Recent Cases Affecting Criminal Law and Procedure
(June 19, 2007 – October 12, 2007)

Robert L. Farb
School of Government

North Carolina Supreme Court

Criminal Law and Procedure

Positive Urinalysis Result for Marijuana Metabolites Is Insufficient Alone to Support Conviction of Possessing Marijuana

State v. Harris, 361 N.C. 400, 646 S.E.2d 526 (28 June 2007), *affirming*, 178 N.C. App. 723, 632 S.E.2d 534 (2006). The court ruled that a positive urinalysis result for marijuana metabolites is insufficient alone to support a conviction of possessing marijuana. [Author's note: The other ruling by the North Carolina Court of Appeals in this case was not reviewed by the North Carolina Supreme Court and remains a valid precedent: defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.]

No Violation of Right to Unanimous Verdict When There Were Greater Number of Acts of Sexual Misconduct Than Number of Charged Offenses and Convictions

State v. Massey, 361 N.C. 406, 646 S.E.2d 362 (28 June 2007), *reversing*, 174 N.C. App. 216, 621 S.E.2d 633 (2005). The defendant was convicted of five counts of first-degree statutory sexual offense, ten counts of sexual acts with a minor when defendant assumed position of parent, and four counts of indecent liberties. The court ruled, relying on State v. Markeith Lawrence, 360 N.C. 368 (2006), and State v. Gary Lawrence, 360 N.C. 393 (2006), that there was no violation of the defendant's right to a unanimous verdict when there were a greater number of acts of sexual misconduct than the number of charged offenses and convictions

Evidence

Victim's Statements to Law Enforcement Officer Responding to Crime Scene and Victim's Later Identification of Defendant at Photo Lineup Were Testimonial Statements Under Davis v. Washington, 126 S. Ct. 2266 (2006)

State v. Lewis, 361 N.C. 541, 648 S.E.2d 824 (24 August 2007). (Author's note: The North Carolina Supreme Court's initial decision in this case was reported at 360 N.C. 1 (2005). The defendant sought review with the United States Supreme Court, which remanded the case to the North Carolina Supreme Court for further consideration in light of Davis v. Washington, 126 S. Ct. 2266 (2006).] The defendant was convicted of felonious assault, armed robbery, and feloniously breaking and entering. The victim died before trial and thus did not testify and be subject to cross-examination (the cause of death was not related to these crimes). The state was allowed at trial to offer her statements made to a law enforcement officer who had responded to the crime scene shortly after it was reported by neighbors, although apparently several hours after the crimes had been committed. The victim told the officer what had occurred. Several hours later, a detective showed a photographic lineup to the victim in which she identified the

defendant's photo as the person who committed the crimes against her. The court ruled that the victim's statements and the photo identification were testimonial statements under Davis v. Washington, 126 S. Ct. 2266 (2006), and their admission violated the defendant's confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court's analysis of the victim's statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine "what happened" rather than "what is happening"; (3) the investigation was formal and conducted outside the defendant's presence; (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred some time after the crimes had been committed. The court ruled that it was also clear that the victim's later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim's statements was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

Trial Judge Erred in Trial of Possession with Intent to Sell or Deliver Cocaine in Admitting Evidence Under Rule 404(b) of Defendant's Prior Sale of Cocaine and Resulting Conviction That Occurred Eight Years Earlier Because Evidence Lacked Sufficient Similarity With Offense Being Tried

State v. Carpenter, 361 N.C. 382, 646 S.E.2d 123 (28 June 2007), *reversing*, 179 N.C. App. 79, 632 S.E.2d 538 (2006). The court ruled that the trial judge erred in a trial of possession with intent to sell or deliver cocaine in admitting evidence under Rule 404(b) of the defendant's prior sale of cocaine and the resulting conviction that occurred eight years earlier, because the evidence lacked sufficient similarity with the offense being tried. The offense being tried involved an officer's discovery of cocaine on the person of the defendant who was a passenger in a vehicle stopped by the officer. The Rule 404(b) offense involved an officer's use of an informant to make a controlled buy from the defendant. (See the court's discussion of other differences between the two offenses and its detailed analysis.)

To the Extent That North Carolina Evidence Rule 103(a)(2) Directly Conflicts with North Carolina Appellate Rule 10(b)(1), It Is Unconstitutional

State v. Oglesby, 361 N.C. 541, 648 S.E.2d 819 (24 August 2007), *affirming*, 174 N.C. App. 658, 622 S.E.2d 152 (2005). North Carolina evidence Rule 103(a)(2) provides that once a trial court rules definitively on the record admitting or excluding evidence, either at or before trial, a party need not review an objection or offer of proof to preserve a claim of error for appeal. The court ruled that this rule is in direct conflict with North Carolina Rule of Appellate Procedure 10(b)(1), which has been interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of the admissibility of evidence for appeal unless a defendant renews the objection during trial. Because the Constitution of North Carolina exclusively vests the authority to make appellate rules with the North Carolina Supreme Court, the court ruled that to the extent evidence Rule 103(a)(2) conflicts with appellate Rule 10(b)(1), it is unconstitutional.

