surrounding its use in this case, constituted a device which in its normal use was hazardous to the lives of more than one person.

Trial Judge Erred in Sentencing for Second-Degree Murder in Finding Non-Statutory Aggravating Factor That Defendant Left Without Rendering Aid to Victim and Showed No Mercy

State v. Baldwin, 139 N.C. App. 65, 532 S.E.2d 808 (18 July 2000). The court ruled that the trial judge erred in sentencing for second-degree murder in finding the non-statutory aggravating factor that defendant left without rendering aid to the victim and showed no mercy. The court ruled, distinguishing State v. Reeb, 331 N.C.159, 415 S.E.2d 362 (1992) (upholding similar non-statutory aggravating factor in felonious assault case), that this finding violated the statutory provision that bars using evidence necessary to prove an element (in this case, malice) to prove an aggravating factor. [Note: Although this case involved the Fair Sentencing Act, the ruling would also apply under the Structured Sentencing Act.]

Trial Judge Erred in Finding Aggravating Factor G.S. 15A-1340.16(d)(14) (Damage Causing Great Monetary Loss) Because That Factor Only Applies to Monetary Loss from Property Damage

State v. Godley, 140 N.C. App. 15, 535 S.E.2d 566 (19 September 2000). In sentencing the defendant for a conviction of felonious assault, the trial judge found aggravating factor G.S. 15A-1340.16(d)(14) (damage causing great monetary loss). The court ruled, relying on State v. Bryant, 318 N.C. 632, 350 S.E.2d 358 (1986), that this aggravating factor only applies to

monetary loss from property damage, not from physical injuries. Thus the trial judge erred in finding this aggravating factor.

Unsworn Victim Impact Statement Is Admissible at Sentencing Hearing

State v. Hendricks, 138 N.C. App. 668, 531 S.E.2d 896 (5 July 2000). A larceny victim testified at the defendant's sentencing hearing without being sworn. The court noted that the rules of evidence do not apply to sentencing hearings [G.S. 15A-1334(b)], and ruled, citing State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981), that the trial judge did not err by allowing the unsworn victim's impact statement into evidence.

Miscellaneous

(1) Insanity Acquittee at Re-Commitment Hearing Was Properly Found "Mentally Ill" Based on Diagnosis of Personality Disorder
(2) No Due Process Violation When Judge at Re-Commitment Hearing Considered Crimes "Within the Relevant Past" in Deciding Insanity Acquittee's Dangerous to Others

In re Hayes, 139 N.C. App. 114, 532 S.E.2d 553 (18 July 2000). A judge ordered the recommitment of an insanity acquittee after an annual re-commitment hearing under G.S. 122C-276.1. The insanity acquittee had been committed after his acquittal by reason of insanity in 1989 of four murders and five felonious assaults. (1) The court ruled, distinguishing Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992), that it is not unconstitutional to find an antisocial personality disorder as a mental illness. (2) The court ruled that there was no due process violation when the judge at the re-commitment hearing considered the crimes for which he was acquitted as "within the relevant past" in deciding the insanity acquittee's dangerous to others. (There also was evidence admitted of more recent behavior on the issue of dangerousness.)