RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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North Carolina Supreme Court

Criminal Law and Procedure

G.S. 14-51.1, Permitting Use of Deadly Physical Force Against Intruder by Lawful Occupant "Within" Home, May Apply to Porch of Home Under Certain Circumstances—Court of Appeals Ruling Reversed

State v. Blue, 356 N.C. 79, 565 S.E.2d 133 (28 June 2002), *reversing*, 143 N.C. App. 478, 550 S.E.2d 6 (15 May 2001). The court ruled that G.S. 14-51.1, permitting the use of deadly physical force against an intruder by a lawful occupant "within" a home, may apply to the porch of a home under certain circumstances. The court noted that the functional use of a porch may not differ significantly from that of the interior of the living quarters. However, porches vary in description and usefulness from large, screened-in porches to small, uncovered stoops. Whether a porch, deck, garage, or other appurtenance attached to a dwelling is within the home under G.S. 14-51.1 is a question of fact for the jury's determination based on the evidence presented at trial. The court also noted that this statute broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* an unlawful entry into a home or to *terminate* an unlawful entry by an intruder.

Sufficient Evidence of Nonexclusive Constructive Possession of Cocaine to Support Drug Trafficking Convictions—Court of Appeals Ruling Affirmed

State v. Butler, 356 N.C. 141, 567 S.E.2d 137 (16 August 2002), *affirming*, 147 N.C. App. 1, 556 S.E.2d 304 (6 November 2001). The defendant was convicted of trafficking by possessing cocaine and trafficking by transporting cocaine, based on cocaine found in a taxicab after he had been passenger. The court ruled, relying on its ruling in State v. Matias, 354 N.C. 549, 556 S.E.2d269 (2001), that the following evidence was sufficient to support nonexclusive constructive possession of the cocaine. The defendant, carrying a small bag, alighted from a bus that originated in New York City, a source city for drugs. He acted suspiciously when seeing drug officers (see the discussion in the court's opinion). He hurried into a taxicab, sat down in the passenger seat behind the driver, slammed the door, and urged the driver to leave immediately. When the officers asked him to step out of the cab, he bent over and reached toward the driver's seat. The officers could not see his hands. The driver testified that he felt the defendant struggling behind him and pushing the back of his seat. After the officers questioned the defendant and searched his bag (no drugs were found), he left the bus terminal on foot although other cabs were available. Meanwhile, the driver picked up another passenger, who sat in the rear right side passenger seat and made no movement toward the area behind the driver's seat. After ten minutes, the driver returned to the terminal, where he consented to a search by the officers. They found a package of cocaine under the driver's seat. The driver testified that he had cleaned and vacuumed the cab before beginning his shift, and the defendant had been his first fare. The driver said that the cocaine had not been under the driver's seat when the defendant had entered the taxicab.

Trial Judge Did Not Err in Denying Defendant's Motion Made Six Days Into Trial for Dismissal of Public Defenders and Substitution of Retained Counsel

State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61 (28 June 2002).The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982), and State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977), that the trial judge did not err in denying the defendant's motion made six days into trial for the dismissal of the public defenders representing him and the substitution of retained counsel. The motion cited a "lack of confidence" in appointed counsel and a "breakdown in communication." The defendant did not allege ineffective assistance of counsel. Although the trial judge invited the defendant to present evidence in support of the motion, the defendant presented only an affidavit stating that he or someone on his behalf was prepared to pay for substitute counsel.

Trial Judge Properly Exercised Inherent Authority to Change Venue of Trial

State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440 (4 October 2002). The court ruled that the trial judge properly exercised a judge's inherent authority to change the venue of a trial. (See the court's detailed discussion of the facts.)

No Statutory Prohibition Against State's Using Juvenile's Letter Contained in Law Enforcement Files

State v. Wiley, 355 N.C. 592, 565 S.E.2d 22 (28 June 2002). The court ruled that there is no statutory prohibition against the state's using a juvenile's letter contained in law enforcement files in a later proceeding—in this case, a capital sentencing hearing. See former G.S. 7A-675, pertinent to this case, and current G.S. 7B-3001(b). [Author's note: See G.S. 7B-3000 and 7B–3001 for confidentiality provisions of court records and court counselor's records.]

Trial Judge Did Not Err in Ordering Shackling of Defendant's Legs Based on Many Instances of Misconduct in Jail Awaiting Trial

State v. Holmes, 355 N.C. 719, 565 S.E.2d 154 (28 June 2002). The court ruled that the trial judge did not err in ordering the shackling of the defendant's legs (the shackling was not visible in the courtroom) based on many instances of misconduct, including assaultive behavior, in the jail while he was awaiting trial. The court stated that the defendant's past disregard for order and safety of others while in custody was a reasonable indicator that he may exhibit the same conduct during trial.

Trial Court Has Subject Matter Jurisdiction to Rule on Plaintiff's Declaratory Judgment Action to Declare Whether Plaintiff's Future Conduct in Holding Pigeon Shoot Would Violate a Criminal Statute (G.S. 14-360, Cruelty to Animals)—Court of Appeals Ruling Reversed

Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76 (28 June 2002), *reversing*, 146 N.C. App. 66, 551 S.E.2d 911 (2001). The court ruled that the trial court had subject matter jurisdiction to rule on plaintiff's declaratory judgment action to declare whether plaintiff's future conduct in holding pigeon shoot would violate a criminal statute (G.S. 14-360, cruelty to animals). The case presented an actual controversy between the parties with adverse interests. The plaintiff had sufficiently alleged imminent prosecution and that he may lose fundamental human rights and property interests if the statute was enforced and was later determined to be unconstitutional.

Arrest, Search, and Confession Issues

No Fourth Amendment Violation When Jail Personnel Read Inmate's Outgoing Letter Pursuant to Jail Policy

State v. Wiley, 355 N.C. 592, 565 S.E.2d 22 (28 June 2002). The defendant, a jail inmate awaiting trial for first-degree murder, asked jail personnel to give an unsealed letter to the defendant's father, who had visited the defendant and was still in the waiting room. Pursuant to jail policy concerning incoming and outgoing mail that does not have the words "legal mail" written on it and is not addressed to an attorney, a deputy sheriff scanned the letter to ascertain that there was no contraband, matters concerning a jail break or possible harm to jail personnel, and to make sure that inmates were not communicating between cell blocks. Inmates are informed of the mail policy when they enter the jail. Inmates commonly left their nonlegal mail unsealed because they were aware that it would be examined by jail personnel. The deputy sheriff noticed information in the letter related to the pending murder. He made a copy of the letter, gave the original to the defendant's father, and gave the copy to the state's investigators. The court ruled, citing Stroud v. United States, 251 U.S. 15 (1919), and several other federal and state cases, that the defendant did not have a reasonable expectation of privacy in his nonlegal mail. The court stated that when prisoners or pretrial detainees are made aware that their nonlegal mail will be subject to scrutiny before reaching its intended recipient, pursuant to institutional policies to maintain order and safety, later examination of such mail does not violate their Fourth Amendment rights. Copying and forwarding such mail also does not violate the Fourth Amendment.

(1) Reasonable Suspicion Supported Issuance of Nontestimonial Identification Order
(2) Officer Did Not Intentionally Provide False Information in Affidavit for Nontestimonial Identification Order
(3) Statutory Violations Did Not Require Suppression of Evidence Obtained from Nontestimonial Identification Order

State v. Pearson, 356 N.C. 22, 566 S.E.2d 50 (28 June 2002), *affirming*, 145 N.C. App. 506, 551 S.E.2d 471 (21 August 2001). The defendant was convicted of two counts of second-degree rape. (1) The court ruled that there was reasonable suspicion to support the issuance of a nontestimonial identification order to require the suspect, the defendant, to supply head and pubic hair samples and a saliva sample. [Author's note: The nontestimonial identification order also ordered the defendant to supply a blood sample, but note that probable cause is needed to do so. See State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988).] The defendant met the physical description of the perpetrator given by two rape victims. A peeping tom was reported at the location of one of the rapes—about eight months before the rape occurred at that location. An officer saw a man, wearing a light gray or blue windbreaker and blue jeans, squatting near an air-conditioning unit directly behind an apartment building. The man ran when he saw the officer. Shortly thereafter, the defendant—wearing blue jeans and a light blue windbreaker—was stopped by an officer. (2) The court ruled that an officer did not intentionally provide false information in his affidavit for a nontestimonial identification order. The officer had sufficient evidence to conclude in the affidavit that the suspect, the defendant, was caught secretly peeping at the apartment complex. (3) The court ruled that statutory violations did not require suppression of evidence obtained from the nontestimonial identification order. (See the discussion of the violations and the court's analysis in its opinion.)

(1) Defendant's Statements During Interrogation That His Father Wanted Him to Have an Attorney Present and Defendant's Request to Speak to His Father Did Not Constitute Unambiguous Requests for Counsel
(2) Defendant Properly Waived His *Miranda* Rights Although He Was Kept Unaware of His Lawyer's Presence Outside Interrogation Room and His Lawyer Was Denied Access to Defendant

State v. Hyatt, 355 N.C. 642, 566 S.E.2d 61 (28 June 2002). (1) The court ruled, relying on Fare v. Michael C., 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979), and Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), ruled that the defendant's statements during interrogation that his father wanted him to have an attorney present and the defendant's request to speak to his father did not constitute unambiguous requests for counsel. (2) The court ruled, relying on Moran v. Burbine, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986), and State v. Reese, 319 N.C. 110, 353 S.E.2d 352 (1987), that the defendant properly waived his *Miranda* rights although he was kept unaware of his lawyer's presence outside the interrogation room and his lawyer was denied access to the defendant.

Evidence

Trial Judge in Murder and Attempted Robbery Trial Erred in Admitting Rule 404(b) Evidence of Robberies of Another Person When Robberies Were Dissimilar to Offenses Being Tried and Person's Testimony Rested on Identification Procedure of Questionable Validity

State v. Al-Bayyinah, 356 N.C. 150, 567 S.E.2d 120 (16 August 2002). The defendant was convicted of first-degree murder of A and attempted robbery of A, which occurred on March 6, 1998. The trial judge allowed under Rule 404(b) the testimony of B that he had been robbed by the defendant on two separate occasions (January 20 and 22, 1998). The court examined each of these two robberies and concluded that they were factually dissimilar to the offenses being tried, and the two robberies against victim B were also dissimilar to each other (see the court's discussion of these issues in its opinion). In addition, the court stated that B's testimony rested on a pretrial identification procedure of questionable validity. An officer told B on March 6, 1998, that there had been a robbery and a suspect was in custody. He then showed B a single photograph (a photograph of the defendant) and asked B if he was the person who robbed him twice. B said yes. The court ruled that the trial judge erred in admitting B's testimony as Rule 404(b) evidence.

