RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(June 19, 2001 – November 9, 2001)

Robert L. Farb
Institute of Government

North Carolina Supreme Court

Sentencing

(1) Court Rules That *Apprendi v. New Jersey* Requires Indictment to Allege Facts in Sixty-Month Firearm Enhancement Statute (G.S. 15A-1340.16A) and State Must Prove Them to Jury
(2) Court Makes Its Ruling Prospective Only
(3) Court Provides Guidance on How to Sentence Defendant under Sixty-Month Firearm Enhancement Statute
(4) Court Rules That Maximum Possible Sentence for an Offense Is Based on Using Highest Minimum Sentence in Aggravated Range of Prior Record Level VI and Then Calculating Maximum Sentence; Court States That Judge at Arraignment and Negotiated Plea Hearing Should Advise Defendant of This Maximum Possible Sentence

State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (20 July 2001). The defendant was convicted of two felony offenses (first-degree burglary and second-degree kidnapping) in which the trial judge imposed the sixty-month firearm sentencing enhancement under G.S. 15A-1340.16A. (1) The court ruled that Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), requires an indictment to allege the firearm enhancement factors in an indictment and the state must prove them to a jury beyond a reasonable doubt. [Note: The court stated that the factors may be alleged in the same indictment that charges the substantive felony. Although not mentioned by the court, the state may follow the procedures for alleging and proving these factors as set out in G.S. 15A-928.] (2) The court explicitly stated that it does not declare G.S. 15A-1340.16A unconstitutional. [Note: The court on July 19, 2001 reversed and remanded State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474 (2000), which had declared the statute facially unconstitutional.] It ruled that its ruling applies to cases in which defendants have not been indicted as of the certification date (August 9, 2001) of its opinion and to cases that are now pending on direct review or are not yet final. (3) The court gave guidance to trial judges on how to sentence a defendant under the firearm enhancement statute. The judge must add 60 months to the minimum sentence imposed for the substantive felony, and then set the maximum sentence by using the chart in G.S. 15A-1340.17(e) or, if the minimum is 340 months or more, use the formula in G.S. 15A-1340.17(e1). The judge would err by simply adding 60 months to the maximum sentence of the substantive felony. (4) The court ruled that unless a statute explicitly sets out a maximum sentence (for example, first-degree murder in G.S. 14-17), the statutory maximum sentence is determined by using the highest minimum sentence in the aggravated range of Prior Record Level VI and then calculating the maximum sentence. For example, the maximum sentence for first-degree burglary, a Class D felony, is 229 months (highest minimum sentence in aggravated range of Prior Record Level VI is 183 months, and using the chart in G.S. 15A-1340.17(e), the maximum sentence is 229 months). The court stated that a judge at arraignment and a negotiated plea hearing should advise the defendant of the maximum possible sentence as determined by the calculation set out in the prior sentence.

Criminal Offenses and Criminal Procedure

Court Reaffirms *State v. Tucker* That Trial Judge May Only Instruct Jury on Theories of Kidnapping Alleged in Indictment

State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (20 July 2001). The defendant was convicted of second-degree kidnapping. The court reaffirmed its ruling in State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986), that a trial judge may only instruct the jury on the theories of kidnapping alleged in the indictment. In this case, the court ruled that the judge erred by instructing on *removal* of the victim when the indictment only alleged the *confinement* of the victim. However, the court also ruled that the error was not prejudicial, based on the facts in this case (see the discussion in the opinion).

(1) In-Court Identification of Defendant Did Not Violate Due Process
(2) Sufficient Evidence of Armed Robbery of Murder Victim

State v. Fowler, 353 N.C. 599, 548 S.E.2d 684 (20 July 2001). The defendant was convicted of first-degree murder of a motel employee, the felonious assault of the motel night clerk, and two counts of armed robbery. (1) The court ruled that the in-court identification of the defendant by a person who saw him in the motel lobby on the night that the crimes were committed did not violate due process. (See the court's analysis in its opinion.) The court noted, however, that prosecutors should avoid instructing a witness about the defendant's location in the courtroom before a pretrial hearing is conducted on an identification issue. (2) The court ruled, relying on State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (1993) and State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991), that there was sufficient evidence of armed robbery of the murder victim. The evidence showed that the murder victim habitually carried cash in his wallet. The court noted that evidence of habit can be used to prove an element of a criminal offense. The evidence also showed that the victim's wallet, business cards, and birth certificate were lying by his side at the crime scene. The wallet contained no money.

Court Comments on When Defendant Must Assert Allegation of Ineffective Assistance of Counsel on Direct Appellate Review

State v. Fair, 354 N.C. 131, 557 S.E.2d 500 (5 October 2001). The defendant was convicted of first-degree murder and sentenced to death. On direct appeal, the defendant assigned as error that he was denied the effective assistance of counsel at trial. The court stated that the defendant appeared to treat his ineffective-assistance-of-counsel claim as an issue for preservation. Whether the defendant is in a position to litigate this claim at this time is a determination for the court on his direct appeal. Similarly, whether the defendant has waived his ineffective-assistance-of-counsel claim for the purpose of postconviction review is a determination for the presiding judge during a motion for a appropriate relief proceeding. (See the additional discussion of this issue in the court's opinion.)

Arrest, Search and Interrogation Issues

(1) Defendant Was Arrested When Officer Seized His Shoes, Based on Facts in This Case
(2) Officer Had Probable Cause to Arrest Defendant Before Seizing His Shoes, Based on Anonymous Tip and Corroboration
(3) Officer's Belief That He Did Not Have Probable Cause to Arrest Was Irrelevant
(4) Officer's Seizure of Defendant's Shoes Was Justified by Both Plain View Doctrine and As Search Incident to Arrest
(5) Defendant's Confession Was Voluntary, Based on Facts in This Case

State v. Bone, 354 N.C. 1, 550 S.E.2d 482 (17 August 2001). An elderly woman was murdered in her apartment. An SBI agent applied dye to the apartment floor, and it raised shoe print impressions left in blood. A manager of a sporting goods store, along with a detective, examined a photograph of the impressions and determined that a Converse "Chuck Taylor" athletic shoe made the impressions. Within two months of the murder, an anonymous person called about this homicide and said that Tony Bone (the defendant), black male, late 20s, climbed in an open window, punched an elderly female in the face so hard that her ears bled, and stole five dollars. The caller said that Bone worked for a moving company in Greensboro, lived in Trinity, North Carolina, and is married and was recently released from prison. The court noted that a detective verified almost all of the anonymous caller's information before he approached the defendant. For example, he learned that the defendant was married and worked at a moving company in Greensboro. A criminal history check revealed that the defendant had been released from prison about one year before the murder. A cut screen at the murder scene indicated access through an apartment window. The victim was found with blood on her face, and the primary cause of death was a broken neck. The only incorrect information was that the defendant lived in Liberty, North Carolina—although both Liberty and Trinity are small communities in northern Randolph County. The detective approached the defendant at the moving company and asked him if he would come downtown to speak about an undisclosed manner; the defendant agreed to do so. The detective noticed that the defendant was wearing Converse "Chuck Taylor" athletic shoes. At a Greensboro Police Department interview room, the detective informed the defendant that he was investigating the murder of the victim and asked if he could examine the defendant's shoes. The defendant refused, so the detective left to obtain a search warrant. The defendant was left in the interview room with the door closed but unlocked. The detective returned after about one hour and twenty minutes to serve the search warrant on the defendant, who then surrendered his shoes. The detective then left the interview room to take the shoes to the police laboratory, where he compared the shoes with the photograph of the impressions found at the murder scene. After nearly two hours, the detective returned to the interview room and advised the defendant of his *Miranda* rights. During a one-and-one-half hour interrogation, the detective told the defendant that he believed the defendant had killed the victim, adding that the shoe prints are "just like" fingerprints and that the defendant's athletic shoes "matched" the shoe prints. The defendant did not make any incriminating statements. The detective formally placed the defendant under arrest, and another officer took him to the magistrate for processing. The defendant then requested to speak with the detective. He was brought to the detective, who then gave him *Miranda* rights. The defendant signed a written waiver of his rights and confessed to the murder. (1) The court ruled that the defendant was arrested when the detective seized his shoes, based on the facts in this case, although the defendant had initially come to the police department voluntarily. When the defendant refused to give his shoes to the detective, the detective had left the defendant waiting in a windowless interrogation room with the door closed. When he returned and seized the defendant's shoes, the defendant was stranded without shoes, away from work and his hometown. The court noted that unlike the taking of other personal items (watch, glasses, etc.), the taking of the defendant's shoes effectively immobilized him. (2) The court ruled, relying on Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), that the officer had probable cause to arrest the defendant before seizing the defendant's athletic shoes. The information given by the anonymous caller was substantially corroborated by the known facts. In addition, the detective saw the defendant wearing

"Chuck Taylor" shoes (see the discussion above). (3) The court ruled, relying on State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), that the detective's belief that he did not have probable cause to arrest the defendant when he seized the shoes was irrelevant. A search or seizure is valid when the objective facts known to an officer meet the required legal standard. (4) The court noted that the state had not argued on appeal that the search warrant to seize the defendant's shoes was valid (the court stated that the affidavit failed to set out probable cause); thus, the search warrant could not justify the seizure of the defendant's shoes. The court then ruled that the detective's seizure of the defendant's shoes was justified by both the plain view doctrine, citing Harjo v. State, 882 P.2d 1067 (Okla. Crim. App. 1994), and as a search incident to arrest. The court noted, citing State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (1994) and United States Supreme Court cases, that a search may be made before an actual arrest and still be justified as a search incident to arrest. (5) The court ruled that the defendant's confession was voluntary. The detective's statements about the match of the impressions and athletic shoes were incorrect in degree but were not outright fabrications. Although the detective in the initial interview (in which the defendant did not confess) made no promises to the defendant in exchange for a confession, he did tell the defendant that he *might* receive a lesser sentence if he confessed. However, the detective made no commitment, and the defendant made no statement in response to this suggestion. The court, citing State v. Corley, 310 N.C. 40, 311 S.E.2d 540 (1984), upheld the confession, based on the totality of the circumstances: the confession was voluntary and not triggered by any improper police conduct.