Arrest, Search, and Confession Issues

Juvenile's Request During Custodial Interrogation to Telephone Aunt Was Not Request for "Guardian" to be Present Under G.S. 7B-2101(a)(3) and Thus Did Not Require Officers to Stop Interrogation, Because Aunt Was Not His Guardian

State v. Oglesby, 361 N.C. 541, 648 S.E.2d 819 (24 August 2007), *affirming*, 174 N.C. App. 658, 622 S.E.2d 152 (2005). Officers during the interrogation of the sixteen-year-old defendant did not stop questioning him during custodial interrogation when he requested to telephone his aunt. Although the aunt testified that she was a "mother figure" to the defendant, the court ruled that this evidence did not constitute the legal authority inherent in a guardian or custodial relationship. Thus, the aunt was not a "guardian" under G.S. 7B-2101(a)(3) to require the officers to stop their questioning of the defendant. [Author's note: See also State v. Jones, 147 N.C. App. 527 (2001), summarized on page 468 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Capital Case Issues

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Challenge for Cause of Prospective Juror Who Was a Law Enforcement Officer
(2) Trial Judge Did Not Abuse Discretion in Denying Defendant's Challenge for Cause of Prospective Juror Under Morgan v. Illinois, 504 U.S. 719 (1992)
(3) Trial Judge Did Not Err in Refusing to Allow Defense Counsel During Jury Argument in Capital Sentencing Hearing to Present Exhibit Containing Statement That Life Imprisonment Is Presumptive Sentence for First-Degree Murder
(4) Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity)

State v. Cummings, 361 N.C. 438, 648 S.E.2d 788 (24 August 2007). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not abuse his discretion in denying the defendant's challenge for cause of a prospective juror who was a law enforcement officer. See the court's extensive discussion of this issue. (2) The court ruled that the trial judge did not abuse his discretion in denying the defendant's challenge for cause of a prospective juror under Morgan v. Illinois, 504 U.S. 719 (1992) (defendant has right to challenge for cause a prospective juror who would automatically vote for the death penalty in every case). See the court's extensive discussion of this issue. (3) The court ruled that the trial judge did not err in refusing to allow defense counsel during jury argument in the capital sentencing hearing to present an exhibit containing a statement that life imprisonment is the presumptive sentence for first-degree murder unless and until the prosecution proves otherwise. (4) The court ruled that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). A rational juror could conclude that the defendant's underage alcohol and illegal drug use were minor offenses and thus insignificant. Likewise, the robbery of another person about a month before the murder could be considered to be insignificant because it was so close in time to the murder and an aberration in an otherwise insignificant criminal background.

Sentencing

Defendant Appealing Revocation of Probation May Not Collaterally Attack on *Blakely* Grounds Suspended Sentence in Aggravated Range Imposed When Defendant Was Convicted and Placed on Probation

State v. Holmes, 361 N.C. 410, 646 S.E.2d 353 (28 June 2007), *reversing*, 177 N.C. App. 565, 629 S.E.2d 520 (2006). The defendant was convicted and placed on probation with suspended sentences in the aggravated range. He did not appeal his sentences. His probationary sentences were later revoked. He argued on appeal that the suspended sentences in the aggravated range violated the ruling in Blakely v. Washington, 542 U.S. 296 (2004). The court ruled, relying on the reasoning in State v. Noles, 12 N.C. App. 676 (1971), and State v. Rush, 158 N.C. App. 738 (2003), that a defendant appealing a revocation of probation may not collaterally attack on *Blakely* grounds an aggravated suspended sentence imposed when the defendant was convicted and placed on probation. The court stated that a direct appeal from an original judgment lies only when the sentence is originally entered.

No *Blakely* Error Because Defendant Admitted Existence of Factor That Provides One Additional Point in Sentencing

State v. Cupid, 361 N.C. 417, 646 S.E.2d 348 (28 June 2007), *affirming in part and reversing in part*, 173 N.C. App. 448, 618 S.E.2d 874 (2005). The defendant during his sentencing hearing stated to the trial judge that he "was . . . on probation" when the offenses were committed. The court ruled, relying on State v. Hurt, 361 N.C. 325 (2007), that the defendant's statement was an admission of the factor (committing offense while on probation) found by the trial judge that provides one additional point for sentencing. Thus, there was no Blakely v. Washington, 542 U.S. 296 (2004), error.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Defendant's Use of Hands and Water Together (By Holding Victim Under Water) Was Sufficient Evidence of a Deadly Weapon in Trial of Assault with Deadly Weapon on Government Officer
(2) Trial Judge Erred in Not Submitting Lesser Offense of Misdemeanor Assault on Government Officer in Trial of Felony Assault with Deadly Weapon on Government Officer When Evidence Did Not Support Finding as a Matter of Law That Hands and Water Together Were Deadly Weapon

State v. Smith, 186 N.C. App. 57, 650 S.E.2d 29 (18 September 2007). The defendant was convicted of assault with a deadly weapon on a government officer under G.S. 14-34.2 involving an assault on a law enforcement officer who was attempting to arrest the defendant at a river. (1) The defendant used his hands to submerge the officer's head, chest, and abdomen in the river and to hold him there. The court ruled that the defendant's use of his hands and the water together was sufficient evidence of a deadly weapon to submit the issue to the jury. The manner in which the defendant used his hands and the water was likely to cause death or serious bodily harm. The court emphasized that the defendant did not assault the officer with his hands alone; rather, he used his hands to bring the officer to an instrument of the assault, forcibly submerging the officer in the river and holding him there. Thus, the state was not required to show (to prove the hands and water together were a deadly weapon) that the officer was significantly smaller or weaker than the defendant or that the officer was injured or otherwise incapacitated when the defendant assaulted him. The court referred to the rulings in State v. Rogers, 153 N.C. App. 203 (2002), and State v. Shubert, 102 N.C. App. 419 (1991). (2) The court ruled that the trial judge erred in not submitting the lesser offense of misdemeanor assault on a government officer when the evidence

did not support a finding as a matter of law that the defendant's hands and water together were a deadly weapon.