Capital Case Issues

(1) Defendant's Statement Showing Satanic Motivation For Murder Was Admissible To Prove Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Separate Evidence Supported Submission of Both G.S. 15A-2000(e)(5) (Murder Committed During Commission of Robbery) and G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain)
(3) Defendant's Felonious Assault Conviction Obtained When, As a Juvenile, He Was Tried as Adult Was Properly Submitted Under G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction)
(4) Cookbook Dedicated to Murder Victim Was Properly Admitted as Victim Impact Evidence

State v. White, 355 N.C. 696, 565 S.E.2d 55 (28 June 2002). (1) The court ruled, relying on State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the defendant's statement showing a satanic motivation for the murder was admissible to prove aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel). A satanic motive may show a depravity of mind and thus is relevant in determining the existence of this aggravating circumstance. (2) The court ruled that separate evidence supported the submission of both G.S. 15A-2000(e)(5) (murder committed during commission

of robbery) and G.S. 15A-2000(e)(6) (murder committed for pecuniary gain). The theft of the victim's keys and car supported G.S. 15A-2000(e)(5). The defendant stole the car for transportation, not to sell it. The defendant's theft of the victim's money supported G.S. 15A-2000(e)(6). Thus separate, independent evidence supported submission of these aggravating circumstances. The court noted that the jury instructions properly limited the jury's consideration of the evidence supporting each circumstance. (3) The court ruled that the defendant's felonious assault conviction (assault with a deadly weapon inflicting serious injury) obtained when, as a juvenile, he was tried as adult was properly submitted under G.S. 15A-2000(e)(3) (prior violent felony conviction). (4) The court ruled that a cookbook dedicated to the murder victim was properly admitted as victim impact evidence. The evidence reflected the high regard in which the victim was held among her family and throughout the community.

Legislative Amendment to Aggravating Circumstance G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction) Adding Delinquency Adjudication for Violent Offense That Would Be Class A through E Felony If Juvenile Had Been Tried as Adult Was Effective for First-Degree Murders Committed On or After May 1, 1994

State v. Leeper, 356 N.C. 55, 565 S.E.2d 1 (28 June 2002). The court ruled that the legislative amendment to aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) adding a delinquency adjudication for a violent offense that would be a Class A through E felony if the juvenile had been tried as an adult was effective for first-degree murders committed on or after May 1, 1994. Because the murder was committed on April 18, 1996, the defendant's 1992 delinquency adjudication of armed robbery was properly submitted as an aggravating circumstance. The date of the delinquency adjudication may occur before the effective date of the legislative amendment.

Application of Legislative Amendment, Effective for First-Degree Murders Committed on or After May 1, 1994, to Juvenile Adjudication Occurring Before May 1, 1994, Used as Prior Violent Felony Conviction Under G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction), Did Not Violate Ex Post Facto Clause

State v. Wiley, 355 N.C. 592, 565 S.E.2d 22 (28 June 2002). The court ruled, relying on State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811, *aff'd per curiam*, 349 N.C. 219, 504 S.E.2d 785 (1998) and other cases, that the application of a legislative amendment, effective for first-degree murders committed on or after May 1, 1994, to a juvenile adjudication occurring before May 1, 1994, used as a prior violent felony conviction under G.S. 15A-2000(e)(3) (prior violent felony conviction), did not violate the Ex Post Facto Clause.

State Did Not Violate *State v. Case* Ruling By Requesting Aggravating Circumstance G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction) for Prior Georgia Murder Conviction But Did Not Request Aggravating Circumstance G.S. 15A-2000(e)(2) (Prior Capital Felony Conviction)

State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440 (4 October 2002). The defendant was convicted of first-degree murder and sentenced to death. The state at the capital sentencing hearing presented evidence of the defendant's 1974 conviction of murder in Georgia. The state requested the submission of aggravating circumstance G.S. 15A-2000(e)(3) (prior violent felony conviction) for the Georgia conviction, but did not request aggravating circumstance G.S. 15A-2000(e)(2) (prior capital felony conviction). The court ruled that the state did not violate the ruling in State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991) (if aggravating circumstance could be supported by the evidence, state must submit it). The court noted that the (e)(3) circumstance was submitted in lieu of the (e)(2) circumstance, which distinguishes this case from the facts in *State v. Case*.

Sentencing

Defendant Whose Suspended Sentence Was Activated Was Entitled to Credit Against Prison Time for Time Spent in IMPACT During Probation—Court of Appeals Ruling Reversed

State v. Hearst, 356 N.C. 132, 567 S.E.2d 124 (16 August 2002), *reversing*, 147 N.C. App. 298, 555 S.E.2d 357 (20 November 2001). The court ruled that a defendant whose suspended sentence was activated was entitled to credit under G.S. 15-196.1 against his prison time for time spent in IMPACT (Intensive Motivational Program of Alternative Correctional Treatment) during probation. The court, distinguishing house arrest, concluded that the defendant was in custody and not at liberty and therefore was "in confinement" under G.S. 15-196.1 while at IMPACT.

North Carolina Court of Appeals

Criminal Law and Procedure

Trial Judge Committed Plain Error in Not Instructing on Assault Inflicting Serious Injury as Lesser-Included Offense of Assault with Deadly Weapon Inflicting Serious Injury When Fists and Commode Lid Were Alleged Deadly Weapons

State v. Lowe, 150 N.C. App. 682, 564 S.E.2d 313 (18 June 2002). The court ruled, relying on State v. Bell, 87 N.C. App. 626, 362 S.E.2d 288 (1987), that the trial judge committed plain error in not instructing on assault inflicting serious injury as a lesser-included offense of assault with deadly weapon inflicting serious injury when fists and a commode lid were the alleged deadly weapons. The court stated that there was sufficient evidence that the jury could find that the fists and commode lid were not used as deadly weapons but did inflict serious injury. [Author's note: The defendant did not request a jury instruction on assault inflicting serious injury and thus the court conducted plain error review.]

Defendant's Guilty Plea to Habitual Felon Indictment Alleging Five Felony Convictions Barred State from Using All Five Felony Convictions in Calculating Defendant's Prior Record Level

State v. Lee, 150 N.C. App. 701, 564 S.E.2d 597 (18 June 2002). The court ruled, relying on G.S. 14-7.6, that the defendant's guilty plea to a habitual felon indictment alleging five felony convictions barred the state from using all five felony convictions in calculating the defendant's prior record level. [Author's note: If the defendant had pleaded not guilty, a hearing held, and the trial judge had instructed the jury on only three of the five felony convictions, then it would appear that the remaining two felony convictions could be used to establish the defendant's prior record level.]

(1) Defendant May Plead No Contest to Habitual Felon Indictment
(2) Court Rejects Assertion of Fatal Variance Between Indictment and Proof for Charge of Felonious Possession of Stolen Goods

State v. Jones, 151 N.C. App. 317, 566 S.E.2d 112 (16 July 2002). (1) The court rejected the defendant's argument that the language of G.S. 14-7.6 ("conviction or plea of guilty") prohibits a plea of no contest to a habitual felon indictment. The court noted that the judge followed the statutory procedures of G.S. 15A-1022 in accepting the defendant's no contest plea. (2) The court ruled, relying on State v. Medlin, 86 N.C. App. 114, 357 S.E.2d 174 (1987), that a variance between an indictment's allegations of ownership of property and proof of ownership is not fatal for a charge of felonious possession of stolen goods.

(1) Trial Judge Did Not Err After Jury Returned Felony Guilty Verdicts in Granting State a Continuance to Obtain Superseding Habitual Felon Indictment to Correct Erroneous Date for One of Prior Convictions Alleged in Habitual Felon Indictment
(2) Trial Judge Did Not Err in Ordering Defendant to Proceed With Either Court-Appointed Counsel or Pro Se When on Morning of Sentencing Hearing Defendant Sought to Remove Appointed Counsel and Wanted Continuance to Retain Private Counsel

State v. Gant, 153 N.C. App. 136, 568 S.E.2d 909 (17 September 2002). (1) The defendant was indicted for several felonies and for being an habitual felon. He was convicted of some of the felonies. An error was discovered in the habitual felon indictment in alleging the date of one of the prior felony convictions. The judge granted the state's motion for a continuance so the state could obtain a superseding habitual felon indictment to correct the error. The court ruled, citing State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994), that the trial judge did not err in granting the continuance. The court noted that the defect was only technical. [Author's note: A superseding indictment was probably unnecessary. The indictment likely could have been amended to correct the technical error. See, for example, State v. Hargett, 148 N.C. App. 688, 559 S.E.2d 282 (2002).] (2) The court ruled, citing State v. Chavis, 141 N.C. App. 553, 540 S.E.2d 404 (2000), that the trial judge did not err in ordering the defendant to proceed with either court-appointed counsel or pro se when on the morning of the sentencing hearing the defendant sought to remove appointed counsel and wanted a continuance to retain private counsel. The court noted that the defendant had attempted to fire his appointed counsel six weeks before the sentencing hearing but had made no effort since then to hire private counsel.

When Indictment Only Charged Assault on a Female, Court Lacked Jurisdiction to Sentence Defendant for Habitual Misdemeanor Assault

State v. Williams, 153 N.C. App. 192, 568 S.E.2d 890 (17 September 2002). The state indicted the defendant for assault on a female. He was convicted. Then the state proved at a separate sentencing hearing that the defendant had five qualifying convictions to purportedly establish habitual misdemeanor assault under G.S. 14-33.2. The court ruled that the court lacked jurisdiction to sentence the defendant for habitual misdemeanor assault when the indictment only charged assault on a female, a misdemeanor. An indictment charging the felony of habitual misdemeanor assault is required. [Author's note: G.S. 15A-928 requires the state, in charging the felony of habitual misdemeanor assault, to indict the defendant for the misdemeanor assault and to allege in either a separate count of the same indictment or in a separate indictment the five prior qualifying convictions that constitutes habitual misdemeanor assault.]

Indictment Charging Assault with Firearm on Law Enforcement Officer Did Not Need to Allege That Defendant Knew or Had Reasonable Grounds to Believe Victim Was Law Enforcement Officer

State v. Thomas, 153 N.C. App. 326, 570 S.E.2d 142 (15 October 2002). The court ruled, relying on the reasoning in State v. Baynard, 79 N.C. App. 559, 339 S.E.2d 810 (1986), that an indictment charging assault with a firearm on a law enforcement officer did not need to allege that the defendant knew or had reasonable grounds to believe that the victim was a law enforcement officer. The indictment's allegation that the defendant committed the assault "willfully" effectively alleges that the defendant knew that the person he was assaulting was a law enforcement officer.