Defendant's Sixth Amendment Right to Counsel Did Not Begin with Issuance of Arrest Warrant for Murder or His Arrest Pursuant to Arrest Warrant

State v. Taylor, 354 N.C. 28, 550 S.E.2d 141 (17 August 2001). An arrest warrant was issued charging the defendant with murder. He then was arrested in Florida pursuant to that arrest warrant. The defendant was appointed defense counsel in Florida for extradition proceedings. At defense counsel's request, a Florida magistrate issued an order prohibiting law enforcement officers from speaking to the defendant about the murder. Wilmington, North Carolina detectives went to Florida and obtained a confession from the defendant. The court ruled, applying the analysis in United States v. Gouveia, 467 U.S. 180, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984), that the defendant's Sixth Amendment right to counsel did not begin with the issuance or the arrest warrant or the defendant's arrest pursuant to the warrant. The court also ruled that any violation of the magistrate's order did not affect the defendant's constitutional rights and was not relevant to the admissibility of the defendant's confession. [Note: A defendant's Sixth Amendment right to counsel in a felony case begins at the first appearance in district court or the issuance of an indictment, whichever occurs first. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina, p. 219 (2d ed. 1992).]

State Properly Cross-Examined Defendant About His Voluntary Statements to News Media After His Arrest and Whether Statements Were Inconsistent With His Trial Testimony

State v. Fair, 354 N.C. 131, 557 S.E.2d 500 (5 October 2001). The defendant was convicted of first-degree murder. The defendant was arrested, advised of his *Miranda* rights (the court assumed, for purposes of this issue, that he had in fact been advised of these rights), and volunteered statements to the news media that he didn't kill anybody and he hoped they would find the real killer. The defendant essentially testified at trial that he was present when the victim was killed but he was not involved in the killing. The state cross-examined the defendant about the discrepancy between his trial testimony and his statements to the news media after his arrest (that is, why didn't the defendant tell the news media that he knew who was the real killer). The court ruled, relying on Anderson v. Charles, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980), that the cross-examination did not violate the ruling in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (use of defendant's post-arrest silence after being given *Miranda* warnings violates due process). The *Doyle* ruling is not triggered when a defendant chooses to speak voluntarily after being given *Miranda* warnings. The court also ruled that the cross-examination

was proper under the evidentiary rules about prior inconsistent statements set out in State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980).

Capital Case Issues

Court Upholds Constitutionality of Governor Easley's Exercise of Clemency Power

Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840 (2 August 2001). Plaintiffs, who were convicted of first-degree murder and sentenced to death, brought a civil action challenging the constitutionality of Governor Michael F. Easley's exercise of his clemency powers. Governor Easley served as Attorney General from January 1993 to January 2001 and served as counsel of record during the plaintiffs' appellate and post-conviction proceedings. In addition, Governor Easley served as District Attorney of the Thirteenth Prosecutorial District when one of the plaintiffs was convicted of first-degree murder and sentenced to death in that district (this plaintiff later received a new sentencing hearing and was again sentenced to death after Easley became Attorney General in 1993). Plaintiffs' several constitutional challenges were essentially grounded on the theory that Governor Easley could not be a neutral and impartial decision maker in exercising his clemency powers because he was involved as a representative of the state (as Attorney General and, in one case, also as a prosecutor) in their prosecution. The court first ruled that only one plaintiff's (Bacon's) claims were ripe for judicial review because the other plaintiffs had not exhausted their federal and state post-conviction remedies. The court then ruled, after discussing Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998) and other appellate cases, that the plaintiff had not alleged any cognizable violation of his due process rights in connection with the clemency procedures available to him under North Carolina law. Specifically, the plaintiff's due process rights are not violated by Governor Easley's consideration of his clemency request. Alternatively, even if the plaintiff adequately alleges a due process violation, Governor Easley cannot delegate the exercise of the clemency authority under Article III, Section 5(6) of the Constitution of North Carolina. The court invoked the "rule of necessity" and concluded that, even if any of the plaintiff's claims are cognizable in a court, the Governor nonetheless remains fully able to consider, and resolve, the plaintiff's clemency request. (See the court's opinion for a full discussion of all the constitutional issues that were rejected by the court.)

(1) Insufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Trial Judge Erred in Not Submitting Peremptory Instruction for Mitigating Circumstance G.S. 15A-2000(f)(8) (Defendant Testified Truthfully for State in Prosecution of Felony)

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant shot the victim four times and death was relatively rapid. The court conducted a detail review of its cases involving the aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel), and ruled that the evidence was insufficient to submit this aggravating circumstance. (See the court's discussion in its opinion.) (2) The court ruled that the trial judge erred in not submitting a peremptory instruction for the mitigating circumstance G.S. 15A-2000(f)(8) (defendant testified truthfully for state in prosecution of felony). The defendant's evidence in the capital sentencing hearing showed that his truthful testimony at another trial was both uncontroverted and credible.

(1) Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Trial Judge Did Not Err in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(2) (Murder Committed Under Influence of Mental or Emotional Disturbance)
(3) Trial Judge Did Not Err in Admitting Victim Impact Evidence

State v. Hooks, 353 N.C. 629, 548 S.E.2d 501 (20 July 2001). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). The defendant and the victim were arguing. The defendant stated that he was going to "fuck [the victim] up." The victim began backing away, and the defendant pulled a .38 caliber handgun from his pocket and pointed it at the victim's face. The victim said, "Oh, you're going to shoot me now," and after a silent moment, the defendant shot the victim four times. The victim fell to the ground, and the defendant began kicking him in the face and chest, pistol-whipping him, and taunted him by saying, "you thought I was playing." The defendant then fled the scene. The victim remained conscious and in obvious extreme pain for at least fifteen minutes. (2) The court ruled, relying on State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996) and distinguishing State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991), that the trial judge did not err in failing to submit mitigating circumstance G.S. 15A-2000(f)(2) (murder committed under influence of mental or emotional disturbance). The court stated that the evidence tended to show that the defendant's impoverished skills, which resulted from chronic substance abuse, led to poor impulse control and a failure to understand the consequences of his actions. This evidence showed diminished capacity rather than any mental disturbance at the time of the killing. [Note: The judge submitted G.S. 15A-2000(f)(6) (impaired capacity).] The court noted that despite the American Psychiatric Association's listing alcohol and drug abuse as mental disorders, the court has consistently ruled that voluntary intoxication is not a mental disturbance under the (f)(2) mitigating circumstance. (3) The court ruled that the trial judge did not err in admitting victim impact evidence offered by the victim's brother. He testified that the victim was easygoing; gave everything "110 percent"; wanted to make something of himself; and was loving, kind, and respectful. He also testified that the victim had accepted Jesus Christ after a neighbor died of a heart attack and that the victim left a favorable impression on everyone he met. The court stated that the comment concerning the victim's acceptance of Jesus Christ briefly addressed the religious facet of the victim's life and did not inflame the jury to sentence the defendant to death because the victim was a Christian.

(1) No Conclusive Presumption of Prejudice When Officer Who Served as Officer or Custodian in Charge of Jury Was Prospective State's Witness But Did Not Testify,
(2) Prosecutor's Jury Argument in Capital Sentencing Hearing Impermissibly Commented on Defendant's Right Not to Testify

State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (9 November 2001). The defendant was convicted of first-degree murder and sentenced to death. (1) A law enforcement officer who was listed as a state's witness served as the officer or custodian in charge of the jury but he never testified (he was responsible for securing drivers and ensuring that jurors, who came from another county, arrived at the place of departure on time—the court noted that he was therefore a custodian or officer in charge of the jury even if he didn't serve as a driver). The court ruled that the conclusive presumption of prejudice set out in State v. Mettrick, 305 N.C. 383, 289 S.E.2d 354 (1982) (conclusive presumption of prejudice when state's witness serves as custodian or officer in charge of jury), did not apply to these facts. (2) The defendant did not testify at the trial or capital sentencing hearing. The court ruled that the prosecutor's jury argument in the capital sentencing hearing impermissibly commented on the defendant's right not to testify. The prosecutor commented that when the defendant was being evaluated at Dorothea Dix Hospital he decided to sit quietly and didn't want to say anything that would incriminate himself. He wouldn't discuss his criminality with the people at the hospital.

Sufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest or Escape from Custody)

State v. Fowler, 353 N.C. 599, 548 S.E.2d 684 (20 July 2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Green, 321 N.C. 594, 365 S.E.2d 587 (1988), that there was sufficient evidence of aggravating circumstance G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest or escape from custody). The murder was committed during an armed robbery. The court noted that there was no evidence that the victim either posed a threat to the defendant or tried to resist during the robbery. The defendant shot the victim from behind from close range with a .44 caliber handgun. The victim was on the ground when he was shot. The court stated that the jury could reasonably infer from these facts that the defendant shot the victim to avoid being apprehended.