(1) State Laid Proper Foundation in Trafficking Case for Testimony on Weighing Marijuana on Scale
(2) State Presented Sufficient Evidence of Weight of Marijuana Excluding Mature Stalks

State v. Manning, 184 N.C. App. 130, 646 S.E.2d 573 (19 June 2007). The defendant was convicted of trafficking in marijuana in excess of 10 pounds. (1) The court ruled that the state laid a proper foundation for testimony on weighing marijuana on a scale. The state's evidence showed that the scale was functioning properly. (2) The court ruled that the state presented sufficient evidence of the weight of the marijuana excluding the mature stalks. (See the court's discussion of the state's and defendant's evidence on this issue.)

Insufficient Evidence to Support Conviction of Common Law Robbery Because Commission of Battery to Victim Did Not Induce Victim to Part With Money

State v. Carter, 186 N.C. App. 259, 650 S.E.2d 650 (2 October 2007). The victim was delivering cash to replenish an ATM. He placed the cash in a grocery cart, entered the store, approached the ATM, and began replenishment, placing the grocery cart to his left. He then felt spray hit the back of his head, which he believed to be pepper spray or mace. He then saw that the money in the grocery cart was gone. The court ruled that this evidence was insufficient to support the a conviction of common law robbery because the commission of the battery to the victim did not induce the victim to part with the money. The court remanded the case to the trial court for resentencing for the lesser-included offense of larceny from the person.

Defense Counsel's Cross-Examination of State's Witness Did Not Result in Forfeiture of Right to Last Jury Argument

State v. Hennis, 184 N.C. App. 536, 646 S.E.2d 398 (3 July 2007). The defendant was convicted of various drug charges resulting from an officer's stop of a vehicle in which the defendant was a passenger. On cross-examination, defense counsel requested the officer to draw a diagram of the arrest scene, which was marked as defendant's exhibit A. The diagram illustrated where a crack rock had been found. Defense counsel also questioned the officer about his incident report, which was marked as an exhibit. The report was never published to the jury, however. The defendant did not testify or offer witnesses on his behalf. The court ruled that the trial judge erred in ruling that the defendant had forfeited his right to last jury argument based on defense counsel's cross-examination. (See the court's discussion of case law on the issue of forfeiture of last jury argument.)

Trial Judge Erred in Effectively Requiring Represented Defendant to Proceed *Pro Se* If He Wished to Testify at His Trial

State v. Colson, 186 N.C. App. 281, 650 S.E.2d 656 (2 October 2007). The day before the defendant's trial was to begin, his counsel moved to withdraw because counsel told the court that the defendant wished to testify and in counsel's opinion the defendant's testimony would be false. The trial judge told the defendant that counsel could not knowingly present testimony that counsel believed to be false and another lawyer could not be appointed to do the same thing. The judge told the defendant that if he insisted on testifying in his own behalf, the defendant could discharge his counsel and proceed *pro se*. The defendant told the judge that he wanted to testify on his own behalf and wanted counsel to represent him. After further conversation, the defendant

indicated he would testify and proceed without a lawyer. The court ruled that the trial judge erred in effectively requiring the defendant to proceed *pro se* if he wished to testify at his trial. By choosing to exercise his constitutional right to testify in his own behalf, the defendant was forced to relinquish his constitutional right to counsel. The court discussed the role of counsel on remand of this case for a new trial, specifically Rule 3.3(a)(2) of the Rules of Professional Conduct and Comment 9 to that rule, which states that unless a lawyer knows the client's testimony will be false, the lawyer must honor the client's decision to testify.

(1) G.S. 15A-1024 (Judge Imposing Sentence Other Than Provided in Plea Agreement Must Allow Defendant to Withdraw Plea) Did Not Apply When Judge Found Defendant Failed to Comply with Plea Agreement and Thus No Plea Agreement Existed at Time of Sentencing
(2) Trial Judge Did Not Err in Not Allowing Defendant to Withdraw Guilty Plea

State v. Hatley, 185 N.C. App. 93, 648 S.E.2d 222 (7 August 2007). The defendant pled guilty pursuant to a plea agreement in which he would provide truthful statements to a SBI agent and the state would recommend a specific sentence. If the defendant failed to provide truthful statements, the agreement specifically provided that the state was not bound to recommend the specific sentence. The prosecutor later determined that the defendant did not provide truthful statements and thus the defendant was not entitled to the sentencing recommendation in the plea agreement. The trial judge denied the defendant's motion to withdraw his guilty plea and sentenced him to a more severe sentence than provided in the plea agreement. (1) The court ruled that G.S. 15A-1024 (judge imposing sentence other than provided in plea agreement must allow defendant to withdraw plea) did not apply when the judge found that the defendant failed to comply with the plea agreement and thus no plea agreement existed at the time of sentencing. (2) The court ruled that the trial judge did not err in not allowing the defendant to withdraw his guilty plea. The defendant did not meet his burden of proving a "fair and just" reason to support his motion to withdraw.

Sufficient Evidence to Support Defendants' Convictions of Felony Child Abuse

State v. Parker, 185 N.C. App. 437, 651 S.E.2d 377 (21 August 2007). The court ruled that there was sufficient evidence to support the two defendants' convictions of felony child abuse. Expert medical testimony established: the injuries to the one-month-old infant were (1) intentional; and (2) occurred within six to 24 hours of 8:00 p.m., December 25, 2002. Two state's witnesses testified that they left the defendants' house at approximately 11:00 p.m., December 24, 2002, and the infant was fine. The defendants went to sleep and allegedly discovered the infant's injuries during the morning of December 25, 2002. The court noted that there was sufficient evidence to establish that the infant's injuries occurred between 11:00 p.m., December 24, 2002, and 2:29 p.m., December 25, 2002, when the defendants took the infant to the hospital, and the infant was under the sole care and supervision of the defendants during that time. In addition, there was evidence that both defendants altered accounts they provided to investigators and doctors treating the infant.