(1) No Fatal Variance Between Dates in Indictment for Sex Offenses With Young Person and Evidence at Trial
(2) No Error in Allowing State to Amend Indictment About Dates of Sex Offenses With Young Person

State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776 (6 August 2002). The defendant was indicted for statutory rape and indecent liberties, with the dates of the offenses alleged from on or about January 4, 1999, through January 27, 1999. The evidence at trial showed that the acts occurred in December 1998. The defendant did not present any evidence, including an alibi defense. (1) The court ruled, relying on State v. Hutchings, 139 N.C. App. 184, 533 S.E.2d 258 (2000), and other cases, that there was not a fatal variance between the indictment's allegations and the evidence. Time variances do not require a dismissal of charges if they do not prejudice a defendant's opportunity to present a defense. (2) During the trial, the trial judge granted the state's motion to amend the indictments to allege that the offenses occurred between December 1, 1998, and January 27, 1999. The court ruled, citing State v. Brinson, 337 N.C. 764, 448 S.E.2d 822 (1994), that the trial judge did not err in allowing the state to make the amendment.

Defendant's Use of Stun Gun Constituted Dangerous Weapon to Support Armed Robbery Conviction

State v. Gay, 151 N.C. App. 530, 566 S.E.2d 121 (16 July 2002). The defendant was convicted of armed robbery. The defendant put his left arm around the victim's neck and attempted to shock her with a stun gun that was in his right hand. The victim began struggling with the defendant and, as she fell to the ground, he ripped the back pack off her back and ran away. The court ruled, citing State v. Westall, 116 N.C. App. 534, 449 S.E.2d 24 (1994), State v. Funderburk, 60 N.C. App. 777, 299 S.E.2d 822 (1983), and other cases, that the defendant's actions constituted the use of a dangerous weapon that threatened the victim's life.

(1) Robbery Victim's Injuries and Description of Weapon Were Sufficient to Prove Defendant's Use of Dangerous Weapon to Support Armed Robbery Conviction
(2) Doctrine of Possession of Recently-Stolen Property and Other Evidence Supported Armed Robbery Conviction

State v. Reid, 151 N.C. App. 379, 565 S.E.2d 747 (16 July 2002). The defendant was convicted of armed robbery. (1) The victim testified that although she was unable to see what object the assailant used to hit her, she did not believe it was his hand. She said that the object had a smooth surface, but it was firm and "rigid enough to have . . . exerted some force." The force of the object loosened several of her teeth and drove her upper teeth through her lower lip, requiring 25 stitches. The court ruled, relying on State v. Greene, 67 N.C. App. 703, 314 S.E.2d 262 (1984) and State v. Peacock, 313 N.C. 554, 330 S.E.2d 190 (1985), that this evidence was sufficient to prove the defendant used a dangerous weapon in committing the robbery. (2) The court ruled that the doctrine of possession of recently-stolen property and other evidence supported the armed robbery conviction. The victim did not identify the defendant at trial. However, the state's evidence showed that the contents of the victim's purse were stolen, and the contents were recovered from the defendant's possession 24 hours later when the defendant attempted to make a substantial purchase using the victim's credit card.

(1) Evidence of Serious Personal Injury Committed on Person Other Than Victim Was Sufficient to Support Conviction of Attempted First-Degree Rape
(2) Defendant's Use of His Hand to Injure Victim Was a Deadly Weapon to Support Felonious Assault Conviction

State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (1 October 2002). (1) A person (hereafter, A) came into a house where the defendant was attempting to rape the victim. The defendant apparently heard A and discontinued his attempt to rape the victim. The defendant pulled the victim through the house, whereupon the defendant encountered A. The defendant then committed serious personal injury on A. The court ruled, relying on State v. Blackstock, 314 N.C. 232, 333 S.E.2d 245 (1985), that the serious personal injury to A supported the attempted first-degree rape conviction ("inflicts serious personal injury upon the victim or another person") because it was inflicted on another person to conceal the attempted rape or to aid in the defendant's escape. (2) The court ruled, relying on State v. Krider, 138 N.C. App. 37, 530 S.E.2d 569 (2000) and other cases, that the defendant's use of his hand to injure the victim was a deadly weapon to support his felonious assault conviction. The victim suffered a cracked cheekbone, a broken nose, and a broken jaw. The defendant, a male, was six feet two inches tall and weighed 165 pounds, while the victim, a female, was approximately five feet three inches tall and weighed 99 pounds.

Defendant's Hands and Feet Were Deadly Weapons to Support Felonious Assault Conviction

State v. Hunt, 153 N.C. App. 316, 569 S.E.2d 709 (1 October 2002). The court ruled, relying on State v. Grumbles, 104 N.C. App. 766, 411 S.E.2d 407 (1991), that the defendant's hands and feet were deadly weapons to support his felonious assault conviction in which he used his hands and feet to beat the victim. The victim's injuries included factures of the left orbit, or eye socket, and the left maxillary. She also had swelling and contusions about her face, neck, and upper chest. She was admitted to a hospital's intensive care unit and was placed on a ventilator. The defendant outweighed the victim by forty pounds, and the victim was 19 weeks pregnant when she was assaulted.

Double Jeopardy Clause Does Not Bar Convictions for Both Felony Child Abuse and Assault With Deadly Weapon Inflicting Serious Injury, Based on Same Act

State v. Carter, 153 N.C. App. 756, 570 S.E.2d 772 (5 November 2002). The defendant intentionally kicked his son in the abdomen and lacerated his pancreas. The court ruled that there was no double jeopardy bar to convictions for both felony child abuse and assault with a deadly weapon inflicting serious injury, based on the same act. Each offense has an element that is not contained in the other offense.

Sufficient Evidence of Malice to Prove Second-Degree Murder Involving Vehicle Crash

State v. McDonald, 151 N.C. App. 236, 565 S.E.2d 273 (2 July 2002). The court ruled that there was sufficient evidence of malice to prove second-degree murder involving a vehicle crash. The defendant drove his vehicle at 55 mph (almost twice the legal limit) through a stop sign at an intersection while bending down to pick up a lit cigarette and crashed into another vehicle, killing one of its occupants. The defendant had a 0.15 alcohol concentration and had previously been convicted of consuming alcohol while under 21.

Defendant's Failure to Request Arraignment Under G.S. 15A-941(d) Waived Prohibition in G.S. 15A-943 of Trying Defendant in Same Week in Which He Is Arraigned (In Counties Where Arraignment Is Required)

State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592 (5 November 2002). The court ruled that the defendant's failure to request his arraignment under G.S. 15A-941(d) (defendant must file written request for arraignment not later than 21 days after service of indictment, or if defendant is not required to be served, not later than 21 days from return of indictment) waived the prohibition in G.S. 15A-943 of trying a defendant in the same week in which the defendant is arraigned (in counties where arraignment is required).

Judge Did Not Err in Finding Defendant Competent to Stand Trial

State v. Pratt, 152 N.C. App. 694, 568 S.E.2d 276 (3 September 2002). The court ruled, distinguishing State v. Reid, 38 N.C. App. 547, 248 S.E.2d 390 (1978), that the judge did not err in finding the defendant competent to stand trial. (See the court's discussion of the testimony of the state's expert and the two defense experts.)

(1) Insufficient Evidence of Keeping or Maintaining Vehicle for Sale or Delivery of Cocaine
(2) No Double Jeopardy Bar to Conviction and Punishment for Both (i) Sale and Delivery of Cocaine, and (ii) Possession of Cocaine With Intent to Sell and Deliver

State v. Dickerson, 152 N.C. App. 714, 568 S.E.2d 281 (3 September 2002). (1) The court ruled, relying on State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994), that there was insufficient evidence to support the defendant's conviction of keeping or maintaining a vehicle for the sale or delivery of cocaine [G.S. 90-108(a)(7)]. The fact that the defendant was in his vehicle on one occasion when he sold a controlled substance did not by itself demonstrate that the vehicle was kept or maintained to sell or deliver a controlled substance. The state presented no evidence in addition to the defendant's being seated in a vehicle when the cocaine was purchased. (2) The court ruled, citing State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973), that there is no double jeopardy bar to a conviction and punishment for both (i) sale and delivery of cocaine, and (ii) possession of cocaine with the intent to sell and deliver.

Trial Judge Did Not Err in Not Submitting Lesser Offense of Trafficking by Possessing Cocaine Because There Was No Evidence of Lesser Weight of Cocaine

State v. Reid, 151 N.C. App. 420, 566 S.E.2d 186 (16 July 2002). The defendant was convicted of trafficking by possessing more than 28 but less than 200 grams of cocaine. The cocaine was discovered in a bag submerged by water in a toilet. The bag weighed 33.5 grams. No evidence was presented whether the weight included water weight. The court rejected the defendant's argument that the trial judge erred in not submitting a lesser offense of trafficking because the jury could have concluded that the cocaine in the bag was not fully dry when weighed. The court noted that the relevant weight is the mixture containing cocaine, the undisputed evidence showed a weight of 33.5 grams, and thus there was no evidence to support a lesser offense instruction.

Evidence of Nonexclusive Constructive Possession of Cocaine Was Sufficient to Support Conviction of Trafficking by Possessing Cocaine

State v. Siriguanico, 151 N.C. App. 107, 564 S.E.2d 301 (18 June 2002). The defendant was convicted of trafficking by possessing 990 grams of cocaine. An informant worked with law enforcement officers to arrange a cocaine transaction. The defendant was aware of and was present during all conversations concerning the cocaine purchase. The defendant, knowing the cocaine was in a vehicle, rode in the

vehicle with the informant to transport the cocaine. The defendant accompanied the informant inside an apartment and remained inside while the informant returned to the vehicle to retrieve the package of cocaine. After the informant returned with the cocaine, the defendant watched as the informant opened the cocaine package in his presence and placed the cocaine on scales. Although the defendant never touched the cocaine, the defendant actively assisted the informant in weighing the cocaine on the scales. The court ruled that this evidence established that the defendant had nonexclusive constructive possession of the cocaine.