Court Reaffirms Rulings That Codefendant's Sentence Is Not Mitigating Circumstance

State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179 (20 July 2001). The defendant was convicted of first-degree murder and sentenced to death. The court reaffirmed prior rulings [see, for example, State v. Meyer, 353 N.C. 92, 540 S.E.2d 1 (2000)] that a codefendant's sentence is not a mitigating circumstance and rejected the argument that State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000) permitted evidence of a codefendant's sentence as a mitigating circumstance.

Court Finds No Extraordinary Facts Making Any Error By Trial Judge in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) Prejudicial to Defendant

State v. Bone, 354 N.C. 1, 550 S.E.2d 482 (17 August 2001). The defendant was convicted of first-degree murder and sentenced to death. The murder was committed in 1997. The defendant had four prior violent felony convictions: a 1986 common law robbery conviction and three convictions (armed robbery, kidnapping, and felonious assault on a law enforcement officer) arising from a single incident in 1990. The trial judge submitted mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The court found that there were no extraordinary facts [see discussion in State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996)] making any error by the trial judge in submitting this mitigating circumstance prejudicial to the defendant.

Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Parker, 354 N.C. 268, 553 S.E.2d 885 (9 November 2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Rowsey, 343 N.C. 603, 472 S.E.2d 903 (1996) and other cases, that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The defendant was convicted in 1995 of sixteen counts of obtaining property by false pretenses, nonviolent crimes that arose during one brief period of the defendant's life. The court stated that a rational jury could have concluded that the defendant had no significant prior criminal history.

Trial Judge Did Not Err in Prohibiting Defense Sociologist from Testifying About Defendant's Mental Capacity to Appreciate Criminality of His Conduct or Whether Defendant Was Under Influence of Mental or Emotional Disturbance

State v. Taylor, 354 N.C. 28, 550 S.E.2d 141 (17 August 2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge in the capital sentencing hearing

did not err in prohibiting a defense sociologist from testifying about the defendant's mental capacity to appreciate the criminality of his conduct or whether the defendant was under the influence of a mental or emotional disturbance. The court noted that although the sociologist was clearly qualified to give his opinion about the possible cultural affects of living in a drug-infested environment, he was not qualified—based on his training and experience—to give in essence a medical opinion about any possible mental defect of the defendant.

Prosecutor's Biblical Argument at Capital Sentencing Hearing Was Improper

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of first-degree murder and sentenced to death. The prosecutor recited the "Dance, Death" poem during closing argument of the capital sentencing hearing and added the following words: "Let the Judge set the date. The death penalty is the only appropriate punishment in this case for what [the defendant] did to [the victim]." The court noted that it had reluctantly ruled in this case that the prosecutor's recitation of this poem (without the additional language) during jury argument in the guilt/innocence phase did not require the trial judge's intervention ex mero motu (although the court disapproved of and cautioned prosecutors against using such an argument). The court stated: "This additional language, however, crosses the line into impropriety by linking the law enforcement powers of the State, and specifically the judge, to divine powers of God. We admonish the State against making such arguments at defendant's new sentencing proceeding."

Evidence

Unavailable Eyewitness's Declarations Were Properly Admitted under Residual Hearsay Exception, Rule 804(b)(5)

State v. Fowler, 353 N.C. 599, 548 S.E.2d 684 (20 July 2001). The defendant was convicted of first-degree murder of a motel employee, the felonious assault of the motel night clerk, and two counts of armed robbery. One detective interviewed the motel night clerk the day after the crimes were committed and another detective interviewed the clerk seven days later. The court ruled that two detectives' hearsay testimony concerning the clerk's statements to them were properly admitted under the residual hearsay exception, Rule 804(b)(5). The clerk had moved to India and would not return to North Carolina to testify despite the state's efforts to persuade him to return. [See also the court's analysis of the admissibility of this testimony under the six-prong test set out in State v. Triplett, 316 N.C. 316 N.C. 1, 340 S.E.2d 736 (1986).]

Trial Judge Did Not Err in Excluding Defense Proffered Evidence That Another Person Committed Murders, Based on Facts in This Case

State v. May, 354 N.C. 172, 552 S.E.2d 151 (5 October 2001). The defendant was convicted of two first-degree murders and received two death sentences. The court ruled that the trial judge did not err in excluding defense proffered evidence that another person committed the murders. The court stated, relying on State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), that even if this evidence indicated that the other person could have been suspected of committing the murders, the defendant failed to produce any evidence that was inconsistent with his guilt. The court noted that, on the contrary, the state's evidence showed that the other person and the defendant were both at the murder scene, and the other person's involvement was entirely consistent with the defendant's guilt. Thus, speculative evidence that the other person could have killed the victims was not relevant to whether the defendant killed the victims.

SBI Expert's Testimony, Based Partly on Examination Done by Another SBI Expert, Did Not Violate Defendant's Confrontation Rights

State v. Fair, 354 N.C. 131, 557 S.E.2d 500 (5 October 2001). An SBI expert testified at trial concerning the presence and physical location of the defendant's DNA on the murder victim's flipped-over pants pocket. Her testimony was partly based on testing of cloth samples cut from the victim's pants by another SBI expert, who was unavailable to testify. The testifying expert noted that she had looked at the victim's pants herself to determine whether the cuttings were taken from the areas indicated in the nontestifying expert's notes. The court ruled, relying on State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984) and other cases, that this testimony did not violate the defendant's confrontation rights.

(1) Murder Victim's Statement to Defendant That She Had Killed Another Person Was Inadmissible as Defense Evidence When Defendant Relied on Defense of Accident, Not Self-Defense
(2) Jury Instruction on Defendant's Flight from Murder Scene Was Properly Admitted

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of first-degree murder. (1) The trial judge prohibited the defendant from testifying that the murder victim had previously told him that she had killed another person and had gotten away with it. The court ruled, relying on State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997) and other cases, that because the defendant asserted that he never intentionally shot the murder victim in this case and instead asserted that the shooting was accidental, the evidence was irrelevant and inadmissible under Rule 404(b) to prove the defendant's apprehension and state of mind when he drew his gun. (2) The defendant hurriedly left the murder scene without providing medical assistance to the victim. He then drove to a business to confront the victim's boyfriend and then went to a convenience store for a soda. He thereafter called the police department to arrange his surrender, but he did not request assistance for the victim and did not say where he could be found. He drove around for thirty minutes and then went to another convenience store to buy cigarettes and a soda. Before turning himself in, he called his mother. The court ruled, relying on State v. Beck, 346 N.C. 750, 487 S.E.2d 751 (1997) and other cases, that there was sufficient evidence of the defendant's flight from the murder scene to support the jury instruction on flight as consciousness of guilt.

Court Summarily Affirms, Without Opinion, Ruling of Court of Appeals That Trial Judge Erred in Admitting Expert Testimony That Children Were Sexually Abused, Based on Facts in This Case

State v. Grover, 354 N.C. 354, 553 S.E.2d 679 (9 November 2001), *affirming*, 142 N.C. App. 411, 543 S.E.2d 179 (20 March 2001). The court summarily affirmed, without an opinion, a ruling by the court of appeals. The defendant was convicted of various sexual offenses involving two children. Two experts, a clinical social worker and a pediatric nurse practitioner, were permitted to testify that the children had been sexually abused even though no physical evidence of abuse had been found. Their opinions were based solely on their interviews with the children. The court ruled, relying on State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597 (2000) and other cases and distinguishing State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580 (1992), that the trial judge erred in admitting this testimony. The court noted, however, that it may be permissible for an expert to testify under these circumstances (when there is no physical evidence of abuse) that a child exhibits characteristics consistent with abused children.

North Carolina Court of Appeals

Criminal Offenses and Criminal Procedure

Thirty-Day Pretrial Impaired Driving License Revocation (G.S. 20-16.5) Is Not Punishment Under United States and North Carolina Constitutions and Thus Does Not Bar Later Prosecution of DWI

State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (7 August 2001). The court ruled, applying the double jeopardy analysis set out in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), that the thirty-day pretrial impaired driving license revocation (G.S. 20-16.5) is not punishment under the United States and North Carolina constitutions and thus does not bar a later prosecution of DWI. [Note: This ruling also rejected the trial judge's ruling that the Double Jeopardy Clause barred criminal prosecution of indigent DWI defendants whose licenses had been civilly revoked for thirty days because "the effort and expense of obtaining a limited driving privilege were completely unmanageable."]

Court Upholds Conviction of First-Degree Felony Murder Based on Commission of Felonious Child Abuse with Deadly Weapon (Defendant's Hands)

State v. Krider, 145 N.C. App. 711, 550 S.E.2d 861 (21 August 2001). The defendant was convicted of first-degree felony murder based on the commission of felonious child abuse with a deadly weapon—the defendant's hands. The court reviewed the defendant's conviction on remand from North Carolina Supreme Court for reconsideration, in light of State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000) (culpable negligence in committing felony is insufficient to support conviction of first-degree felony murder), of the court's prior decision upholding the conviction [State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569 (2000)]. The court upheld the conviction. The evidence showed that the defendant purposely resolved to commit the underlying felony of felonious child abuse—using her hands as a deadly weapon, she intentionally shook the child that resulted in serious physical injury.

Court Rules, Relying on *State v. Jones*, That First-Degree Felony Murder Conviction Could Not Be Supported by Underlying Felony of Operating Motor Vehicle to Elude Arrest (G.S. 20-141.5)

State v. Woodard, 146 N.C. App. 75, 552 S.E.2d 650 (4 September 2001). The defendant—driving a motor vehicle while impaired, at a high rate of speed, and being chased by law enforcement officers—struck another vehicle, killing one occupant and seriously injuring another occupant. The court ruled, relying on State v. Jones, 353 N.C. 159, 538 S.E.2d 917 (2000) (first-degree felony murder conviction could not be supported by underlying felony, felonious assault, committed only through culpable negligence), that the defendant's first-degree felony murder conviction could not be supported by the underlying felony of operating a motor vehicle to elude arrest (G.S. 20-141.5).