Sufficient Evidence to Support Conviction of Disseminating Obscenity

State v. Mueller, 184 N.C. App. 553, 647 S.E.2d 440 (17 July 2007). The defendant was convicted of disseminating obscenity to his daughter by showing her photographs of people engaged in sexual acts. The daughter testified that the photographs shown to her in court were substantially similar to the photos that the defendant had shown her. The court ruled that the state was not required to produce the exact photos the defendant had shown to his daughter.

Trial Judge Did Not Err in Not Giving Jury Instruction on Contributory Negligence in Prosecution of Felony Death by Vehicle

State v. Bailey, 184 N.C. App. 746, 646 S.E.2d 837 (17 July 2007). The defendant was convicted of felony death by vehicle. The defendant drove his vehicle in the rear of the victim's vehicle, which had stopped on a highway. The court ruled that the trial judge did not err in not giving a jury instruction on the victim's contributory negligence because that theory is not a defense to a criminal prosecution. The court noted that if the defendant had requested a jury instruction on intervening negligence, the judge would have been required to give that instruction [see State v. Hollingsworth, 77 N.C. App. 36 (1985)]. The court stated that even assuming that the victim was negligent, her negligence was at most a concurring proximate cause of her death, which still would have made the defendant criminally liable. The state's evidence tended to show that the defendant's blood alcohol level was over twice the legal limit, which inhibited him from exercising due care and keeping a proper lookout.

(1) Trial Judge Did Not Abuse Discretion in Allowing Joinder for Trial of Offenses of Possession of Firearm by Felon and Felonious Breaking or Entering, Larceny, and Possession of Stolen Property
(2) Possession of Firearm by Felon Is Substantive Criminal Offense
(3) Possession of Firearm by Felon Does Not Violate Double Jeopardy

State v. Wood, 185 N.C. App. 227, 647 S.E.2d 679 (7 August 2007). (1) The court ruled that the trial judge did not abuse his discretion in allowing the joinder for trial of the offenses of possession of firearm by felon and felonious breaking or entering, larceny, and possession of stolen property. The court stated that the defendant's alleged theft and subsequent possession of a firearm as a result of a breaking or entering were so closely related in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others. (2) The court ruled that possession of a firearm by a felon is a substantive criminal offense, not a recidivist offense. (3) The court ruled that possession of a firearm by felon does not violate double jeopardy.

Convictions of Both First-Degree Statutory Rape and First-Degree Forcible Rape Based on Same Act Is Not Authorized, and Same Rule Applies to First-Degree Statutory Sexual Offense and First-Degree Forcible Sexual Offense

State v. Ridgeway, 185 N.C. App. 423, 648 S.E.2d 886 (21 August 2007). The defendant was convicted of multiple offenses involving the murder and sexual assaults of a fourteen year old victim. The court ruled that convictions of both first-degree statutory rape and first-degree forcible rape based on the same act is not authorized, and the same rule applies to first-degree statutory sexual offense and first-degree forcible sexual offense.

Sexual Battery Is Not Lesser-Included Offense of Second-Degree Rape Under G.S. 14-27.3(a)(2) (Vaginal Intercourse With Mentally Helpless, Mentally Incapacitated, or Physically Helpless)

State v. Pettis, 186 N.C. App. 116, 651 S.E.2d 231 (18 September 2007). The court ruled that sexual battery is not a lesser-included offense of second-degree rape under G.S. 14-27.3(a)(2) (vaginal intercourse with mentally helpless, mentally incapacitated, or physically helpless). Sexual battery has a purpose element (battery committed for purpose of sexual arousal, sexual

gratification, or sexual abuse) that is not an element of second-degree rape under G.S. 14-27.3(a)(2).

Circumstantial Evidence Established That Crime Was Committed in State of North Carolina

State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876 (21 August 2007). The defendant was convicted of possession of cocaine. There was no testimony during the trial that explicitly stated that the crime was committed in North Carolina. However, the court ruled that circumstantial evidence established that the crime was committed in the State of North Carolina. The defendant was indicted by a Mecklenburg County, North Carolina grand jury, and the crime was investigated and the defendant was arrested on a named street by an officer of the Charlotte-Mecklenburg Police Department. A North Carolina identification card was seized during the defendant's arrest. A forensic chemist employed by the Charlotte-Mecklenburg Police Crime Lab analyzed the pills, and a Charlotte-Mecklenburg Police Department property sheet accompanied the sealed package containing the pills.

Defendant's Letter to Victim Was Insufficient to Support Conviction of Attempting to Intimidate State's Witness

State v. Williams, 186 N.C. App. 223, 650 S.E.2d 607 (2 October 2007). The defendant was convicted of attempting to intimidate a witness. The defendant was in jail with another person (Scott), who was charged with the rape and kidnapping of a female. The state's case against the defendant consisted solely of a letter that the defendant had written to the victim. The indictment charged that the defendant had "by menaces and coercive statements attempt[ed] to deter and prevent" her from attending court by sending the letter to her. The court examined the letter and found that it was not threatening, coercive, or menacing (see the discussion in the court's opinion). The court ruled that the evidence was insufficient to support the defendant's conviction.