Evidence of Constructive Possession of Cocaine Was Sufficient to Support Conviction of Possessing Cocaine in Rented Car

State v. Tisdale, 153 N.C. App. 294, 569 S.E.2d 680 (1 October 2002). The defendant was convicted of possession of cocaine. An officer stopped his patrol car at a traffic light behind a car driven by the defendant. When the light turned green, the defendant quickly accelerated through the intersection and the officer eventually stopped the defendant for speeding 60 m.p.h. in a 35 m.p.h. zone. The defendant was alone in the car, which had been rented to another person. The officer saw a small baggie containing cocaine in plain view in the cutout near the handle on the driver's side door. The defendant was sweating profusely and appeared nervous. The officer believed that he was under the influence of something, but not so impaired that he could not drive. After placing the defendant in the patrol car, the officer found another small baggie of cocaine under the driver's seat. The defendant presented evidence at trial that the car had recently been used by at least two other people and an admitted crack addict had recently dropped cocaine in the car while washing it. However, the renter of the car did not notice any cocaine in the car after the addict had cleaned it. The court ruled that the evidence supported a reasonable inference that the defendant was aware of the cocaine in the car and had the power and intent to control its disposition.

Misdemeanor Possession of Drug Paraphernalia Cannot Be Elevated to Felony Under G.S. 90-95(e)(3)

State v. Stevens, 151 N.C. App. 561, 566 S.E.2d 149 (16 July 2002). The court ruled that misdemeanor possession of drug paraphernalia cannot be elevated to a felony under G.S. 90-95(e)(3) (person committing Class 1 misdemeanor "under this Article" and with specified prior conviction is punished as Class I felon) because possession of drug paraphernalia is in Article 5B of Chapter 90 and G.S. 90-95(e)(3) is in Article 5 of Chapter 90.

Defendant in Drug Prosecution Failed to Establish Entrapment As a Matter of Law to Require Dismissal of Charges

State v. Branham, 153 N.C. App. 91, 569 S.E.2d 24 (17 September 2002). The trial judge in a drug prosecution instructed the jury on the defense of entrapment. However, the judge denied the defendant's motion to dismiss the charges based on the argument that there had been entrapment as a matter of law. The court upheld the judge's ruling. (See the court's discussion of the facts in its opinion.)

(1) Neither G.S. 15-11.1 Nor G.S. 90-112 Bar North Carolina State or Local Law Enforcement Officer from Delivering Evidence to Federal Authorities
(2) Party May Not Thwart Federal Forfeiture By Collateral Attack in North Carolina State Courts

State v. Hill, 153 N.C. App. 716, 570 S.E.2d 768 (5 November 2002). A local law enforcement agency lawfully seized illegal drugs and currency from the defendants' residences. After the search and before a hearing on the defendants' motion for return of the currency, the currency was turned over to the federal Drug Enforcement Agency for in rem forfeiture under federal law. The court noted that G.S. 90-112 involves an in personam forfeiture (no forfeiture unless there is a criminal conviction of the property

owner). Thus, there is no application of the rule that when two in rem actions are pending, the court that first had dominion or control of the res retains exclusive jurisdiction. The court ruled that (1) neither G.S. 15-11.1 nor G.S. 90-112 bar North Carolina state or local law enforcement officers from delivering evidence to federal authorities, and (2) once a federal agency has adopted a state seizure, a party may not attempt to thwart the forfeiture by collateral attack in North Carolina state courts, because exclusive original jurisdiction is then vested in the federal court under 28 U.S.C. § 1355. The court relied on the rulings in United States v. Winston-Salem/Forsyth Bd. of Educ., 902 F.2d 267 (4th Cir. 1990), and Michigan State Police v. 33rd Dist. Court, 360 N.W.2d 196 (Mich. App. 1984).

Sufficient Evidence of Larceny "By Trick" Theory to Support Larceny Conviction

State v. Barbour, 153 N.C. App. 500, 570 S.E.2d 126 (15 October 2002). The defendant was convicted of felony larceny. He went to a car dealer and asked to test drive a truck. He was told to return the truck by 5:00 p.m. He never returned it. An officer saw him driving the truck several days later. There also was evidence that the defendant had been convicted of two similar crimes in which he drove vehicles from dealership lots with permission to take them for a test drive but then failed to return them. The court noted that larceny involves a trespass, either actual or constructive. A constructive trespass occurs when possession of property is fraudulently obtained by a trick or artifice—commonly known as larceny by trick, which is not a different crime than larceny but simply a way to prove the element of trespass in common law larceny. The court ruled that the evidence proved this element to support the felony larceny conviction (felony larceny was proved because the value of the truck was more than $1,000).

Sufficient Evidence to Prove Disorderly Conduct in School, G.S. 14-288.4(a)(6)

In re Pineault, 152 N.C. App. 196, 566 S.E.2d 854 (6 August 2002). The court ruled, distinguishing In re Brown, 150 N.C. App. 127, 562 S.E.2d 583 (2002), that there was sufficient evidence to support the juvenile's adjudications of two charges of disorderly conduct in school, G.S. 14-288.4(a)(6). One charge involved the juvenile's uttering obscenities at his teacher, which required her to stop teaching her class for at least several minutes while she took the juvenile to the principal's office. The other charge involved the juvenile's disruptive behavior in the principal's office, which required the attention of several administrators and teachers. These people stopped teaching and performing administrative duties while attending to him.

(1) Trial Judge Erred in Failing to Provide Person With Summary Opportunity to Respond Before Finding Person in Summary Criminal Contempt
(2) Court States That Refusing to Rise When Asked By Trial Court Is Ground for Criminal Contempt

State v. Randell, 152 N.C. App. 469, 567 S.E.2d 814 (20 August 2002). The trial judge called for a morning recess. The bailiff called for all to rise. A person (hereafter, the defendant) who was seated in the courtroom refused to obey the call to rise. The defendant continued to remain seated even after the judge called for all to rise. The judge ordered the defendant to come up to the front of the courtroom. The defendant said, "For what?" The judge said, "You're in custody. Thirty days." The defendant said again, "For what?" The judge said, "Contempt of court," and later added, "You didn't stand up." The defendant was brought back into the courtroom later that day and given an opportunity to be heard on the finding of contempt of court. (1) The court ruled that the trial judge erred under G.S. 5A-14(a) in failing to provide the defendant with a summary opportunity to respond before finding him in summary criminal contempt. Although the judge gave the defendant ample opportunity to explain himself after the fact, that did not correct the prior error. (2) The court stated that refusing to rise while a court is adjourning or leaving the courtroom is sufficient grounds for criminal contempt. Courtroom decorum and function depend on the

respect shown by its officers and those in attendance. Unexcused refusals to stand create a rift in that respect and interrupt the normal proceedings of court.

Delay of 940 Days from Arrest to Trial While Defendant Remained Incarcerated Did Not Deny Speedy Trial

State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898 (5 November 2002). The defendant was convicted of second-degree rape of his divorced wife. The court ruled, applying the four factors set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), ruled that a delay of 940 days from the defendant's arrest to trial while he remained incarcerated did not deny his constitutional right to a speedy trial. The court noted that the defendant did not allege any prejudice created by the delay other than prolonged anxiety and concern. He did not show any loss of evidence or witnesses.

Sufficient Evidence of to Support Conviction of Possessing Alcoholic Beverages for Sale Without Permit

State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116 (15 October 2002). The court ruled that there was sufficient evidence to support the defendant's conviction of possessing alcoholic beverages for sale without a permit. Three prior searches of the defendant's house resulted in the seizure of quantities of spirituous liquor that were substantial enough to establish a prima facie case under G.S. 18B-304(b). Although the amount seized in this case did not establish a prima facie case, there was substantial evidence to support the conviction. Officers found about five liters of spirituous liquor stored in various closets and refrigerators, approximately $946.00 in small bills, packaging items, 78 cans of beer, a box of business cards, and a copy of "Harry's house rules," which indicated that nothing was "free."

Juvenile Waived Appellate Review of Issues Concerning Transfer Hearing Because Juvenile Failed to Appeal Transfer Order to Superior Court Under G.S. 7B-2603(a)

State v. Wilson, 151 N.C. App. 219, 565 S.E.2d 223 (2 July 2002). A juvenile petition was filed against the defendant for felonious assault and at a transfer hearing a district court judge ordered the case transferred to superior court for trial as an adult. The defendant was tried and convicted of felonious assault in superior court. On appeal to the court of appeals, the defendant asserted assignments of error contesting the validity of evidence admitted at the transfer hearing and the ensuing transfer order. The court ruled that the juvenile waived appellate review of issues concerning the transfer hearing because he failed to appeal the transfer order to superior court under G.S. 7B-2603(a). Appellate review also was unavailable under Rule 2 of the Rules of Appellate Procedure or by writ of certiorari under Rule 21.

Juvenile Was Not Entitled to Use Self-Defense When School Principal Physically Prevented Juvenile from Improperly Leaving School

In re Pope, 151 N.C. App. 117, 564 S.E.2d 610 (18 June 2002). The juvenile was adjudicated delinquent of assault on a government employee, a school principal, who was struck by the juvenile when the principal was carrying the juvenile back to his office after preventing the juvenile from improperly leaving the school. Relying on the authority granted principals under G.S. 115C-288(e), the court rejected the juvenile's argument that the principle of self-defense authorized his use of force against the principal.

Juvenile's and Parents' Presence in Courtroom for Adjudicatory Hearing on Simple Assault Petition Without Objection to Defective Service of Petition and Summons Constituted General Appearance That Waived Defective Service

In re Hodge, 153 N.C. App. 102, 568 S.E.2d 878 (17 September 2002). The court ruled that the juvenile's and parents' presence in the courtroom for a adjudicatory hearing on simple assault petition without objection to the defective service of the petition and summons constituted a general appearance that waived the defective service.

Failure to Give Probationer Written Notification of Modification of Term of Probation Makes Modification Invalid; Oral Notification Is Insufficient

State v. Seek, 152 N.C. App. 237, 566 S.E.2d 750 (6 August 2002). The court ruled, relying on State v. Suggs, 92 N.C. App. 112, 373 S.E.2d 687 (1988), that failure to give a probationer written notification of a modification of a term of probation as required by G.S. 15A-1343(c) makes the modification invalid. Oral notification is insufficient.

Arrest, Search and Seizure, and Confession Issues

Officers' Warrantless Search of Trash Can Located Immediately By Steps to Side-Entry Door of Defendant's House Violated Fourth Amendment

State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266 (2 July 2002). The court ruled, distinguishing California v. Greenwood, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988) and State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995), that the officers' warrantless search of a trash can located immediately by the steps to the side-entry door of the defendant's house violated the Fourth Amendment. The court noted that the trash can, fifty feet from the road, was within the curtilage of the home. Unlike *Greenwood* and *Hauser*, the officers in this case did not obtain the trash can's contents from a sanitation worker who had obtained the trash in the usual manner (that is, the contents of the trash can were not placed there for collection in the usual and routine manner).