Double Jeopardy Did Not Bar Defendant's Convictions for Attempted First-Degree Murder and Assault with Firearm on Law Enforcement Officer Arising from Same Act

State v. Haynesworth, 146 N.C. App. 523, 553 S.E.2d 103 (16 October 2001). The court ruled, relying on Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) and State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988), that the Double Jeopardy Clause did not bar the defendant's convictions for attempted first-degree murder and assault with a firearm on a law enforcement officer arising from the same act. Each offense requires proof of an element that is not required to be proved for the conviction of the other offense, and that fact demonstrates the legislature's intent to allow multiple punishment to be imposed for the separate crimes.

Not Guilty Verdict in Violent Habitual Felon Hearing Barred State, on Collateral Estoppel Grounds, from Trying Defendant in Later Violent Habitual Felon Hearing Based on the Same Two Prior Convictions Used in Prior Violent Habitual Felon Hearing

State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516 (21 August 2001). The court ruled, relying on G.S. 15A-954(7), that a not guilty verdict in a violent habitual felon hearing barred the state, on collateral estoppel grounds, from trying the defendant in a later violent habitual felon hearing based on the same two prior convictions used in the prior violent habitual felon hearing. [Note: A guilty verdict in a habitual felon or violent habitual felon hearing does not bar the state from trying the defendant in a later habitual felon or violent habitual felon hearing based on the same convictions used in the prior hearing. State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1996).]

Habitual Felon Law Used in Conjunction with Structured Sentencing Does Not Violate Double Jeopardy

State v. Brown, 146 N.C. App. 299, 552 S.E.2d 234 (18 September 2001). The court ruled, relying on State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985) and other cases, that the habitual felon law used in conjunction with structured sentencing does not violate double jeopardy.

State's Failure to Disclose Phone Records of Calls Between State's Witness and Murder Victim Denied Exculpatory Evidence for Defendant and Required New Trial

State v. Barber, 147 N.C. App. 69, 554 S.E.2d 413 (6 November 2001). The defendant was convicted of first-degree murder of her husband. The defendant's defense was that the husband (hereafter, decedent) committed suicide while drinking and being depressed. A state's witness testified that she had called the decedent at his residence several times the night of his death in which she informed him that she planned to take out an arrest warrant against him for communicating threats against her. The witness stated that she had been drinking and could not remember her exact words to the decedent or how many times she called him. The state disclosed to the defendant after trial the existence of phone records of the witness. These records showed that the witness made eight phone calls to the decedent's residence the night of his death. The defendant argued on appeal that the phone records were exculpatory because they bolstered the witness's testimony that she threatened the decedent with arrest shortly before his death. The records also supported the defendant's assertions at trial that the decedent killed himself because he was despondent and agitated by the thought of returning to prison. The court noted that the state had cast general aspersions about this witness's credibility. The court ruled that the phone records were exculpatory and prejudicial to the defendant (see the court's discussion in its opinion) requiring a new trial.

District Attorney's Policy of Prosecuting All Defendants Who Qualify as Habitual Felons Is Not Unconstitutional

State v. Parks, 146 N.C. App. 568, 553 S.E.2d 695 (16 October 2001). The court ruled that a district attorney's policy of prosecuting all defendants who qualify as habitual felons is not unconstitutional.

Fine of $50,000 for Corporation's Conviction of Disseminating Obscenity Was Not Constitutionally Excessive, Based on Facts in This Case

State v. Sanford Video & News, Inc., 146 N.C. App. 554, 553 S.E.2d 217 (16 October 2001). The court ruled, distinguishing United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), that a fine of $50,000 for a corporation's conviction of disseminating obscenity, a Class I felony, was not constitutionally excessive, based on the facts in this case.

(1) Exchanging Cocaine for Clothing and Video Game Constituted Sale of Cocaine; "Sale" Is Not Limited to Exchange of Controlled Substance for Money
(2) State Sufficiently Complied with G.S. 90-95(g) So SBI Lab Report Was Admissible

State v. Carr, 145 N.C. App. 335, 549 S.E.2d 897 (7 August 2001). The defendant was convicted of cocaine offenses. Officers acquired the cocaine from the defendant in exchange for three shirts and a video game. (1) The court ruled, after noting that statements in State v. Creason, 313 N.C. 122, 326 S.E.2d 24 (1985) and State v. Moore, 327 N.C. 378, 395 S.E.2d 124 (1990) that a sale of a controlled substance is defined as a transfer of property for specified price payable in money were dicta, that exchanging cocaine for clothing and a video game constituted a sale of that cocaine. (2) The court ruled that the state sufficiently complied with G.S. 90-95(g) so that an SBI lab report analyzing the substance as cocaine was admissible in evidence. The state sent the defendant's attorney a copy of the lab report and had given timely notice (to the defendant's former attorney) of its intent to introduce the report into evidence, and the defendant failed to notify the state at least five days before trial that he objected to the introduction of the report into evidence.

(1) Trial Judge Did Not Err in Allowing State to Amend Sexual Offense Indictment to Allege "By Force"
(2) Jury Need Not Be Unanimous Concerning Which of Two Alternatives Supported One Charge of First-Degree Rape

State v. Haywood, 144 N.C. App. 223, 550 S.E.2d 38 (19 June 2001). The defendant was convicted of first-degree sexual offense, first-degree rape, and conspiracy to commit first-degree rape. (1) The court ruled that the judge did not err in allowing the state to amend the first-degree sexual offense indictment, which tracked the wording set out in G.S. 15-144.2(a) but had omitted the words "by force." Relying on the reasoning in State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994), the court noted because the indictment included the words "feloniously" and "against the victim's will," the amendment did not substantially alter the charged offense. (2) Relying on State v. Belton, 318 N.C. 141, 347 S.E.2d 755 (1986) and State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996), the court ruled that the trial judge did not err in instructing disjunctively on two different theories of first-degree rape (display deadly weapon or aiding or abetting). A jury need not be unanimous concerning which of two alternative theories supported one charge of first-degree rape.

(1) Evidence Was Insufficient to Support Kidnapping Conviction Because Restraint Was Not Independent of Commission of Sexual Offense
(2) Evidence Was Sufficient to Support Element of Serious Personal Injury in First-Degree Sexual Offense
(3) Circumstantial Evidence Proved That Defendant Was 18 Years Old or Older in Assault on Female Prosecution
(4) Prosecutor's Opening Statement Did Not Constitute Improper Comment That Defendant Would Not Testify

State v. Ackerman, 144 N.C. App. 452, 551 S.E.2d 139 (3 July 2001). The defendant was convicted of first-degree sexual offense, first-degree kidnapping, assault on a female, and other offenses. The defendant entered the car in which the victim was located and sexually assaulted her there. (1) The court ruled that the evidence was insufficient to support the kidnapping conviction because the restraint in this case was not independent of the commission of the sexual offense. There was no restraint "separate and apart" from the victim's confinement in the car. There was no movement of the victim or the vehicle in the commission of the sexual offense. (2) The court ruled that the evidence was sufficient to support the element of serious personal injury in first-degree sexual offense. The combination of the victim's physical

and mental injuries included: three bite marks, thumb print, scab, and swelling on the victim's neck from being choked by the defendant; many bruises and swelling about the victim's face, head, neck, chest, and knees from being struck by a full beer bottle by the defendant; scars on her arm from the defendant's bites; hearing problems from being struck on her ear; and the victim dreams every night about the incident, and was still receiving therapy some 15 months later. (3) In the prosecution of assault on a female by a male 18 years old or older, the state failed to present direct evidence of the defendant's age. Distinguishing In re Jones, 135 N.C. App. 400, 520 S.E.2d 787 (1999) (jury may not determine defendant's age beyond a reasonable doubt by merely observing him in the courtroom without other evidence, circumstantial or direct), the court ruled that there was sufficient circumstantial evidence in this case to support the conviction—the defendant was involved in a romantic relationship with a person who was 43 years old, and the defendant was a regular customer at a bar where he purchased and drank alcoholic beverages. (4) The prosecutor said during opening statement that the jury was not going to hear a plausible explanation by the defense about why these terrible events occurred—all the jury will hear from the defense is blaming the victim. The court ruled that this opening statement was not an improper comment that the defendant would not testify and did not unfairly shift the burden of proof to the defendant.

Arrest Warrant Insufficiently Charged Simple Assault By Show of Violence

State v. Garcia, 146 N.C. App. 745, 553 S.E.2d 914 (6 November 2001). The court ruled that a criminal pleading charging an assault by show of violence must allege facts to support the elements of this form of assault, which are: (1) a show of violence by the defendant; (2) accompanied by the victim's reasonable apprehension of immediate bodily harm or injury; and (3) causing the victim to engage in a course of conduct that he or she would not otherwise have followed. The court ruled that the arrest warrant in this case failed to allege facts to support element (2) and thus was insufficient to allege this form of assault.