(1) Sufficient Evidence to Support Juvenile's Adjudication of False Bomb Report Under G.S. 14-69.1(a)
(2) No Error When State Obtained Adjudication of False Bomb Report Under G.S. 14-69.1(a) (Involving Any Building) When Evidence Also Would Have Supported Adjudication of False Bomb Report Involving Public Building Under G.S. 14-69.1(c) (Involving Public Building)

In re B.D.N., 186 N.C. App. 108, 649 S.E.2d 913 (18 September 2007). Evidence showed that the juvenile typed "Bomb at Lunch" on a school calculator in a middle school math class. (1) The court ruled that there was sufficient evidence to support the juvenile's adjudication of making a false bomb report under G.S. 14-69.1(a) (false bomb report involving a building). Although no one saw the juvenile type the words on the calculator, testimony by students and teachers and admissions by the juvenile were sufficient to support the adjudication. (2) The court rejected the juvenile's argument that judgment should have been arrested for the adjudication under G.S. 14-69.1(a) because the state should have charged a violation under G.S. 14-69.1(c) (false bomb report involving public building). The court ruled that the state could have charged the juvenile under either statutory provision, and the state proved all the elements of the offense under G.S. 14-69.1(a).

Trial Judge Did Not Err in Allowing Trial to Continue in Defendant's Absence When He Failed to Appear When Trial Had Reconvened

State v. Davis, 186 N.C. App. 242, 650 S.E.2d 612 (2 October 2007). The court ruled that the trial judge did not err in allowing the trial to continue in the defendant's absence when he failed to appear when the trial had reconvened. The record showed that the defendant knew of the date and time that the trial reconvened and failed to appear or provide a reasonable excuse for his absence.

Trial Judge Did Not Err in Giving Acting-in-Concert Instruction to Jury (Which Had Not Been Included in Initial Instructions) After It Had Reported That It Was Divided 11-1 on Verdict

State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896 (21 August 2007). The defendant was convicted of first-degree murder based on the felony murder theory, with the underlying felony being armed robbery. Evidence showed that another person was involved in committing the offense. In the original jury instructions, the trial judge did not give an instruction on acting in concert. After the jury reported that it was divided 11-1 on a verdict (without indicating whether the vote was for conviction or acquittal), the judge gave the instruction. The court ruled that the judge properly gave the instruction under G.S. 15A-1234(a)(4), and by doing so did not impermissibly coerce a verdict.

Trial Judge Did Not Abuse Discretion in Allowing Two State's Witnesses to Testify and Rejecting Defendant's Objections That State Failed to Comply With Discovery Requirements for Expert Witnesses

State v. Hall, 186 N.C. App. 267, 650 S.E.2d 666 (2 October 2007). The defendant was convicted of common law robbery. The court ruled, distinguishing State v. Blankenship, 178 N.C. App. 351 (2006), that the trial judge did not abuse his discretion in allowing two state's witnesses to testify and rejecting the defendant's objections that the state failed to comply with discovery requirements for expert witnesses (for example, providing a curriculum vitae). One witness was a physician's assistant, who the trial judge determined was a fact witness, not an expert witness, in testifying about the victim's injuries. Also, any opinion testimony by the physician's assistant was not germane to any issue before the jury. The other witness testified to lifting latent fingerprints from a car and did not offer any expert opinion.

When Defendant Violated Many Probation Conditions Warranting Revocation, Imposition of Improper Probation Condition That Defendant Admit Responsibility for Offenses Was Harmless Error

State v. Howell, 184 N.C. App. 369, 646 S.E.2d 622 (3 July 2007). The defendant was convicted of several sexual offenses and placed on probation. One of the probation conditions (admit responsibility for offenses) was invalid under In re T.R.B., 157 N.C. App. 609 (2003). The court ruled, however, that when the defendant violated many other conditions warranting revocation, imposition of the improper condition was harmless error.

Defendant's Admission Through Counsel That He Had Violated Probation Conditions Was Sufficient; Trial Judge Did Not Need to Personally Examine Defendant Concerning His Admission

State v. Sellers, 185 N.C. App. 726, 649 S.E.2d 656 (4 September 2007). A probation violation report was filed against the defendant. The defendant through counsel admitted to two of the violations alleged in the report. The trial judge heard from the probation officer concerning the violations. The trial judge found that the defendant willfully violated the terms of his probation,

revoked the probation, and activated his suspended sentence. The court ruled that unlike when a defendant pleads guilty, a trial judge is not required to personally examine a defendant concerning his admission that he violated probation. The defendant's admission through counsel was sufficient.

Defendant Failed to Properly Present Legal Argument in Trial Court During Proceedings on Motion for Appropriate Relief and Thus Did Not Preserve Argument for Appellate Review

State v. Moore, 185 N.C. App. 257, 648 S.E.2d 288 (7 August 2007). The defendant was convicted and then later filed a motion for appropriate relief, seeking a new trial based on newly-discovered evidence. At the hearing on the motion, the defendant sought to expand on the legal grounds alleged in his written motion for appropriate relief. However, the defendant failed to file a written amendment to his motion, nor could the defendant's argument be considered a new motion for appropriate relief under G.S. 15A-1420, based on the facts in this case. The court ruled that the defendant failed to properly present the legal argument in the trial court during the proceedings on the motion for appropriate relief and thus did not preserve the argument for appellate review.