(1) State's Abandonment of Argument at Suppression Hearing That Defendant Did Not Have Standing to Contest Fourth Amendment Issue Waived Appellate Review
(2) Officers' Warrantless Reentry Into Residence Where Homicide Had Been Committed Did Not Violate Fourth Amendment When Evidence Seized During Reentry Had Been Seen in Plain View By Officers Who Had Made Initial Entry in Response to Call About Homicide

State v. Phillips, 151 N.C. App. 185, 565 S.E.2d 697 (2 July 2002). (1) The state at a suppression hearing raised the argument that the defendant did not have standing to contest a Fourth Amendment issue, but later the state explicitly abandoned the argument. As a result, the trial judge made no findings of fact or conclusions of law on the issue. The court ruled, citing State v. Cooke, 54 N.C. App. 33, 282 S.E.2d 800 (1981), that the state waived appellate review of this issue. (2) Officers arrived at a residence in response to a call about a stabbing. They found the victim in the doorway and then conducted a protective sweep of the entire residence. Meanwhile, emergency personnel administered aid to the victim but pronounced her dead. Officers secured the crime scene. A lab technician arrived about thirty minutes later. She and the officers reentered the residence and officers pointed at evidence they had observed during their initial sweep. The technician made a videotape and took pictures. A detective arrived about thirty minutes later, and he and the officers reentered the residence. The officers again pointed to evidence they had observed during their initial sweep. The detective instructed the lab technician to collect blood samples from various places within the residence; the technician collected only evidence seen in plain view. The defendant did not challenge the officers' initial entry into the residence to look for other victims or

suspects. The defendant argued, however, that the later entries by the lab technician and detective violated the Fourth Amendment because they did not have a search warrant or proper consent. Relying on State v. Jolley, 312 N.C. 296, 321 S.E.2d 883 (1984) (rifle seen in plain view by officers during initial entry into house was "seized" when officers secured house so that later-arriving detective who made warrantless entry and removed rifle did not violate Fourth Amendment because rifle had already been lawfully seized), the court ruled that the later warrantless entries and seizure of evidence by the technician and detective did not violate the Fourth Amendment when the evidence had been seen in plain view by the officers who had made the original entry. [Author's note: Officers would reduce the likelihood of violating the Fourth Amendment (as well as an allegation of violating the Fourth Amendment) if they obtain a search warrant or proper consent after making the initial warrantless entry and before additional warrantless entries are made.]

(1) Reasonable Suspicion Existed to Make Investigative Stop of Vehicle for Illegal Drugs
(2) Reasonable Suspicion Existed to Search Defendant's Closed Hand for Weapons
(3) Reasonable Force Was Used to Open Defendant's Closed Hand to Search For Weapons and to Prevent Destruction of Evidence

State v. Summey, 150 N.C. App. 662, 564 S.E.2d 624 (18 June 2002). Officers were conducting surveillance in a known drug area. An officer watched a residence that had been the subject of a nuisance abatement proceeding for drug-related activities. A group of men were standing in the residence's front yard. He saw a pickup truck stop at the residence. One man in the yard approached the truck and appeared to converse with the driver. A few moments later, the man returned to the yard and the truck drove away. Believing that he had witnessed a drug transaction, the officer radioed to other officers who stopped the vehicle. The defendant was seated in the passenger seat with her left hand hidden underneath a fabric material. An officer recognized her from prior investigative stops. Concerned about small weapons in her hand, the officer asked her to show her hands. She lifted her hands but kept her left hand closed in a fist. The officer noticed a rock-like substance, which he believed to be crack cocaine, wedged in a gap between the defendant's fingers. She refused to open her left hand. The officer applied pressure to the back of her hand and forced it open. The officer recognized one piece of crack cocaine fall from her hand and another piece remained stuck to her palm. (1) The court ruled that reasonable suspicion existed to make an investigative stop of the vehicle for illegal drugs. (2) The court ruled that reasonable suspicion existed to search the defendant's closed hand for weapons. The court noted that at the suppression hearing the officers testified they had been trained that a small knife or razor blade could be concealed in a clenched fist. Also, the search of the defendant's hand was justified by seeing crack cocaine wedged in her fingers. (3) The court ruled that reasonable force was used to open the defendant's closed hand to search for weapons and to prevent the destruction of evidence.

(1) Length of Detention of Vehicle Driver to Check Driver's License Was Reasonable Under Fourth Amendment
(2) Search of Television Set in Trunk Did Not Exceed Scope of Driver's Consent

State v. Castellon, 151 N.C. App. 675, 566 S.E.2d 696 (6 August 2002). Officer A stopped the defendant, the vehicle driver, for failing to wear a seat belt. The officer used his mobile data computer to check the defendant's driver's license and for outstanding warrants. The computer responded slowly. Officer B arrived and both officers saw several indicators of illegal drug activity. After twenty-five minutes and a determination that the driver's license was valid and the defendant was not wanted, the defendant was given a warning ticket. As the defendant was leaving the patrol car, Officer A asked the defendant for consent to search his vehicle. The defendant gave consent. During a search of the trunk, Officer B found cocaine in the back of a television set. (1) The court ruled, citing State v. Munoz, 141 N.C. App. 675, 541 S.E.2d 218 (2001), that the length of detention to determine the validity of the driver's license was reasonable under the Fourth Amendment. (2) The court ruled that the search of a

television set in the trunk did not exceed the scope of the driver's consent. The television set was lying face down. Officer B saw a package wrapped in saran wrap inside the back panel of the set. The officer knew that illegal drugs are commonly packaged with saran wrap. Based on this information, the court ruled that the officers were justified under the plain view doctrine in unscrewing the back panel of the television set and seizing the package.

Release of Lawfully-Seized Evidence from One Law Enforcement Agency to Another for Testing and Further Analysis Is Not Search or Seizure Requiring Fourth Amendment Justification

State v. Motley, 153 N.C. App. 701, 571 S.E.2d 269 (5 November 2002). A detective investigating a felonious assault learned that another law enforcement agency had lawfully seized a rifle and ammunition from the defendant's truck during the investigation of unrelated crimes. The detective obtained the evidence from the other agency, and it was analyzed by the State Bureau of Investigation laboratory and introduced in the felonious assault trial. The court ruled, relying on State v. Barkley, 144 N.C. App.514, 551 S.E.2d 131 (2001), that the release of lawfully-seized evidence from one law enforcement agency to another for testing and further analysis is not a search or seizure requiring Fourth Amendment justification. The defendant no longer possessed a reasonable expectation of privacy in the rifle once it was lawfully obtained by law enforcement. The court noted that the defendant never made a request or motion that the rifle be returned to him.

(1) Probable Cause Supported Search Warrant to Search Apartment for Cocaine Based on Controlled Buy and Other Information
(2) Forced Entry Into Apartment to Execute Search Warrant for Cocaine Was Justified

State v. Reid, 151 N.C. App. 420, 566 S.E.2d 186 (16 July 2002). The defendant was convicted of trafficking by possessing cocaine. (1) The court ruled that probable cause supported a search warrant to search an apartment for cocaine. A confidential informant told officers that a white female named "Thomasina" and an unknown black male were in the business of selling cocaine from the apartment, and the informant had seen them possessing cocaine within the past six days. In addition, the informant at the direction of the officers made a controlled buy from the apartment within the past six days. The court rejected as immaterial the search warrant's failure to specify the person from whom the informant had purchased the cocaine during the controlled buy. (2) In executing the search warrant for cocaine, officers knocked three times on the door of the apartment, announced "Sheriff's Office, search warrant," then knocked three times and made the same announcement. After waiting six to eight seconds, the officers forcibly entered the apartment by breaking down the door with a battering ram. The court ruled, relying on State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60 (2002), and State v. Gaines, 33 N.C. App. 66, 234 S.E.2d 42 (1977), that the delay of six to eight seconds before the officers made a forcible entry into the apartment did not violate the defendant's Fourth Amendment rights or G.S. 15A-251.

Error in Search Warrant's Recitation of Mobile Home's Address Did Not Require Suppression of Evidence

State v. Moore, 152 N.C. App. 156, 566 S.E.2d 713 (6 August 2002). There were two mobile homes in a driveway with separate addresses, 996 Camp Ground Road and 995 Camp Ground Road. Probable cause existed to search the defendant's mobile home at 995 Camp Ground Road, but not the mobile home at 996 Camp Ground Road, the address listed in the search warrant. However, a map to the defendant's mobile home was attached to the search warrant, and defendant's home was correctly described as being white with brown trim. Based on these and other facts, the court ruled that the error reciting the address did not require the suppression of evidence seized from the defendant's mobile home. The executing officer's prior knowledge of the place to be searched was relevant in this case.

Officers' Protective Search of Residence After Arresting Drug Dealer There Did Not Violate Fourth Amendment

State v. Bullin, 150 N.C. App. 631, 564 S.E.2d 576 (18 June 2002). Officers entered the defendant's residence with an arrest warrant for illegal drugs and arrested him. They then made a protective search of the home to ensure that another person was not there who could harm them. They seized drug items they saw in plain view in the master bedroom closet. They then obtained a search warrant to search the residence. The court, relying on Maryland v. Buie, 494 U.S. 325, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990), that the protective search was valid; the court noted that the officers limited their search to obvious hiding places. Before conducting the protective search, the officers knew that the defendant: (1) had a history of drug dealing; (2) was currently involved in drug dealing; (3) was a current suspect in a drug trafficking investigation involving many people; and (4) resisted arrest when informed of the arrest warrant. The court also stated that drug trafficking was dangerous.

(1) Defendant Was Not In Custody to Require *Miranda* Warnings, and Request for Attorney Did Not Trigger *Miranda* Protections
(2) Officers Had Probable Cause and Exigent Circumstances to Conduct Gunshot Residue Test Without Search Warrant
(3) Evidence of Defendant's Refusal to Submit to Gunshot Residue Test Was Admissible at Trial

State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592 (5 November 2002). (1) Responding to a call that the defendant was involved in a shooting, officers handcuffed the defendant to frisk him for weapons and then removed the handcuffs. They asked him if he would voluntarily accompany them to the police station so they could continue their investigation. He agreed to go with the officers; he was not questioned or handcuffed during the ride to the station. He was questioned at the station without being given *Miranda* warnings. He was informed several times that he was free to leave, including after he indicated interest in having an attorney present, but made no effort to do so. The court ruled, citing State v. Gaines, 345 N.C. 647, 483 S.E.2d 396 (1997), that the defendant was not in custody to require *Miranda* warnings. The court also ruled that because he was not in custody, his request for an attorney did not trigger *Miranda* protections. (2) The officers asked the defendant to submit to a gunshot residue test, but he refused. The state was permitted to introduce evidence of this refusal at trial. The court ruled, citing State v. Coplen, 138 N.C. App. 48, 530 S.E.2d 313 (2000), that the officers had probable cause and exigent circumstances to conduct the gunshot residue test without a search warrant. Information from witnesses to the shooting provided probable cause. Testimony by an officer that a gunshot residue test must be conducted within three or four hours of a shooting provided exigent circumstances. (3) The court noted appellate cases that have ruled that evidence of a defendant's refusal to submit to a lawful testing or identification procedure is circumstantial evidence of guilt, and ruled that the admission of the defendant's refusal to submit to the gunshot residue test was not error.