(1) State Was Properly Allowed to Amend False Pretenses Indictment in Its Description of Property Obtained by Defendant
(2) State Failed to Prove Property Was Valued Over $1,000 in Prosecution of Felonious Possession of Stolen Goods

State v. Parker, 146 N.C. App. 715, 555 S.E.2d 609 (6 November 2001). (1) The court ruled that the state was properly allowed to amend a false pretenses indictment to substitute "Magnavox VCR" for "two (2) cameras and photography equipment." The court stated the amendment did not substantially alter the charge. The description of the property which the defendant falsely represented as his own was irrelevant in proving the elements of false pretenses. (2) The jury charge on felonious possession of stolen goods named certain property that was allegedly stolen. The victim testified at trial that all the stolen property (which included property not named in the jury charge) had an estimate value of $5,000.00. The court ruled, relying on State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986), that this testimony failed to prove that the property named in the jury charge was valued over $1,000 to support a conviction of felonious possession of stolen goods. The court remanded the case for entry of a verdict of guilty of misdemeanor possession of stolen goods.

Sufficient Evidence of Restraint and Removal Separate and Apart from Acts Constituting Common Law Robbery to Support Second-Degree Kidnapping Conviction

State v. Muhammad, 146 N.C. App. 292, 552 S.E.2d 236 (18 September 2001). The defendant was convicted of common law robbery and second-degree kidnapping. Distinguishing State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) (defendant forced employee at knife point to walk to back of store to obtain property; kidnapping conviction reversed), the court ruled that there was sufficient evidence of restraint and removal separate and apart from the acts constituting common law robbery to support the second-

degree kidnapping conviction. The defendant placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, pointed a gun (later determined to be a cap gun) at his head, and marched him to the front of the store where the defendant obtained money. The court stated that these actions constituted restraint beyond what was necessary for the commission of common law robbery.

Insufficient Evidence to Support Convictions of Possession of Cocaine with Intent to Sell or Deliver and Maintaining Dwelling to Keep or Sell Controlled Substances

State v. Hamilton, 145 N.C. App. 152, 549 S.E.2d 233 (17 July 2001). An officer conducting surveillance saw the defendant coming and going from an apartment on several occasions during the day and night. The apartment was leased to the defendant's girlfriend, and three vehicles registered to her were regularly parked in front of the apartment. Two of the vehicles were used regularly by the defendant. A search warrant was obtained for the apartment. Before the search warrant was executed, the defendant was stopped as he left the apartment. Officers later saw the girlfriend leave the apartment, another woman approach the apartment and speak to someone at the door and then depart, and a man enter the apartment. The search warrant was then executed, and cocaine, marijuana, and weapons were seized from the apartment. Also, three adult men were found inside the apartment. A traffic citation with the defendant's address listed as the apartment's address was seized either from the apartment or the person of the defendant. Also, the defendant had $1,771 in cash on his person. The court ruled, relying on State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000), that this evidence was insufficient to support the conviction of maintaining a dwelling to keep and sell controlled substances. The court also ruled, relying on State v. McLaurin, 320 N.C. 143, 357 S.E.2d 636 (1987) and State v. Minor, 290 N.C. 68, 224 S.E.2d 180 (1976), that there was insufficient evidence of the defendant's constructive possession to support the conviction of possession of cocaine with intent to sell or deliver.

Evidence Was Sufficient in Crime Against Nature Prosecution to Prove Penetration of Penis into Victim's Mouth

In re Heil, 145 N.C. App. 24, 550 S.E.2d 815 (17 July 2001). An eleven-year-old juvenile was adjudicated delinquent of crime against nature (fellatio) with a four-year-old victim. The victim's father testified that when he asked the victim to show him exactly what the victim did after the juvenile asked the victim to lick his penis, the victim went over to his mother and licked her thumb. The court ruled that, in light of the relative size difference between the victim and the juvenile and the fact that the incident occurred in the close quarters of a closet, it was reasonable for the trial judge to find that there was some penetration, albeit slight, of the juvenile's penis into the victim's mouth.

Trial Judge Erred in Wording of Acting-In-Concert Instruction Involving Sexual Assaults, Based on Facts in This Case

State v. Graham, 145 N.C. App. 483, 549 S.E.2d 908 (7 August 2001). The defendant was convicted of several sexual assaults, some of which he committed the sex acts himself and some of which he aided and abetted his accomplice who committed the sex acts. The court ruled that the trial judge erred in the wording of the acting-in-concert instruction concerning the offenses in which the accomplice committed the sex acts, because the instruction permitted the jury to convict him whether he acted by himself *or* acted with his accomplice who committed the sex acts. The jury instruction effectively permitted the jury to convict the defendant twice for the same sex acts committed by the defendant.

Conviction of Conspiracy to Possess Cocaine with Intent to Sell and Deliver Was Sufficiently Proven Solely by Circumstantial Evidence

State v. Harris, 145 N.C. App. 570, 551 S.E.2d 499 (21 August 2001). The court ruled that the defendant's conviction of conspiracy to possess cocaine with the intent to sell and deliver was sufficiently proven solely by circumstantial evidence. There was another person in the hotel room with the defendant, who was selling drugs from there. That other person had drug paraphernalia in his possession when the officers arrived and ran to the toilet and flushed it before officers could arrest him. Cocaine residue was found on drug paraphernalia in the room. (See additional facts set out in the opinion.)

(1) State Had Right to Appeal Judge's Dismissal of Charge Pursuant to Defendant's Motion for Appropriate Relief Because Double Jeopardy Did Not Bar Retrial
(2) Trial Judge Had No Authority to Rule on Defendant's Motion to Dismiss Charge under G.S. 15A-1227 and G.S. 15A-1414, Based on Facts in This Case

State v. Allen, 144 N.C. App. 386, 548 S.E.2d 554 (19 June 2001). The defendant was tried for felony child abuse. The trial judge denied the defendant's motions to dismiss the charge for insufficiency of evidence made after the close of the state's evidence and at the close of all the evidence. When the jury was unable to reach a verdict, the judge declared a mistrial. Neither the state nor the defendant made any motions after the mistrial, and court adjourned sine die. Nine days later, the defendant made a motion for appropriate relief that asserted that the evidence at trial was insufficient to submit the case to the jury. The trial judge treated the defendant's "motion for appropriate relief" as two motions: (i) a motion to dismiss under G.S. 15A-1227, and (ii) a motion for appropriate relief under G.S. 15A-1414(a). The judge ruled that it should have granted the defendant's motion to dismiss at the close of all the evidence and then dismissed the charge with prejudice. (1) The court ruled that the state had the right to appeal the judge's dismissal of the charge pursuant to the defendant's motion for appropriate relief because double jeopardy did not bar retrial. The court ruled, relying on United States v. Sanford, 429 U.S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976), that the judge's dismissal of the charge effectively was a pretrial dismissal (that is, before the retrial after the mistrial) because the defendant's motion to dismiss was untimely under G.S. 15A-1227 (because it was not made before the end of the court session) and unauthorized under G.S. 15A-1414(a) (because there was no verdict to permit such a motion). The court also ruled that the judge did not have inherent authority to dismiss the charge. (2) The court ruled that the judge had no authority to dismiss the charge under G.S. 15A-1227 and G.S. 15A 1414(a), and thus reversed the judge's order dismissing the charge. The state may retry the defendant.

Defendant's Unexplained Absence from Habitual Felon Hearing After Court Recess Was Waiver of His Right to Be Present

State v. Skipper, 146 N.C. App. 532, 553 S.E.2d 690 (16 October 2001). The defendant was being tried in a habitual felon hearing when the court took a five-minute recess. The defendant failed to return to court, and the remainder of the hearing was conducted in the defendant's absence. The court ruled, relying on State v. Richardson, 330 N.C. 174, 410 S.E.2d 61 (1991) and State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (2001), that the defendant's unexplained absence was a waiver of his right to be present during the hearing. The defense failed to meet its burden of explaining his absence.

Federal Drug Conviction May Support Forfeiture of Defendant's Property Under G.S. 90-112

State v. Woods, 146 N.C. App. 686, 554 S.E.2d 383 (6 November 2001), *affirmed*, 356 N.C. 121, 564 S.E.2d 881 (28 June 2002). The defendant was convicted of a federal drug violation. The state had previously taken a voluntary dismissal of a state drug charge based on the same drug violation. The state then obtained the forfeiture of the defendant's property under G.S. 90-112 based on the federal drug

conviction. The court ruled that a federal drug conviction may support the forfeiture. The court reasoned that the defendant's act was a violation of Article 5 of G.S. Ch. 90, and G.S. 90-112 does not require a state conviction of that violation; a federal conviction is sufficient.

Trial Judge Erred in Quashing Defendant's Subpoena Duces Tecum for School Board Documents Without Conducting In Camera Review for Exculpatory Evidence

State v. Johnson, 145 N.C. App. 51, 549 S.E.2d 574 (17 July 2001). The defendant, a teacher and coach at a middle school, was charged with multiple sexual offenses with students. The court ruled, relying on Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) and State v. Phillips, 328 N.C. 1, 399 S.E.2d 293 (1991), that the trial judge erred in quashing the defendant's subpoena duces tecum for school board documents without conducting an in camera review for exculpatory evidence. The school board attorney had acknowledged at a pretrial hearing that some of the documents were from witnesses who would testify at trial.