Arrest, Search, and Confession Issues

Court Reverses Trial Judge's Ruling That Checkpoint Violated Fourth Amendment Because Judge Misapplied Ruling in State v. Rose, 170 N.C. App. 284 (2005), and Court Remands for Further Factual Findings

State v. Burroughs, 185 N.C. App. 496, 648 S.E.2d 561 (21 August 2007). The trial judge ruled that a checkpoint (at which the defendant was arrested for DWI) violated the Fourth Amendment based on the ruling in State v. Rose, 170 N.C. App. 284 (2005). The state appealed. The court noted that the trial judge's ruling was based on the absence of evidence to support the primary programmatic purpose of the checkpoint. The court stated that the ruling misconstrued the principles of *Rose* and City of Indianapolis v. Edmond, 531 U.S. 32 (2000), on which *Rose* heavily relied. The court stated that the *Rose* ruling provided that when contradictory evidence exists about a checkpoint's primary purpose, the trial judge must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask unconstitutional purposes. Neither *Rose* nor *Edmond* mandated that trial judges extensively inquire about the purpose of every checkpoint. The court in *Rose* required additional findings of the checkpoint's purpose because substantial evidence indicated that the checkpoint's purpose was to impermissibly check for illegal drugs. The court concluded that from the available evidence in the case before it, the actual purpose of the checkpoint clearly was the same as its stated purpose: to check for impaired drivers. Because such a purpose has been expressly ruled constitutional and the trial judge misconstrued the *Rose* ruling, the court reversed the trial judge's ruling. However, the court ruled there still remained on remand for the trial court to determine whether the individual circumstances surrounding the stop of the defendant at this checkpoint were constitutional; the court cited and quoted from State v. Mitchell, 358 N.C. 63 (2004).

When Officer Ran Vehicle's Registration Plate and Then Registered Owner's Driver's License, Which Was Reported to be Suspended, Officer Had Reasonable Suspicion to Stop Vehicle When There Was No Evidence That Owner Was Not Driving Vehicle

State v. Hess, 185 N.C. App. 530, 648 S.E.2d 913 (21 August 2007). An officer on patrol at night ran a vehicle's registration plate and then the registered owner's driver's license, which was reported to be suspended. The officer could not determine the sex or race of the driver. The officer stopped the vehicle. The court ruled, relying on cases from other jurisdictions, that the officer had reasonable suspicion to stop the vehicle. The court stated that it was reasonable for the officer under these circumstances to infer that the owner was driving the vehicle.

When Officer Stopped Vehicle Because He Mistakenly Believed That Speed Limit Was 20 M.P.H. (Vehicle Was Going 30 M.P.H.) When Speed Limit Was Actually 55 M.P.H., Officer Did Not Have Probable Cause to Stop Vehicle

State v. McLamb, 186 N.C. App. 100, 649 S.E.2d 902 (18 September 2007). An officer stopped a vehicle going 30 m.p.h. The officer believed the speed limit was 20 m.p.h., but the legal limit was actually 55 m.p.h. The court ruled, relying on State v. Ivey, 360 N.C. 562 (2006), and cases from other jurisdictions, that the officer did not have probable cause to stop the vehicle for speeding. An officer's mistake of law may not support probable cause to stop a vehicle.

Reasonable Suspicion Did Not Exist to Justify Officer's Stop and Frisk of Defendant Shortly After Commission of Armed Robbery at Nearby Convenience Store

State v. Cooper, 186 N.C. App. 100, 649 S.E.2d 664 (18 September 2007). A law enforcement officer during the late afternoon heard a radio report that an armed robbery had been committed at a convenience store. The robber was described as a black male. The officer also heard over the radio that another officer has seen a black male walking on Lake Ridge Drive shortly after the robbery. The officer turned onto Deanna Drive to begin a sweep of the area. The robber had reportedly left the rear of the store, heading in the general direction of the area that the officer was searching. The officer knew that there was a path running approximately from the store through woods to Lake Ridge Drive. The officer approached the intersection of Deanna Drive and Lake Ridge Drive approximately five minutes after the robbery. The officer saw a black male near where the path exited onto Lake Ridge Drive. From the time the officer turned off Capital Boulevard until this point, the officer had seen no one else. He drove closer to the black male and motioned him to approach his car. In response, the defendant walked over to the car. The officer conducted a stop and frisk of the black male. The court ruled that the officer did not have reasonable suspicion to stop and frisk the defendant for the armed robbery. (See the court's discussion of the case law on this issue.)

Although Officers' Forcible Entry into Residence During Execution of Search Warrant Violated Fourth Amendment and Was Substantial Violation of G.S. 15A-251, Evidence Seized in Residence Was Not Subject to Suppression Because There Was No Causal Relationship Between Violation and Seizure of Evidence

State v. White, 184 N.C. App. 519, 646 S.E.2d 609 (3 July 2007). Officers executed a search warrant for illegal drugs. The trial court ruled that the officers' forcible entry into the residence violated the Fourth Amendment and was a substantial violation of G.S. 15A-251, and the substantial violation required suppression of the evidence seized in the residence as a fruit of he poisonous tree. The state on its appeal of the trial court's ruling did not contest that the officers' entry into the residence violated the Fourth Amendment and was a substantial violation of G.S. 15A-251. The court ruled, relying on State v. Richardson, 295 N.C. 309 (1978), that the evidence seized in the residence was not subject to suppression because there was no causal relationship between the violation and the seizure of the evidence. The search was conducted sometime after the forced entry and only after the occupants were secured and the defendant was read a copy of

the search warrant. The cocaine would have likely been located even in the absence of the forced entry. (Author's note: The Fourth Amendment's exclusionary rule was not applicable based on the ruling in Hudson v. Michigan, 126 S. Ct. 2159 (2006).