Interception of Cordless Telephone Conversation Was Not Willful and Therefore Was Not Unlawful; Evidence of Conversation Was Properly Admitted at Trial

State v. McGriff, 151 N.C. App. 631, 566 S.E.2d 776 (6 August 2002). A person was using her cordless telephone when she inadvertently intercepted a call between two people she recognized. The conversation was about a prior commission of a sex crime that one caller, the defendant, had committed against the other caller, who was a minor. She listened to the conversation and testified about it at trial. The court ruled, relying on Adams v. Sumner, 39 F.3d 933 (9th Cir. 1994) (hotel switchboard operator inadvertently overheard hotel guest refer to guns and remained on line for several minutes; interception not willful because operator remained on line because of concern for other hotel guests after hearing reference to guns), that the interception was not willful and therefore was not unlawful under G.S. 15A-287(a)(1) and 18 U.S.C. § 2511(1)(a). The person continued to listen because of her concern for the minor. Evidence of

the conversation was properly admitted at trial. The court also noted, citing In re Askin, 47 F.3d 100 (4th Cir. 1995) and other cases, the defendant did not have a reasonable expectation of privacy in his cordless telephone conversation.

(1) Spouse's Non-Consensual Interception of Oral Communications Between Other Spouse and Others in Family Home Violates North Carolina's Electronic Surveillance Act
(2) Court Adopts "Vicarious Consent" Doctrine to Permit Interception of Oral Communications by One Spouse of Communications Between Other Spouse and Children Under Certain Circumstances
(3) Nonconsensual Videotaping Without Aural Acquisition of Oral Communications Does Not Violate North Carolina's Electronic Surveillance Act

Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (20 August 2002). The plaintiff husband sued the defendant wife for violations of North Carolina's Electronic Surveillance Act. Without her husband's knowledge, the wife placed voice-activated tape recorders and a video camera in the family home. The tape recorders picked up conversations between the husband and others when the wife was not a party to the communications. There was no evidence that the video camera recorded conversations. (1) The court ruled that the wife's non-consensual interception of oral communications between the husband and others in the family home violates North Carolina's Electronic Surveillance Act. See G.S. 15A-287(a)(1). Because the wife was not a party to the intercepted communications, she could not escape liability under G.S. 15A-287(a), which effectively permits the interception if one party to the communication consents to the interception. [Author's note: This ruling is also consistent with interpretations of similar federal law.] (2) The wife contended that she variously consented, on behalf of her minor children, to the interception of any oral communications between her husband and her sons. The court adopted the "vicarious consent" doctrine set out in several federal cases. This doctrine permits a custodial parent to vicariously consent to the recording of a minor child's conversations as long as the parent has a good faith, objectively reasonable belief that the interception of the conversation is necessary for the child's best interests (for example, to uncover child abuse). (3) The court ruled that nonconsensual videotaping without aural acquisition of oral communications does not violate North Carolina's Electronic Surveillance Act. [Author's note: This ruling is also consistent with interpretations of similar federal law. However, law enforcement officers should remember that there are Fourth Amendment issues involved when officers videotape people in places where they have a reasonable expectation of privacy.]

Defendant's Sixth Amendment Right to Counsel Did Not Begin With Issuance of Arrest Warrants So Officers' Interrogation Did Not Violate Defendant's Sixth Amendment Rights

State v. Lippard, 152 N.C. App. 564, 568 S.E.2d 657 (3 September 2002). Arrest warrants charging the defendant with several murders were issued on October 4, 1999 (the defendant was not indicted until October 18, 1999). On October 8, 1999, the defendant was arrested in Louisiana for these charges as a fugitive from North Carolina. The defendant's family in North Carolina hired counsel for the defendant, who informed the SBI not to question the defendant about the case. An SBI agent and a detective went to Louisiana on October 12, 1999, interrogated the defendant and obtained a statement that was introduced at his trial. Before interrogating the defendant, the SBI agent give him *Miranda* warnings and informed the defendant that he had an attorney in North Carolina. The court ruled, relying on State v. Taylor, 354 N.C. 28, 550 S.E.2d 141 (2001), that the defendant's Sixth Amendment right to counsel did not begin with the issuance of the arrest warrants. The court also stated that this right does not begin simply because an attorney may be acting for the defendant and trying to insulate him from interrogation. The defendant was free to waive his right to counsel and speak to the officers. The court ruled that the evidence showed that the defendant validly waived his *Miranda* rights. [Author's note: There was no evidence that the defendant himself ever requested counsel for the murder charges before the officers interrogated him.]

Officers Violated Juvenile's Statutory Interrogation Rights By Continuing to Question Him After He Had Requested That His Mother Be Present During Custodial Interrogation

State v. Branham, 153 N.C. App. 91, 569 S.E.2d 24 (17 September 2002). The court ruled, relying on State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986), that officers violated the juvenile's statutory interrogation rights by continuing to question him after he had requested that his mother be present during custodial interrogation. There was evidence that the mother, when informed of her son's request that she be present during custodial interrogation, refused to be with him. The court stated that even if she did not want to be present, she could not waive his right to have her present during the custodial interrogation. The court ordered that the juvenile's statement must be suppressed.

Juvenile Was Not in Custody During Officer's Interrogation So Juvenile Interrogation Rights Warnings Were Not Required

In re Hodge, 153 N.C. App. 102, 568 S.E.2d 878 (17 September 2002). A detective spoke to the juvenile, his mother, and the juvenile's brother in the living room of their home as a result of an allegation made by the brother. Proceedings had not been initiated against the juvenile, and the detective's visit was solely to investigate the allegation. The detective prefaced her interview with the juvenile by telling him that he did not have to talk to her and she was not going to arrest him. The detective did not inform the juvenile of his juvenile interrogation rights. Based on this evidence and the circumstances of the interview, the court ruled that the juvenile was not in custody during the officer's interrogation so juvenile interrogation rights warnings were not required.

Sixteen-Year-Old Mentally-Retarded Defendant Was Not in Custody During Interrogation and His Confession Was Voluntarily Given

State v. Jones, 153 N.C. App. 358, 570 S.E.2d 128 (15 October 2002). The defendant, sixteen years old and mentally retarded, was convicted of first-degree murder and other offenses. The court ruled that he was not in custody during interrogation by law enforcement officers and his confession was voluntarily given. (See the detailed facts discussed in the opinion.) The court relied on State v. Sanders, 122 N.C. App. 691, 471 S.E.2d 641 (1996), State v. Fincher, 309 N.C. 1, 305 S.E.2d 685 (1983), and other cases.

Evidence

(1) Trial Judge Did Not Err in Accepting Law Enforcement Officer as Expert in Accident Investigation and Reconstruction
(2) Trial Judge Did Not Err in Allowing Law Enforcement Officer, Accepted as Expert in Accident Investigation and Reconstruction, to Give Opinion How Vehicle Crash Occurred

State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90 (4 June 2002) (Note: On June 4, 2002, this opinion was originally ordered not to be published, but it was ordered published on June 26, 2002. It is included in this paper because of the late date when it was ordered published.) The defendant was convicted of involuntary manslaughter based on an vehicle crash in which the defendant, who was impaired, was a driver of one of the vehicles. A State Highway Patrol officer inspected the crash scene. The trial judge accepted the officer as an expert in accident investigation and reconstruction and allowed the officer to testify about the accident scene, including the extent and location of damage to the vehicles, the presence of scrape, gouge, and scuff marks in the pavement, and the location of debris. Based on the officer's analysis, he gave an opinion about the sequence of events. He said that a tractor and the defendant's vehicle, a jeep, were traveling north on a highway. The jeep collided with the rear of the tractor. Then the jeep crossed the center line of the highway and collided with a pickup truck that was traveling south, and both vehicles came to rest on the left side of the road. (1) The court reviewed the officer's training and

experience and ruled that the trial judge did not err in accepting the officer as an expert in accident investigation and reconstruction. (2) The court ruled, relying on Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233 (2002), Griffith v. McCall, 114 N.C. App. 190, 441 S.E.2d 570 (1994), and State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989), that the trial judge did not err in allowing the officer to give an opinion how the vehicle crash occurred. The testimony meet the requirements of Daubert v. Merrell Dow, 509 U.S. 579 (1993), and State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), which were discussed in the *Taylor* ruling, cited above.

(1) State Was Properly Permitted Under Rule 806 to Impeach Under Rule 609 Defendant's Hearsay Statement Introduced Through Testimony By Defense Witness By Asking Defense Witness About Defendant's Prior Robbery Conviction
(2) No Balancing Under Rule 403 Is Required for Admission Under Rule 609(a) of Conviction Less Than Ten Years Old

State v. McConico, 153 N.C. App. 723, 570 S.E.2d 776 (5 November 2002). Rule 806 provides (in pertinent part to this case) that when a hearsay statement is admitted into evidence, the declarant's credibility may be attacked by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Defense counsel on direct examination of a defense alibi witness asked the witness what the defendant did when he brought her car home. She testified, "[h]e told me he was going to the studio." On cross-examination, the witness testified that the defendant had previously convicted of forcible robbery. The court ruled that the defendant's statement was hearsay statement under Rule 806 because it was offered to prove the truth of the matter asserted. The court also ruled that the testimony of the defendant's prior conviction was not inconsistent with Rule 609(a) (impeachment by prior conviction) because it was properly elicited from the defense witness, who took the place of the defendant's offering trial testimony. (2) The court ruled that no balancing under Rule 403 is required for the admission under Rule 609(a) of conviction less than ten years old. The court noted the that the rule states that the evidence "shall" be admitted.