Capital Case Issues

Trial Judge Erred in Prohibiting Defendant from Using Remaining Peremptory Challenges When Questioning of Juror Had Been Reopened Before Impanelment of Jury

State v. Locklear, 145 N.C. App. 447, 551 S.E.2d 196 (7 August 2001). The defendant was being tried capitally for first-degree murder. The defendant used eleven peremptory challenges during the selection of the twelve trial jurors. The defendant then used three peremptory challenges in choosing the first alternate juror and none in selecting the second alternate juror. Before the jury was impaneled, the judge reopened questioning of one of the twelve trial jurors. The defendant then moved to exercise a peremptory challenge against that juror. The judge stated that the defendant had exercised all of his peremptory challenges for the regular jury and that he only had challenges remaining for the alternate jurors. The judge denied the defendant's motion to exercise the peremptory challenge. The court noted that G.S. 15A-1217(a)(1) allowed the defendant fourteen peremptory challenges, and G.S. 15A-1217(c) allowed the defendant one peremptory challenge for each alternate juror in addition to any unused challenges. In this case, the defendant had exercised a total of fourteen peremptory challenges. Thus he had used twelve of the fourteen challenges allotted under G.S. 15A-1217(a)(1) and the two challenges allotted under G.S. 15A-1217(c). The court stated that the trial judge erred in believing that the defendant was required to use the three peremptory challenges he had remaining after seating the trial jury before being able to use the additional challenges allotted for the alternate jurors. The court then ruled, relying on State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985), that the trial judge erred in denying the defendant's right [see G.S. 15A-1214(g)(3)] to exercise his remaining peremptory challenges when the judge had reopened questioning of a juror before impanelment.

Arrest, Search, and Interrogation Issues

(1) Fourth Amendment Was Not Violated When Blood Sample Lawfully Obtained in Investigation of One Crime Was Used as Evidence in Prosecution of Another Unrelated Crime
(2) Defendant's Consent to Give Blood Sample in Investigation of One Crime Did Not Limit Its Evidentiary Use in Prosecution of Another Crime, Based on Facts in This Case

State v. Barkley, 144 N.C. App. 514, 551 S.E.2d 131 (3 July 2001). The defendant was convicted of first-degree rape. DNA evidence was introduced at trial that had been obtained from a blood sample that the defendant had voluntarily given to law enforcement officers in an investigation of a murder that was unrelated to the first-degree rape. (1) The court ruled, relying on cases from other jurisdictions, that a blood sample lawfully obtained in the investigation of one crime may be used as evidence in the

prosecution of another unrelated crime without any additional justification under the Fourth Amendment. The court stated that once the blood was lawfully drawn from the defendant's body, he no longer had a possessory interest in that blood. (2) The court examined the facts surrounding the defendant's consent to give a blood sample in the murder investigation and ruled that a reasonable person would have understood by his conversations with the investigating law enforcement officer that his blood analysis could be used generally for investigative purposes and was not limited to the murder investigation.

DWI Checkpoint Did Not Violate G.S. 20-16.3A(2) in Failing to Designate in Advance a Pattern for Requesting Drivers to Submit to Alcohol Screening Tests

State v. Colbert, 146 N.C. App. 506, 553 S.E.2d 221 (16 October 2001). Law enforcement agencies collaborated in establishing a DWI checkpoint under G.S. 20-16.3A. An officer stopped the defendant's vehicle at the checkpoint. Pursuant to the checkpoint plan, the officer (1) requested the defendant to produce his driver's license, (2) observed the defendant's eyes for signs of impairment, (3) conversed with the defendant to determine if he had the odor of alcohol on his breath and if his speech pattern indicated impairment, and (4) observed the defendant's clothing. The checkpoint plan provided that an Alco-Sensor test would be used only when an officer had reasonable suspicion that the driver had committed an implied consent offense. After these observations, the officer instructed another officer to conduct an Alco-Sensor test on the defendant. Based on the test results, the officer arrested the defendant for DWI. The court ruled that the checkpoint did not violate G.S. 20-16.3A(2) in failing to designate in advance a pattern for requesting drivers to submit to alcohol screening tests. The court stated that the fact that an officer must make a judgment whether there is reasonable suspicion does not vitiate the plan's validity nor offend the requirement that individual officers not exercise unbridled discretion under G.S. 20-16.3A(2). The court noted that the term "alcohol screening test" in G.S. 20-16.3A(2) is not limited to the administration of the Alco-Sensor test, but also includes the four procedures in the plan, discussed above, that was administered to every driver who passed through the checkpoint. The court found that the checkpoint plan was constitutionally reasonable under Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

Driver's License Checkpoint Was Conducted in Constitutional Manner

State v. Tarlton, 146 N.C. App. 417, 553 S.E.2d 50 (2 October 2001). Two State Highway Patrol (SHP) officers were on preventive patrol and decided to establish a driver's license checkpoint. One officer called his supervisor and received permission to establish the checkpoint. The officers were aware that SHP policy required the checkpoint to be conducted by at least two officers, by a non-random method, and a blue light to be on. During the checkpoint, they checked every vehicle in both directions except when they were writing citations. Blue lights were operating on both vehicles. The court ruled that the checkpoint was constitutionally valid. The court stated that (1) supervisory approval of a driver's license checkpoint is not constitutionally required, and (2) a written guidelines setting out a driver's license checkpoint is also not constitutionally required.

(1) Vehicle Stop Was Supported by Reasonable Suspicion That Driver Had Revoked License
(2) Defendant Consented to Additional Questioning by Officer After Detention Had Ended for Traffic Stop
(3) *Miranda* Warnings Were Not Required During Consensual Questioning

State v. Kincaid, 147 N.C. App. 94, 555 S.E.2d 294 (6 November 2001). An officer saw the defendant driving a vehicle, attempting to conceal his face from the officer. The officer stopped the vehicle because he knew that the defendant's license had been revoked for two to three years. During the time the officer had known the defendant, he had seen him travel either as a passenger in a car or riding a moped, but never driving a car. The defendant gave his license to the officer. The officer allowed the defendant to

enter a convenience store while he ran a license check. It was valid, and the officer returned it and the registration to the defendant when he returned. The officer then asked him if he could answer some questions concerning another matter. The defendant consented. After asking the defendant if he had anything in the car that the officer needed to be concerned about, the defendant admitted that he had marijuana under the front seat. (1) The court ruled that the officer had reasonable suspicion to stop the vehicle based on his information about the defendant and his driver's license, despite that fact that the officer's information turned out to be incorrect after the stop. (2) The court noted that the ground for the detention of the defendant ended when the officer learned that the defendant's license was valid. However, the defendant consented to questions after the officer had returned the driver's license and registration to the defendant. The court ruled that a reasonable person would have felt free to leave when the documents were returned. The court noted that the officer was neither prohibited from simply asking if the defendant would consent to additional questioning, nor was the officer prohibited from questioning the defendant after receiving his consent. Based on the totality of circumstances, the court ruled the defendant was not seized under the Fourth Amendment after the officer had returned the documents to him. (3) The court ruled that *Miranda* warnings were not required during the officer's questioning of the defendant because he was not in custody.

Fourth Amendment's Reasonableness Standard in *New Jersey v. T.L.O.* Applied When Law Enforcement Officers Acted in Conjunction with School Principal in Dealing with Students from Another School Who Were on Parking Lot of Principal's School

In re D.D., 146 N.C. App. 309, 554 S.E.2d 346 (2 October 2001). The juvenile was adjudicated delinquent of possessing a knife on educational property. A teacher told the principal about overhearing some students saying that a group of girls was coming to the school's campus to fight at the end of the school day; the students named one student who would be involved in the fight. The principal "gathered" three law enforcement officers, one of whom was the school resource officer. The other two were off-duty officers, one of whom was assigned to the school as a security officer. In the school's parking lot, the principal confronted a student of his school and three girls who were from another school in the city. There were additional encounters with these students, which included the finding of a box cutter in the purse of one of the students (but not in the juvenile's purse; see the discussion of the facts in the opinion). The principal and the officers then took them to the principal's office. The principal ordered the girls to empty their pockets. The juvenile had a knife in her pocket. After reviewing case law in other jurisdictions, the court ruled that the Fourth Amendment's reasonableness standard in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (searches by school officials generally may be conducted without a warrant or probable cause—that is, with reasonable suspicion), applied in this case when the officers acted in conjunction with the school principal to maintain a safe and educational environment and to report truants from other schools. The court also ruled that the search of the juvenile was reasonable under the *T.L.O.* standard.

(1) Officer's Use of Ruse (Trickery) to Get Hotel Room Occupant to Open Door Did Not Violate Fourth Amendment, Based on Facts in This Case
(2) Officer's Accessing Telephone Numbers Stored in Pager's Memory after Pager Had Been Seized Incident to Defendant's Arrest Did Not Violate Fourth Amendment

State v. Harris, 145 N.C. App. 570, 551 S.E.2d 499 (21 August 2001). An officer who had probable cause that drugs were being sold in a hotel room telephoned the room and told the defendant that maintenance would be coming to the room to fix a smoke detector. The officer then knocked on the door. A voice from inside the room asked who was there. The officer responded, "maintenance." One of the occupants opened the door. The officer, holding his credentials in his hand, identified himself as a police officer. The officer then observed activity that gave him exigent circumstances to enter the room to arrest and search (see the discussion in the opinion). A search of the defendant incident to his arrest in the room

revealed a pager. An officer accessed the telephone numbers stored in the pager's memory. (1) The court ruled that the officer's use of a ruse (trickery) to get one of the hotel room's occupants to open the door did not violate the Fourth Amendment. The court noted that the officer did not enter the room based on the ruse (the entry was based on exigent circumstances that existed after the door was opened). (2) The court ruled that the officer's accessing telephone numbers stored in the pager's memory after the pager had been seized incident to the defendant's arrest did not violate the Fourth Amendment. The court stated that the officer had probable cause to believe that the pager contained information that would assist in the investigation of the drug offenses, and hence he was entitled to search the numbers in the pager's memory without a warrant. [Note: The defendant apparently did not assert a violation of federal law in accessing the numbers in the pager. However, in any event, federal courts have ruled that accessing a pager incident to arrest does not violate federal law—United States v. Meriweather, 917 F.2d 955 (6th Cir. 1990); United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996).]