(1) Magistrate Had Substantial Basis for Concluding There Was Probable Cause to Issue Search Warrant to Search Home for Illegal Drugs; Court Reverses Trial Judge's Grant of Defendant's Pretrial Motion to Suppress
(2) After Granting Defendant's Pretrial Motion to Suppress Evidence, Trial Judge Erred in Dismissing Indictments; State Had Right to Try Defendant Without Suppressed Evidence If It Chose to Do So

State v. Edwards, 185 N.C. App. 701, 649 S.E.2d 646 (4 September 2007). The trial judge granted the defendant's pretrial motion to suppress evidence on the ground that probable cause did not exist to issue a search warrant to search the defendant's home for illegal drugs. The judge then dismissed the indictments against the defendant. The state appealed. (1) The court ruled that the magistrate had a substantial basis for concluding there was probable cause to issue a search warrant to search the defendant's home for illegal drugs. The officer's affidavit stated that he had received information from a confidential and reliable informant who had seen hydrocodone (without a prescription) inside the defendant's home within the past 48 hours. He had known the informant for nine years, during which time the informant had provided "confidential and reliable" information that had proven true through independent investigations. The informant was familiar with hydrocodone and its uses. The officer had 24 years' experience with his law enforcement agency, including seven years of street level drug interdiction. The court stated that even though the officer did not set out in exact detail the connection between the informant and the prior drug investigations, the magistrate could properly infer that the informant had provided reliable information to the officer in these situations. (2) The court ruled that the trial judge erred in dismissing the indictments against the defendant after granting the defendant's pretrial motion to suppress evidence. The state had a right to try the defendant without the suppressed evidence if it chose to do so.

Defendant Was Not in Custody in Military Brig to Require *Miranda* Warnings When Sheriff Discussed Status of Murder Investigation With Defendant

State v. Wright, 184 N.C. App. 464, 646 S.E.2d 625 (3 July 2007). The defendant, a military officer, was convicted of first-degree murder for the killing of his girl friend's husband. Based on the defendant's request to see the sheriff, the sheriff and a detective went to the military brig where the defendant was being held on military charges, but those charges did not include murder. The defendant also was not then charged in state court with murder. A guard escorted the defendant without handcuffs or shackles to a room. The room contained a table, chairs, and a couch. The defendant sat on the couch while the sheriff and the detective sat at the table. The sheriff explained to the defendant that he was not there to question him, but simply to inform him of the status of the murder investigation. The sheriff advised the defendant that if he asked a question, the defendant should not answer it. The defendant was free to leave the room any time. The court ruled, relying on State v. Fisher, 158 N.C. App. 133 (2003), and other cases, that the defendant was not in custody to require *Miranda* warnings.

Evidence

(1) Statements Made by Victim to Friend Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006)

(2) Statements Made by Victim to Friend Were Admissible as Present Sense Impressions, Rule 803(1)

(3) Trial Judge Did Not Err in Prohibiting Defense-Proffered Evidence of State's Witness's Plea Bargain Concerning Unrelated Federal Criminal Charge When No Evidence That Plea Bargain Was for Testimony in Current Trial

State v. Williams, 185 N.C. App. 318, 648 S.E.2d 896 (21 August 2007). The defendant was convicted of first-degree murder. (1) The court ruled that statements made by the victim to a friend were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006). The statements were made before the commission of the murder and in the course of a private conversation outside the presence of a law enforcement officer. There was no indication that the statements were made with the thought of a future trial in mind. (2) The court ruled that the statements made by the victim to a friend were admissible as present sense impressions, Rule 803(1). The victim spoke by telephone to the friend immediately before the defendant and accomplice arrived at the victim's house to commit the murder, which was only two hours after the accomplice had initially spoken to the victim. (3) A state's witness, a jail inmate, testified about incriminating statements made by the defendant to the witness while they were in jail together. The defendant sought to introduce evidence that the witness received a reduced sentence for his cooperation with a federal prosecutor concerning an unrelated federal criminal charge against the witness. The defendant did not establish that the witness had entered into the plea bargain in return for his cooperation in the prosecution of the defendant. The court ruled that under these circumstances the trial judge did not err in prohibiting the introduction of this evidence to show bias.

Trial Judge Did Not Err in DWI Trial in Allowing Testimony on Retrograde Extrapolation to Explain Why Non-Refrigerated Blood Sample Might Register Lower Blood Alcohol Concentration When Tested Than When Blood Was Drawn

State v. Corriher, 184 N.C. App. 168, 645 S.E.2d 413 (19 June 2007). The defendant was convicted of DWI. A blood sample taken from the defendant was left unrefrigerated in an officer's vehicle for twelve days before it was tested. The court, relying on the standard for the admissibility of expert testimony set out in Howerton v. Arai Helmut, Ltd., 358 N.C. 440 (2004), and State v. Goode, 341 N.C. 513 (1995), ruled that the trial judge did not err in allowing testimony on retrograde extrapolation to explain why a non-refrigerated blood sample might register a lower blood alcohol concentration when tested than when the blood was drawn.

Trial Judge Erred in Not Allowing Defense Witnesses to Offer Under Rule 405(a) Their Personal Opinions of State's Witness's Character for Truthfulness or Untruthfulness

State v. Hernendez, 184 N.C. App. 344, 646 S.E.2d 579 (3 July 2007). The defendant was on trial for rape. The court ruled that the trial judge erred in not allowing three defense witnesses to offer under Rule 405(a) their personal opinions of the character of truthfulness or untruthfulness of the state's witness (the alleged rape victim) who had testified on the state's case in chief. The defendant needed to show only that each of the three witnesses had personal knowledge of the witness and they had formed an opinion about her character for truthfulness or untruthfulness. The defendant was not required to show that the witness had been untruthful to the defense witnesses as a foundation for their testimony.