Alcohol Concentration Evidence from Testing Blood Sample Kept in Officer's Car for Three Days Was Properly Admitted into Evidence

State v. McDonald, 151 N.C. App. 236, 565 S.E.2d 273 (2 July 2002). The defendant was convicted of second-degree murder involving a vehicle crash. An officer properly obtained a blood sample from the defendant and kept the sample in his car for three days, although his law enforcement agency's rules required that a sample not be left in a car for more than one hour. The sample was then taken to a laboratory for analysis. The state complied with the statutory guidelines for blood testing under G.S. 20-139.1. The court noted that the defendant offered no evidence that the blood had been tainted, not drawn by a professional, or incorrectly labeled. Additionally, there was evidence that the effect, if any, of blood being left in the car for three days was evaporation of the alcohol content and a lower alcohol concentration result. The court also cited cases that most discrepancies concerning blood testing affect the weight of the evidence, not its admissibility. The court ruled that the defendant failed to satisfy his burden of proving that the trial judge erred in admitting the blood test result.

Defendant's Statements to Law Enforcement Officers Were Not Made in Course of Plea Negotiations and Thus Were Not Barred Under Rule 410 From Being Admitted At Trial

State v. Curry, 153 N.C. App. 260, 569 S.E.2d 691 (1 October 2002). The defendant was charged with various sex offenses. An assistant district attorney told the defendant's attorney that there was a possibility that the defendant would be permitted to plead to some lesser charges, but that was not an offer because the district attorney would be involved before an offer was made. The assistant district attorney also told the defendant's attorney that before the state would consider making an offer, the defendant

would need to be completely cooperative in the investigation. The defendant's attorney advised the defendant that if he was fully cooperative, they hopefully could work out a plea to a lesser offense. The attorney stressed that there was no firm offer and therefore not a guarantee. Thereafter, the defendant agreed to an interview with law enforcement officers and made incriminating statements. Before the interview, the officers had told the defendant they did not have any authority from the district attorney to negotiate a plea. (Neither the defendant nor his attorney had attempted to negotiate a plea with the officers.) The court ruled that the defendant's incriminating statements were not made in the course of plea negotiations and thus were not barred under Rule 410 (statements made in course of plea discussions are inadmissible at trial) from being admitted at trial.

(1) Murder Victim's Statements Were Admissible Under Rule 803(3) (Then Existing Mental, Emotional, or Physical Condition) Because Factual Circumstances Surrounding Statements of Facts Served Only to Demonstrate Basis of Her Emotions
(2) Under Rule 801(c) Witness's Testimony About Prior Out-of-Court Statement Made By That Witness Is Not Hearsay
(3) Evidence Supported Trial Judge's Jury Instruction on Defendant's Implied Admission Under Rule 801(d)(B)
(4) State's Evidence Placed Defendant's Credibility in Issue, and Thus Defendant Should Have Been Permitted to Offer Character Witnesses About Defendant's Truthfulness, Even Though Defendant Did Not Testify

State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237 (3 September 2002). The defendant was convicted of second-degree murder for killing his wife. (1) The state was permitted to introduce testimony of witnesses about statements made by the wife about her suspicions that the defendant was having an affair. Relying on State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), the court ruled that the wife's statements were admissible under Rule 803(3) (then existing mental, emotional, or physical condition) because the factual circumstances surrounding the wife's statements of facts served only to demonstrate basis of her emotions. (2) The court ruled that under Rule 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted), a witness's testimony about a prior out-of-court statement made by that witness is not hearsay. (3) Distinguishing State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), and relying on State v. Sibley, 140 N.C. App. 584, 537 S.E.2d 835 (2000), the court ruled that evidence supported the trial judge's jury instruction on the defendant's implied admission under Rule 801(d)(B) (statement of which a party-opponent had manifested his adoption or belief in its truth). The defendant's failure to deny that he killed his wife, along with specified incriminating statements made to the state's witness, manifested circumstantially his assent to the truth of the witness's statement to the defendant that he had killed his wife. (4) The defendant did not testify at trial. However, the state introduced written statements made by the defendant to law enforcement, and later offered evidence contradicting those statements. The court ruled that by doing so the state placed the defendant's credibility in issue, and the trial judge therefore erred in prohibiting the defendant from offering witnesses to testify about his character for truthfulness.

Evidence of Defendant's Long Term Physical Abuse of His Divorced Wife, Victim in Rape Prosecution, Was Properly Admitted Under Rule 404(b)

State v. Strickland, 153 N.C. App. 581, 570 S.E.2d 898 (5 November 2002). The defendant was convicted of second-degree rape of his divorced wife. The court ruled that evidence of the defendant's prior physical abuse of her that occurred from period of twelve years before trial and up to one year before the rape being tried, was properly admitted under Rule 404(b). The court rejected the defendant's argument that because the physical abuse was not sexual, it was not relevant in the rape prosecution. The court noted that the defendant had a history of attacking the victim and asserting his physical power over her, which was relevant to prove his pattern of intimidating her.

Evidence in Child Sexual Assault Trial of Defendant's Striking Similar Assault on Victim's Mother When She Was a Child About Twenty Years Earlier Was Properly Admitted Under Rule 404(b)

State v. Love, 152 N.C. App. 608, 568 S.E.2d 320 (3 September 2002). The defendant was convicted of first-degree sexual offense and first-degree kidnapping of a six-year-old girl. The state was permitted to offer testimony of the girl's mother, who testified to a strikingly similar assault the defendant committed on her when she was nine years old, which was about twenty years ago. The court ruled, relying on State v. Frazier, 344 N.C. 611, 476 S.E.2d 297 (1996), and other cases, that the trial judge did not err in allowing this testimony under Rule 404(b) to show identity, common scheme or plan or modus operandi, and intent.

(1) Evidence of Defendant's Possession of Pornographic Magazines and Videos Was Improperly Admitted Under Rule 404(b) When There Was No Evidence That Defendant Showed Them to Child Sexual Offense Victim When Offenses Were Committed or Defendant and Victim Viewed Them Together
(2) Evidence of Defendant's Nonconsensual Sexual Relations With Babysitter (Not the Victim in This Case) Was Properly Admitted Under Rule 404(b)

State v. Smith, 152 N.C. App. 514, 568 S.E.2d 289 (3 September 2002). The defendant was convicted of several sexual offenses with a twelve-year-old female. (1) Relying on State v. Hinson, 102 N.C. App. 29, 401 S.E.2d 371 (1991), and other cases, the court ruled that evidence of the defendant's possession of pornographic magazines and videos was improperly admitted under Rule 404(b) when there was no evidence that the defendant showed them to the child sexual offense victim when the offenses were committed or that the defendant and victim viewed them together. (2) The court ruled that evidence of the defendant's nonconsensual sexual relations with a fifteen-year-old babysitter (not the victim in this case) was properly admitted under Rule 404(b) to show the absence of mistake and a common plan or scheme, specifically that the defendant took advantage of young girls when he had parental or adult responsibility for them. The fact that the babysitter did not report these events until the investigation of the crimes being tried affects the weight of her testimony, not its admissibility.

(1) Murder Victim's Statements Were Admissible Under Rule 803(1) (Present Sense Impression)
(2) Murder Victim's Statements Were Not Admissible Under Rule 803(1) (Present Sense Impression), But Witness's Testimony About Victim's Mental State Was Admissible Under Rule 701

State v. Smith, 152 N.C. App. 29, 566 S.E.2d 793 (6 August 2002). (1) The murder victim's statements, "Shut up" and Hush," made to the defendant as the victim watched the defendant redeem her property in a pawn shop, were admissible under Rule 803(1) (present sense impression). The defendant had threatened the victim in the pawn shop. (2) The victim's statements about the incident in the pawn shop in a telephone call to her daughter later in the day, after a police officer had stayed with her all afternoon, were not admissible under Rule 803(1) because the statements were not made "immediately thereafter." The court distinguished State v. Clark, 128 N.C. App. 722, 496 S.E.2d 604 (1998). However, the daughter's testimony about the victim's mental state after the pawn shop incident was admissible as opinion testimony under Rule 701.

Pediatric Expert Was Properly Permitted to Testify That Child Had Been Sexually Abused Based on Expert's Finding of Physical Evidence of Trauma to Child's Vagina

State v. Brothers, 151 N.C. App. 71, 564 S.E.2d 603 (18 June 2002). The defendant was convicted of several child sexual assault crimes. Distinguishing State v. Stancil, 355 N.C. 266, 559 S.E.2d 788 (2002),

the court ruled that a pediatric expert was properly permitted to testify that the child had been sexually abused based on the expert's finding of physical evidence of trauma to the child's vagina.

Statements Made in Response to Questions by 911 Operator Were Properly Admitted as Excited Utterances Under Hearsay Rule 803(2)

State v. Wright, 151 N.C. App. 493, 566 S.E.2d 151 (16 July 2002). The court ruled, citing State v. Broczkowski, 130 N.C. App. 702, 504 S.E.2d 796 (1998) and other cases, that statements made in response to questions asked by a 911 operator were properly admitted as excited utterances under hearsay Rule 803(2).

State Laid Proper Foundation to Offer Financial Records Into Evidence Under Business Records Exception [Rule 803(6)] to Hearsay Rule

State v. Frierson, 153 N.C. App. 242, 569 S.E.2d 687 (1 October 2002). The defendant was convicted of embezzlement. The court ruled that the state laid a proper foundation to offer financial records into evidence under the business records exception to the hearsay rule, Rule 803(6). These records included deposit slips, validation reports, and bank account statements. (See the court's discussion of these records.) The court noted that the witness who authenticates the records need not be the person who made them. Also, the court quoted from State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985), that if the records show that they were made at or near the time of the transaction, the authenticating witness need not testify from personal knowledge that they were made at that time.

Business Card Found in Search of Defendant's House Was Properly Authenticated and Admitted Under Rule 801(d) (Admission of Party-Opponent)

State v. Reed, 153 N.C. App. 462, 570 S.E.2d 116 (15 October 2002). The defendant was convicted of possessing alcoholic beverages for sale without a permit. Officers found in the defendant's house approximately five liters of spirituous liquor stored in various closets and refrigerators, approximately $946.00 in small bills, packaging items, 78 cans of beer, a box of business cards, and a copy of "Harry's house rules," which indicated that nothing was "free." Each business card contained the defendant's address, telephone number, and the statement, "Harry's open house for alcohol, food, and fun[.]" The court ruled that the card was properly authenticated under Rule 901(b)(4) based on its "distinctive characteristics, taken in conjunction with circumstances," which included (1) the card was one of many identical business cards found in a box in the defendant's bedroom; (2) the card contained the defendant's name, address, and telephone number; and (3) the defendant was the sole occupant of the house where the card was found—the court cited State v. Mercer, 89 N.C. App. 714, 367 S.E.2d 9 (1988). The card was admissible as an admission of the defendant, a party-opponent, under Rule 801(d).