(1) Duration of Vehicle Stop Was Reasonable, Based on Facts in This Case
(2) Defendant's Consent to Search Vehicle Was Voluntary

State v. Crenshaw, 144 N.C. App. 574, 551 S.E.2d 147 (3 July 2001). The defendant's vehicle was stopped for an inoperable taillight and illegal parking in an area known for drug activity. One of the officers involved with the stop of the vehicle knew that the defendant had previously been convicted of possession of a firearm by a felon. They checked his license and registration, which were valid. The officers then ordered the defendant out of his vehicle and frisked him. (1) The court ruled, relying on State v. Butler, 331 N.C. 227, 415 S.E.2d 719 (1992), that the duration of the vehicle stop beyond the initial stop was reasonable—based on the officers' familiarity with the defendant, the defendant's presence in an area known for drug activity, and having been illegally parked. (2) The officers testified at the suppression hearing that the defendant verbally consented to a search of his vehicle by answering "okay" when one of the officers stated that he wanted to search his vehicle. The defendant did not offer any evidence to refute the voluntariness of his consent. The court ruled that evidence supported the trial judge's ruling that the consent to search was voluntary.

Court Rules That Probable Cause Existed to Justify Seizure of Defendant When He Was Handcuffed and Therefore Declines to Rule Whether Handcuffing and Detaining Defendant for Fifteen Minutes Exceeded Scope of Investigative Stop and Required Probable Cause

State v. Milien, 144 N.C. App. 335, 548 S.E.2d 768 (19 June 2001). On December 16, 1998, a drug officer conducting surveillance near a mobile home park saw the defendant in a wooded area bury a bag containing two or three ounces of an off-white, rocky substance. On December 18, 1998, two officers set up surveillance near where the bag was buried. Other officers went to the mobile home park and spoke with several men, including the defendant. The men consented to being frisked, but no drugs were found. An officer told the men that he was going to get a drug dog to search the wooded area. The officers then left in their cars. The officers conducting the surveillance watched the defendant go to the exact place where he had buried the bag two days earlier, dig up the bag, and place it in his jacket pocket. The defendant then got in his vehicle. Officers followed the defendant in their vehicle. The defendant threw the bag out of his vehicle into the woods. The defendant did not stop his vehicle when the officers put on their blue lights, but he stopped after they turned on their siren. They handcuffed him, but did not formally arrest him. One officer found the plastic bag after approximately fifteen minutes. The defendant was then placed under arrest. The trial judge ruled that reasonable suspicion supported the detention of the defendant before his formal arrest and denied the defendant's motion to suppress. The court stated that it was unnecessary to determine whether the detention of the defendant before his formal arrest exceeded the scope of an investigative stop and required probable cause, because probable cause existed to justify the seizure of the defendant when he was handcuffed. The court cited State v. Harrington, 283 N.C. 527, 196 S.E.2d 742 (1973) on the probable cause issue.

Defendant's Confession Was Voluntary, Based on Totality of Circumstances

State v. Bailey, 145 N.C. App. 13, 548 S.E.2d 814 (17 July 2001). The court ruled that the defendant's confession was voluntary, based on the totality of circumstances (see the court's discussion of the facts in this case). The court stated, relying on State v. Richardson, 316 N.C. 594, 342 S.E.2d 823 (1986), that an officer's statements that if the defendant gave a truthful statement about what happened, "everything would probably have a little less consequence to it" and "things would probably go easier," were not improper promises. The court also noted that merely informing a defendant of the crimes for which he might be charged and the range of punishments does not constitute improper inducement.

Fact That Officer Did Not Tell Suspect He Was Free to Leave in Otherwise Voluntary Encounter Did Not Mean Defendant Was in Custody to Require *Miranda* Warnings

State v. Linton, 145 N.C. App. 639, 551 S.E.2d 572 (21 August 2001). The court ruled that the fact that an officer did not tell a suspect that he was free to leave in an otherwise voluntary encounter did not mean that the defendant was in custody to require *Miranda* warnings.

Evidence

Murder Victim's Statements Were Properly Admitted Under Residual Hearsay Rule 804(b)(5)

State v. Stephenson, 144 N.C. App. 465, 551 S.E.2d 858 (3 July 2001). The defendant was convicted of first-degree murder. The defendant regularly borrowed money from the victim. She killed and robbed the victim after the victim caught her taking money from her dresser drawer. The court ruled that the trial judge did not err in admitting under the residual hearsay rule [Rule 804(b)(5)] the murder victim's statements made several weeks before her death in which she told a witness that the defendant was taking money from her. The victim and the witness were extremely close, and the witness was the only person in the community who looked after her, whom she trusted, and in whom she confided about her financial and personal matters. This evidence supported the trial judge's finding that the witness's testimony on this issue was more probative than any other evidence that the state could have procured through reasonable efforts.

Trial Judge Must Order Recalcitrant Witness to Testify In Order for Witness to Be Considered Unavailable Under Hearsay Rule 804(a)(2)

State v. Linton, 145 N.C. App. 639, 551 S.E.2d 572 (21 August 2001). The court ruled, relying on United States v. Zappola, 646 F.2d 48 (2d Cir. 1981) and United States v. Oliver, 626 F.2d 254 (2d Cir. 1980), that a trial judge must order a recalcitrant witness to testify in order for the witness to be considered unavailable under hearsay Rule 804(a)(2) (persists in refusing to testify despite court order to do so). In this case, a witness for the state refused to testify. She answered "Yes" to the judge's question whether she refused to testify. However, the judge did not order her to testify and did not warn her of the possibility of punishment for her continued refusal. The court ruled that the witness was not unavailable under Rule 804(a)(2). [Note: This ruling only concerns the definition of unavailability in Rule 804(a)(2), not the other four subdivisions of Rule 804(a).]

(1) Defendant's Statement Made Twenty-Five Minutes After Committing Assault Was Inadmissible as Excited Utterance Under Hearsay Rule 803(2)
(2) State Did Not Open Door in Its Direct Examination of Officer About Defendant's Statement to Allow Cross-Examination of Officer About Earlier Exculpatory Statement by Defendant

State v. Safrit, 145 N.C. App. 541, 551 S.E.2d 516 (21 August 2001). The defendant was on trial for felonious assault and armed robbery. (1) The court ruled, relying on State v. Sidberry, 337 N.C. 779, 448 S.E.2d 798 (1994), that a defendant's statement to his sister made twenty-five minutes after committing an assault was inadmissible as an excited utterance under hearsay Rule 803(2). Based on the evidence in this case, the defendant's activities during the twenty-five minutes allowed the defendant to manufacture a statement and also showed a lack of sufficient spontaneity. (2) The court ruled that the state did not open the door in direct examination of an officer about a defendant's statement to allow cross-examination of the officer about an earlier exculpatory statement by the defendant to the officer (see the court's discussion of this issue in its opinion).

Hearsay Statement of Murder Victim Was Properly Admitted Under Rule 803(3) (Declarant's Then Existing State of Mind)

State v. Patterson, 146 N.C. App. 113, 552 S.E.2d 246 (18 September 2001). The defendant was convicted of first-degree murder. The court ruled that a hearsay statement of the murder victim was properly admitted under Rule 803(3) (declarant's then existing state of mind). The court noted that the victim's statement that the defendant wanted to move in with him, that the victim had told the defendant that he did not want the defendant to move in, and that the defendant did not like it, are arguably mere recitations of facts. However, the court, relying on State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999), stated that these facts tend to show the victim's state of mind about his relationship with the defendant and therefore the statement was admissible under the rule. The victim did not want the defendant to move in with him, and the victim was aware that the defendant did not like that.

State Properly Authenticated Videotape of Drug Deal That Contained Deliberate Deletions of Extraneous Material

State v. Redd, 144 N.C. App. 248, 549 S.E.2d 875 (19 June 2001). The court ruled that the state properly authenticated a videotape of a drug deal that contained deliberate deletions of extraneous material. The court noted that although the seven-pronged test in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971) for authenticating a tape recording had been superseded by Rule 901, the supreme court in State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992) ruled that the test still governs the issue of deleting material from a tape before it played before the jury. (See the court's opinion reciting the evidence supporting the state's authentication of the videotape.)

Evidence of Prior Rape, Including Defendant's Conviction of That Rape, Was Admissible in Rape Prosecution Under Rule 404(b) to Show Identity and Common Plan or Scheme

State v. Barkley, 144 N.C. App. 514, 551 S.E.2d 131 (3 July 2001). The defendant was convicted of first-degree rape that was committed on April 12, 1996. The court ruled that the trial judge did not err in admitting evidence of another rape committed in 1990 (through testimony of the victim), including evidence of the defendant's conviction of that rape [see State v. Murillo, 349 N.C. 573, 509 S.E.2d 752 (1998)], under Rule 404(b) to show identity and common plan or scheme. The court noted the similarities between the two rapes: both victims were young black females accosted in Charlotte in the early morning hours. Both victims were grabbed from behind by the mouth; the assailant held a sharp object to their throats while directing them to a dark secluded area. In addition, the defendant disrobed both victims and forced them to have vaginal and anal sex.