(1) Trial Judge Did Not Err in Admitting Under Rule 404(b) to Prove Identity Evidence of Prior Armed Robberies in Which Gun Defendant Used to Commit Those Offenses Was

Same Weapon Defendant Used in Murder Being Tried, and Also Admitting Defendant's Guilty Pleas to the Armed Robberies

(2) Trial Judge Did Not Err in Allowing Officer with Training and Experience with Gangs to Explain Meaning of Gang Terminology

State v. Brockett, 185 N.C. App. 18, 647 S.E.2d 628 (7 August 2007). The defendant was convicted of first-degree murder and felonious assault involving gang-related offenses. (1) The court ruled that the trial judge did not err in admitting under Rule 404(b) to prove identity evidence of prior armed robberies in which the gun that the defendant used to commit those offenses was same weapon the defendant used in the murder being tried. The court stated that the evidence demonstrated that the defendant had used or had access to the same firearm within two months of the shootings and was relevant to prove identity and supported a reasonable inference that the same person committed both the armed robberies and the murder and felonious assault. The court also ruled, distinguishing State v. Wilkerson, 356 N.C. 418 (2002) (adopting dissenting opinion in Court of Appeals, 148 N.C. App. 310) and State v. McCoy, 174 N.C. App. 105 (2005), that the trial judge did not err in admitting not only the testimony of an accomplice and investigators of the armed robberies, but also the transcript of the defendant's plea of guilty to the armed robberies. The court stated that the transcript of plea was more than bare evidence of the defendant's prior armed robbery convictions. Rather, it was an admission by the defendant that he had committed the armed robberies. (2) The court ruled that the trial judge did not err in allowing an officer with training and experience with gangs to explain the meaning of gang terminology in a taped telephone conversation between the defendant and his brother.

Trial Judge Erred in Drug Prosecution in Allowing State to Introduce Evidence of Defendant's Gang Membership and That Hollow Point Bullets Were Recovered in Guns Seized from Defendant and Accomplice

State v. Gayton, 185 N.C. App. 122, 648 S.E.2d 275 (7 August 2007). An undercover officer bought cocaine from the defendant and his accomplice. A gun was recovered from the passenger seat of a vehicle that the defendant had been occupying. The defendant was convicted of trafficking by possessing cocaine and carrying a concealed weapon. The court ruled that the trial judge erred by allowing the state to introduce evidence of the defendant's gang membership. The court stated that even if the officers felt forced to revamp the drug buy operation after learning of the defendant's gang membership to reduce the likelihood of violence, this information was irrelevant to the offenses being tried. The court also ruled that the trial judge erred in allowing an officer to testify that hollow point bullets were recovered from guns seized from the defendant and his accomplice; the evidence was irrelevant to the issues in this case.

Trial Judge Did Not Err in Allowing Law Enforcement Officer to Offer Opinion That Seized Pills Were Crack Cocaine

State v. Freeman, 185 N.C. App. 408, 648 S.E.2d 876 (21 August 2007). The defendant was convicted of possession of cocaine. The court ruled that the trial judge did not err under Rule 701 in allowing a law enforcement officer to offer his opinion that two of the pills in a pill bottle seized from the defendant were crack cocaine—based on his extensive training and experience with narcotics. The officer testified that during his eight years as an officer he had had contact with crack cocaine between 500 and 1,000 times.

Trial Judge Erred in Admitting State's Victim Impact Evidence During Guilt-Innocence Stage of Trial

State v. Graham, 186 N.C. App. 182, 650 S.E.2d 639 (2 October 2007). The defendant was convicted of first-degree burglary and a felonious assault. The defendant broke and entered victim A's home and stabbed victim B. The court ruled that the trial judge erred in admitting during the state's presentation of evidence at trial the testimony of victim A concerning how her mental health was affected by witnessing the stabbing of her son, victim B. The court stated that victim impact testimony is generally inadmissible during the guilt-innocence stage of a trial because it often does not tend to prove whether a particular defendant committed a particular crime against a particular victim. However, there is an exception to the general rule if the victim impact evidence tends to show the context or circumstances of the crime itself, even if it also shows the impact of the crime on the victim and family. The court examined the state's evidence in this case and determined that it did not fit the exception.

Sentencing

Stipulation to Existence of One Point for Prior Record Level Based on All Elements in Current Offense Are Included in Prior Offense Was Ineffective Because Stipulation to Legal Issue Is Not Permitted

State v. Prush, 185 N.C. App. 472, 648 S.E.2d 556 (21 August 2007). The court ruled, relying on State v. Hanton, 175 N.C. App. 250 (2006), that a stipulation to the existence of one point for a prior record level based on all the elements in the current offense are included in a prior offense was ineffective because a stipulation to a legal issue is not permitted.

Conviction After Original Sentencing Was Properly Used to Calculate Defendant's Prior Record Level at Resentencing Hearing

State v. Pritchard, 186 N.C. App. 128, 649 S.E.2d 917 (18 September 2007). The defendant was convicted of two offenses and sentenced under Prior Record Level I. He appealed to the North Carolina Court of Appeals, which ordered a new sentencing hearing. The defendant was convicted of another offense after the original sentencing hearing and before the resentencing hearing. The trial judge at the resentencing hearing determined based on the new conviction that the defendant must be sentenced under Prior Record Level II. The court ruled that the trial judge did not err in using the new conviction to calculate the defendant's prior record level at the resentencing hearing. (Author's note: The length of the defendant's sentence imposed at the resentencing hearing did not exceed the original sentence.)