Trial Judge Committed Plain Error in Admitting State's Written Exhibit That Contained Doctor's Impermissible Opinion That Sexual Assault Victim Was Credible

State v. O'Connor, 150 N.C. App. 710, 564 S.E.2d 296 (18 June 2002). The court ruled that the trial judge committed plain error in admitting state's written exhibit into evidence when exhibit contained doctor's impermissible opinion that sexual assault victim was credible [see State v. Aguallo, 318 N.C. 590, 350 S.E.2d 76 (1986)], state's case rested on victim's credibility, and there was no physical evidence of the assault. [Author's note: The defendant did not object to the admission of this exhibit and thus the court conducted plain error review.]

Trial Judge Did Not Err in Allowing Officer to Illustrate His Testimony Concerning Crack Cocaine Usage By Using Drugs and Drug Paraphernalia That Was Not Found at Defendant's Residence

State v. Hyman, 153 N.C. App. 396, 570 S.E.2d 745 (15 October 2002). The defendant was convicted of delivery of cocaine to a minor under 13 years old. The defendant had the minor inhale smoke from crack cocaine through a plastic tube. The court ruled, distinguishing State v. Moctezuma, 141 N.C. App. 90, 539 S.E.2d 52 (2000), that the trial judge did not err in allowing an officer to illustrate his testimony concerning crack cocaine usage by using drugs and drug paraphernalia that was not found at the defendant's residence.

Trial Judge Did Not Abuse Discretion in Prohibiting Defendant From Offering Evidence of Defendant's Acquittal of First-Degree Rape at Prior Trial

State v. Maney, 151 N.C. App. 486, 565 S.E.2d 743 (16 July 2002). The defendant was tried for first-degree statutory rape and first-degree sexual offense. Both offenses involved the same victim. He was acquitted of the rape charge, and a mistrial was declared for the sexual offense charge. Before the retrial of the sexual offense charge, the trial judge granted the state's motion in limine to prohibit the defendant from offering evidence of the acquittal of the rape charge—based on the state's argument that the prior acquittal was not relevant to the defendant's guilt or innocence of the sexual offense charge and any probative value would be substantially outweighed by the danger of prejudice to the state. The court ruled that the trial judge did not abuse his discretion in granting the state's motion.

Sentencing

(1) Trial Judge Did Not Have Authority to Impose Two Consecutive Five-Year Probationary Sentences at Sentencing Hearing
(2) Trial Judge Did Not Err in Ordering Defendant to Pay Restitution in Amount Up to $2,000 for Future Treatment of Victims

State v. Canady, 153 N.C. App. 455, 570 S.E.2d 262 (15 October 2002). The defendant was convicted of four counts of indecent liberties. (1) The court ruled that under G.S. 15A-1346 the trial judge did not have the authority to impose two consecutive five-year probationary sentences at the sentencing hearing. A sentence of probation must run currently with any other probation sentences imposed on a defendant. However, the court noted that under G.S. 15A-1346, a trial judge may impose a probationary sentence to run at the end of a prison sentence. (2) The court ruled that the trial judge did not err in ordering the defendant to pay restitution in amount up to $2,000 for the future treatment of the victims. The victims had already accumulated $680 in treatment bills, which was the subject of a separate order of restitution. There was evidence that the victims were still undergoing treatment as a result of the defendant's crimes and that the treatment would be needed for an appreciable time period.

(1) Trial Judge Did Not Err in Finding That Each Aggravating Factor Standing Alone Outweighed All Mitigating Factors Combined
(2) Trial Judge Did Not Err in Finding Non-Statutory Aggravating Factors That Victims Were Asleep When Sexually Assaulted, Which Made Them More Vulnerable and Susceptible to Injury or Victimization

State v. Norman, 151 N.C. App. 100, 564 S.E.2d 630 (18 June 2002). (1) The court ruled that the trial judge did not err in finding that each aggravating factor standing alone outweighed all mitigating factors combined. It is not improper to do so, even though such a finding would insulate the sentence from a remand for resentencing if an aggravating factor had been improperly found. (2) The court ruled that the trial judge did not err in finding as non-statutory aggravating factors that the victims were asleep when sexually assaulted, which made them more vulnerable and susceptible to injury or victimization.

Trial Judge Properly Found Statutory Aggravating Factor G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense) for False Pretenses Convictions

State v. Murphy, 152 N.C. App. 335, 567 S.E.2d 442 (20 August 2002). The defendant pleaded guilty to several counts of obtaining property by false pretenses. The defendant offered to broker commercial loans and told clients that to prove their good faith and ability to repay the loans, they would need to pay the defendant a first and last month installment payment on the loans. The defendant took the payments, did not broker the loans, and did not return the payments. The court reviewed the case law on statutory aggravating factor G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust or confidence to commit offense), and ruled that the trial properly found this aggravating factor in these cases. The defendant's loan brokering scheme demonstrated the existence of a relationship between the defendant and the victims generally conducive to reliance of one on the other. The victims placed trust and confidence that the defendant would follow through with his representations and not defraud them of their money.

Trial Judge Erred in Finding Statutory Aggravating Factor G.S. 15A-1340.4(a)(1)(n) [now, G.S. 15A-1340.16(d)(15)] (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense) for Defendant's Murder of His Wife

State v. Marecek, 152 N.C. App. 479, 568 S.E.2d 237 (3 September 2002). The defendant was convicted of second-degree murder for killing his wife. He was sentenced under the Fair Sentencing Act. The court ruled, distinguishing State v. Arnold, 329 N.C. 128, 404 S.E.2d 822 (1991), that the trial judge erred in finding statutory aggravating factor G.S. 15A-1340.4(a)(1)(n) [now, G.S. 15A-1340.16(d)(15)] (defendant took advantage of position of trust or confidence to commit offense). There was no evidence that the defendant exploited his wife's trust in order to kill her.

Defendant Failed to Prove by Preponderance of Evidence That He Was Indigent When He Was Convicted of Two Misdemeanors To Support Suppression of Those Convictions in Felony Sentencing Hearing

State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (1 October 2002). The court ruled, relying on State v. Brown, 87 N.C. App. 13, 359 S.E.2d 265 (1987), that the trial judge did not err in denying the defendant's motion to suppress the state's use of two prior misdemeanor convictions to elevate his prior record level in sentencing the defendant for felony convictions. The defendant's mere assertion that he could not afford an attorney at the time of the prior convictions did not prove by a preponderance of evidence that the defendant was indigent, as required under G.S. 15A-980.

Defense Lawyer's Comments Were Stipulation to Defendant's Prior Convictions on State's Worksheet Presented to Judge for Sentencing

State v. Eubanks, 151 N.C. App. 499, 565 S.E.2d 738 (16 July 2002). The defendant was convicted of second-degree murder. At the sentencing hearing, the state presented to the judge a prior record level worksheet listing five prior convictions. The defense lawyer responded "yes" when the judge asked whether he had seen the worksheet. Then he responded "no" when the judge asked whether he had any objections to the worksheet. The court ruled, relying on State v. Hanton, 140 N.C. App. 679, 540 S.E.2d 376 (2000), that the defense lawyer's statements may reasonably be construed as a stipulation by the defendant that he had been convicted of the offenses on the worksheet.

(1) No Good Time or Gain Time for Class B Felony Sentence Under Fair Sentencing Act
(2) No Ex Post Facto or Due Process Violations When Agency Recalculated Inmate's Parole Eligibility, As Required by Appellate Court Ruling, That Resulted in Longer Term of Imprisonment Before Inmate Became Parole Eligible

Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247 (5 November 2002). (1) Inmate, serving a sentence of life imprisonment for a Class B felony imposed under the Fair Sentencing Act (as well as a consecutive prison term for a kidnapping conviction), alleged that the Parole Commission had incorrectly calculated his parole eligibility by failing to include good time and gain time credits toward the minimum term (twenty years) of his Class B felony sentence. The court ruled that the Secretary of Correction did not abuse his discretion in not promulgating regulations concerning good time and gain time deductions from sentences for Class A, B, and C felonies under the FSA. (2) Based on Robbins v. Freeman, 127 N.C. 162, 487 S.E.2d 771 (1997) (requiring that parole eligibility for prisoner serving consecutive sentences be calculated as if inmate was serving single sentence; court reversed agency policy of calculating parole eligibility separately for each sentence), the prisoner's parole eligibility was recalculated. The recalculation resulted in a longer term of imprisonment before the inmate became parole eligible. The court, citing Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), and Glenn v. Johnson, 761 F.2d 192 (4th Cir. 1985), rejected the inmate's argument that the recalculation violated ex post facto or due process provisions.

Judge Did Not Abuse Discretion in Choosing Level 3 Instead of Level 2 Disposition for Juvenile Adjudicated of Violent Offenses and With Low Delinquency History

In re Robinson, 151 N.C. App. 733, 567 S.E.2d 227 (6 August 2002). The juvenile was adjudicated delinquent of assault with a deadly weapon with intent to kill inflicting serious injury and armed robbery. Under G.S. 7B-2508(f), the judge had a choice of Level 2 or 3 dispositions because the offenses were violent and the juvenile's delinquent history was low. The court examined the facts and ruled that the judge did not abuse her discretion in choosing Level 3, commitment to the Department of Juvenile Justice and Delinquency Prevention.

Miscellaneous

Judge Properly Found That Insanity Acquittee, Who Had Been Involuntary Committed to Mental Institution in 1989, Still Had a Mental Illness and Was Dangerous to Others; Order of Recommitment Was Proper

In re Hayes, 151 N.C. App. 27, 564 S.E.2d 305 (18 June 2002). The respondent in 1989 was found not guilty by reason of insanity of four counts of first-degree murder and other offenses. He was then involuntarily committed to a mental institution and recommitted thereafter. The court ruled the judge properly found that the respondent still had a mental illness and was dangerous to others, and thus the order of recommitment was proper. (See the detailed discussion of the facts in the opinion.)

Judge Had Jurisdiction to Decide Whether Insanity Acquittee, Who Had Been Involuntary Committed to Mental Institution, Should Be Granted Unsupervised Passes on Premises of Dorothea Dix Hospital

In re Williamson, 151 N.C. App. 260, 564 S.E.2d 915 (2 July 2002). The respondent was found not guilty by reason of insanity of two counts of first-degree murder and was involuntarily committed to a mental institution. The court ruled that a judge had the jurisdiction to decide whether the respondent should be granted unsupervised passes on the premises of Dorothea Dix Hospital.