Defendant's Prior Acts of Exposing Himself and Masturbating in Front of Others That Occurred Twelve Years and Fourteen Years Earlier Than Indecent Liberties Offenses Being Tried Was Properly Admitted under Rule 404(b) and Rule 403, Based on Facts in This Case

State v. Beckham, 145 N.C. App. 119, 550 S.E.2d 231 (17 July 2001). The defendant was convicted of two counts of indecent liberties and one count of first-degree statutory rape. These offenses occurred in April 1998. The indecent liberties offenses involved the defendant's masturbating in front of children for whom he was caretaker while their parents were out of town. The trial judge allowed (i) the testimony of one witness that the defendant exposed himself and masturbated in front of her in 1983 or 1984 when she stayed overnight with the defendant's daughter in the defendant's house, and (ii) the testimony of another witness that the defendant frequently exposed himself to children and in May 1986 entered a room where she and his daughter were sleeping and took his daughter's hand and began playing with himself. The court ruled that this evidence was properly admitted under Rule 404(b) to show the defendant's purpose in undertaking the prohibited acts. The court also rejected the defendant's argument that the incidents were two remote and the evidence should have been excluded under the balancing test of Rule 404(b). The lapse of time in this case did not sufficiently diminish the striking similarities between the acts.

Defendant's Signature on Motel Registration Card Was Properly Authenticated and Introduction of Photocopy of Card Did Not Violate Best Evidence Rule

State v. Ferguson, 145 N.C. App. 302, 549 S.E.2d 889 (7 August 2001). Although a motel owner could not remember registering the defendant at his motel, he identified a state's exhibit as a registration card used at his motel and his own handwriting on it; the signature ("Saladin Pasha") of the renter of the room was on the card. A university identification card was also introduced into evidence that contained a signature ("Saladin Pasha") on it; a detective testified that the defendant had given him that card when he had asked the defendant for identification. The jury was then presented with both cards to compare the signatures. Distinguishing State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974) and relying on evidence Rule 901(b)(3), the court ruled that this was a proper method of authentication to admit the motel registration card into evidence. The court also ruled that a photocopy of the original registration card was properly admitted into evidence under Rule 1003 (admissibility of duplicates) and did not violate the best evidence rule (Rule 1002).

Evidence of Chain of Custody of Cocaine Was Sufficient

State v. Greenlee, 146 N.C. App. 729, 553 S.E.2d 916 (6 November 2001). A law enforcement officer seized crack cocaine from the defendant. The officer sealed it in an evidence envelope with date, initials, etc., completed an SBI request for examination form, and placed it in the drop box in his agency's property control room. Two other people were involved in the transfer of the envelope to the SBI chemist. Each person upon receipt and delivery signed their names in the chain of custody section of the request form. Only the officer and SBI chemist testified at trial. The chemist testified that the envelope was still sealed when he received it. Both the officer and chemist testified that the substance appeared to be in the same condition as when they had last seen it. The court ruled that this was sufficient evidence of the chain of custody of the crack cocaine, and the state was not also required to comply with G.S. 90-95(g1) to prove a chain of custody. The court also ruled that the SBI chemist's trial testimony properly authenticated his report to introduce it into evidence, and it was irrelevant that the state did not comply with G.S. 90-95(g).

Trial Judge Did Not Err in Ruling That Three Defense Witnesses' Testimony Was Not Admissible under Rule 804(b)(3) (Statement Against Interest)

State v. Wardrett, 145 N.C. App. 409, 551 S.E.2d 214 (7 August 2001). The defendant was on trial for murder. The court ruled that the trial judge did not err in ruling that three defense witnesses' testimony was not admissible under Rule 804(b)(3) (statement against interest). The court noted that two witnesses would have testified that Fields (the hearsay declarant) told them that the defendant did not kill the victim, and thus it is not clear that Fields' statements were against his penal interest. In any event, the trial judge properly ruled that there were no corroborating circumstances clearly indicating the trustworthiness of the statements by Fields to the three defense witnesses (see the discussion in the opinion).

Expert Who Had Provided Therapy to Child Was Properly Permitted to Testify That Child Had Been Sexually Abused

State v. Ramer, 146 N.C. App. 611, 553 S.E.2d 238 (16 October 2001). The defendant was convicted of first-degree statutory sexual offense. The court ruled, relying on State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794 (2000), that the expert—a licensed clinical social worker—was properly permitted to testify that the child victim had been sexually abused. The expert had provided therapy to the child for several months before the trial. The court noted, distinguishing State v. Stancil, 146 N.C. App. 234, 552 S.E.2d 212 (18 September 2001) (expert is precluded from offering opinion that child had been sexually abused if child's statement was only foundation for opinion), that this testimony was admissible even though the expert testified that he based his opinion partly on statements that the child made during the therapy.

Sentencing

Defendant Was Entitled to Be Resentenced under Structured Sentencing Act When Prior Record Level V Included Prior Conviction That Later Was Reversed on Appeal, Which Would Result in Prior Record Level IV

State v. Bidgood, 144 N.C. App. 267, 550 S.E.2d 198 (19 June 2001). The defendant was convicted of first-degree rape and sentenced under Prior Record Level V in accordance with the Structured Sentencing Act. While the defendant's case was pending in the court of appeals, a prior conviction that was used to support Prior Record Level V was reversed on appeal. The reversal of this conviction would result in Prior Record Level IV. The court ruled that the legislature did not intend in G.S. 15A-1340.11(7)(b) (prior conviction includes conviction on appeal to appellate division) to allow the sentence to stand under these circumstances. The court ordered resentencing for the first-degree rape conviction.

(1) Trial Judge Erred in Finding Statutory Aggravating Factor That Victim Was Very Young [G.S. 15A-1340.16(a)] in Burglary Conviction, Based on Facts in This Case
(2) Court Suggests that If Judge in Probationary Judgment Decides to Address Pretrial Release Bond in Event That Defendant Violates Specified Probation Condition, Judge Should Recommend, Not Mandate, Bond in Specified Amount

State v. Hilbert, 145 N.C. App. 440, 549 S.E.2d 882 (7 August 2001). (1) The defendant was convicted of first-degree burglary in which a husband, wife, and two children were home when the defendant broke and entered. However, none of the victims was aware of the defendant's presence in the home. The court ruled, relying on State v. Styles, 93 N.C. App. 596, 379 S.E.2d 255 (1989), that the trial judge erred in finding the statutory aggravating factor that victim was very young [G.S. 15A-1340.16(a)]. There was no evidence that the defendant targeted the children or took advantage of their age in committing the burglary. (2) The trial judge placed the defendant on probation for other convictions and imposed a requirement that the defendant submit to drug or alcohol testing when instructed by the probation officer.

The judge then provided that if there was a positive test, the defendant was to be immediately arrested and placed under a $100,000 cash bond to await the probation violation hearing. The court, noting G.S. 15A-1345(b), stated that the better practice—if a judge decides to address the issue of bond in a probationary judgment—is that the judge should recommend, not mandate, the bond in a specified amount when a defendant is ordered to be arrested for an alleged violation of probation.

(1) Judge Who Imposes Enumerated Special Probation Condition Is Not Required to Find That It Is Reasonably Related to Defendant's Rehabilitation
(2) Probation Condition That Defendant Not Engage in Practice as Paralegal or Private Investigator Was Valid

State v. Lambert, 146 N.C. App. 360, 553 S.E.2d 71 (2 October 2001). The defendant was convicted of the unauthorized practice of law and placed on probation. (1) The trial judge imposed as a specific probation condition under G.S. 15A-1343(b1)(3c) that the defendant remain under a curfew and not be away from his residence from 7:00 p.m. until 6:00 a.m. The court ruled that G.S. 15A-1343(b1)(10) (judge may impose any other conditions reasonably related to the defendant's rehabilitation) does not require a judge who imposes an enumerated special probation condition [see subdivisions (b1)(1) through (9a)] to find that the condition is reasonably related to the defendant's rehabilitation. Thus the probation condition was validly imposed. (2) In the defendant's first appeal, the court of appeals in an unpublished opinion ruled that a probation condition that the defendant not engage in the practice as a paralegal or private investigator was valid (because the condition bore some relation to the offense and was aimed at preventing the defendant from engaging in similar offenses). In this appeal, the court ruled that it was bound by the prior ruling that the condition was valid because one panel of the court of appeals cannot overrule a prior panel's ruling unless it has been overturned by a higher court.

Juvenile Probation May Be Extended After Expiration of Probationary Period When Motion for Review Was Filed Before End of Probationary Period

In re T.J., 146 N.C. App. 605, 553 S.E.2d 418 (16 October 2001). The court ruled that G.S. 7B-2510(d) and (e) authorize the extension of juvenile probation after the expiration of the probationary period when the motion for review was filed before the end of the probationary period. [Note: Although the case was decided when former Chapter 7A was effective, the court made clear that its analysis also applied under G.S. 7B-2510.]

Miscellaneous

Trial Judge Did Not Abuse Discretion in Finding "Extraordinary Cause" Did Not Exist to Warrant Remittance of Bail Bond Judgments in Whole or in Part, Based on Facts in This Case, in Which Both Defendants Died After Execution of Judgment of Forfeiture

State v. Coronel, 145 N.C. App. 237, 550 S.E.2d 561 (7 August 2001). The court ruled that the trial judge did not abuse his discretion in finding that "extraordinary cause" did not exist to warrant remittance of bail bond judgments in whole or in part, based on the facts in this case, in which both defendants died after execution of judgment of forfeiture. The defendants had failed to appear in court and had fled to Mexico, where they died. The court stated that "extraordinary cause" can exist when a death occurs after the execution of judgment of forfeiture, but "extraordinary cause" did not exist in this case (see the court's discussion of the facts).