Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Arrest, Search, and Confession Issues

(1) Court Rules That Reasonable Suspicion Is Standard for Stops of Vehicles for All Traffic Violations; Court Disavows Statements in Prior Court Opinions and Cases of North Carolina Court of Appeals That Probable Cause Is Standard for Stop of Vehicle for Readily Observed Traffic Violation
(2) Court Rules That Officer Had Reasonable Suspicion to Stop Vehicle for Changing Lanes Without Signaling

State v. Styles, 362 N.C. 412, 665 S.E.2d 438 (27 August 2008), *affirming*, 185 N.C. App. 271 (7 August 2007). The defendant, who was operating a vehicle moving in the same direction and in front of an officer's vehicle, changed lanes without signaling. An officer stopped the defendant for that violation. (1) The court ruled, relying on the rulings of several federal courts of appeal, that reasonable suspicion is the standard for stops of vehicles for all traffic violations. The court disavowed statements in prior court opinions and in cases of the North Carolina Court of Appeals that probable cause is the standard for the stop of a vehicle for a readily observed traffic violation. These cases include: State v. Ivey, 360 N.C. 562 (2006); State v. McClendon, 350 N.C. 630 (1999); State v. Young, 148 N.C. App. 462 (2002), and State v. Wilson, 155 N.C. App. 89 (2003). (2) The court ruled that the officer had reasonable suspicion to stop the vehicle for changing lanes without signaling under G.S. 20-154(a). The defendant's failure to signal violated the statute because changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle (in this case, the officer's vehicle).

North Carolina Court of Appeals

Criminal Law and Procedure

Only One Conviction of Possession of Firearm by Felon Is Permitted When More Than One Weapon Is Possessed Simultaneously

State v. Garris, 191 N.C. App. 276, 663 S.E.2d 340 (15 July 2008). The court ruled, relying on federal and state case law, that only one conviction of possession of firearm by felon (G.S. 14-415.1) is permitted when more than one weapon is possessed simultaneously.

Sufficient Evidence of Defendant's Construction Possession of Firearm in Vehicle to Support Conviction of Possession of Firearm by Felon

State v. Smith, 192 N.C. App. 690, 666 S.E.2d 191 (16 September 2008). The defendant was convicted of possession of firearm by felon. An officer stopped a Ford pick-up truck for failing to display a proper registration tag. After the stop, the officer smelled the odor of marijuana emanating from the vehicle. Two other officers conducted a warrantless search (the defendant

refused to give consent) and recovered a handgun in the bed (cargo area) of the vehicle. The bed was fitted with a lift-up cover. The officers did not find any marijuana. The court ruled that there was sufficient evidence of the defendant's construction possession of the firearm in the vehicle to support the conviction of possession of firearm by a felon. The evidence tended to show: (i) the defendant was the owner and driver of the vehicle; (ii) the defendant exclusively controlled the vehicle; (iii) the vehicle's cargo area contained other objects owned by the defendant; (iv) the defendant stated that everything in the cargo area belonged to him; and (v) the handgun was found in the cargo area wrapped in a man's jacket.

Insufficient Evidence to Support Conviction of Carrying Concealed Weapon

State v. Soles, 191 N.C. App. 241, 662 S.E.2d 564 (1 July 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of carrying a concealed weapon. An officer stopped the defendant's van for a motor vehicle violation and ordered the defendant out of the van. The officer searched a backpack in the back of the van (there were no seats there) and found a pistol. The court noted case law that there must be evidence that a weapon must be within the reach and control of the defendant. Because the state failed to offer evidence on this issue, there was insufficient evidence to support the defendant's conviction.

(1) Sufficient Evidence of Serious Injury in Felonious Assault Trial
(2) Defendant Was Not Prejudiced in Joint Trial of Felonious Assault and Possession of Firearm by Felon by Admission of Prior Conviction of Possession of Cocaine to Prove Element of Possession of Firearm by Felon

State v. Tice, 191 N.C. App. 506, 664 S.E.2d 368 (5 August 2008). The defendant was convicted of assault with a deadly weapon inflicting serious injury and possession of a firearm by felon. (1) The court ruled that there was sufficient evidence of serious injury to support the assault conviction. The defendant was shot in the knee, took pain medication for two weeks, walked with a limp for one to two weeks, and required one month to heal. (2) The defendant argued on appeal that he was denied effective assistance of counsel when his trial lawyer agreed to stipulate that the defendant had a prior felony conviction (possession of cocaine) for the charge of possession of firearm by felon without insisting, as a condition of that stipulation, that the nature of the conviction not be disclosed to the jury. The court rejected the defendant's argument, ruling that the defendant was not prejudiced in the trial of the felonious assault charge by the revelation of the conviction of possession of cocaine, a nonviolent crime.

(1) Sufficient Evidence to Prove Defendant's Hands and Fists Were Deadly Weapon and That Serious Injury Was Inflicted to Support Felonious Assault Conviction
(2) Sufficient Evidence to Prove Larceny of Motor Vehicle When Defendant Took Victim's Vehicle to Virginia and Abandoned It There

State v. Allen, 193 N.C. App. 375, 667 S.E.2d 295 (21 October 2008). The defendant was convicted of assault with a deadly weapon inflicting serious injury and larceny of a motor vehicle. (1) The court ruled, relying on State v. Harris, 189 N.C. App. 49, 657 S.E.2d 701 (2008), that there was sufficient evidence to prove that the defendant's hands and fists were a deadly weapon and that serious injury was inflicted to support the felonious assault conviction. The defendant was 25 years old, seven inches taller and 40 pounds heavier than the victim, who was 38 years old. The defendant struck repeated blows to the victim's head and face with his hands and fists. The victim suffered traumatic head injuries and extreme facial bruising and swelling, as well as bleeding from her left ear and nose. Her left eye was swollen shut for over a month, and the insides of her ear and mouth were damaged. She lost consciousness and remained disoriented

after she awoke,. (2) The court ruled, relying on State v. Kemmerlin, 356 N.C. 446 (2002), that there was sufficient evidence that the defendant committed larceny of the assault victim's motor vehicle. After assaulting the victim, the defendant drove her vehicle to Norfolk, Virginia and abandoned it there. The defendant's abandonment of the vehicle placed the vehicle beyond his power to return it to the victim and showed his indifference whether she ever recovered it.

Sufficient Evidence of Discharging Firearm into Occupied Property When Bullet Was Fired into Exterior Wall of Apartment Building; Bullet Need Not Penetrate Inner Wall or Enter Apartment

State v. Canady, 191 N.C. App. 680, 664 S.E.2d 380 (5 August 2008). The court ruled, relying on State v. Cockerham, 155 N.C. App. 729 (2003), and State v. Watson, 66 N.C. App. 306 (1984), that there was sufficient evidence of discharging a firearm into an occupied property when the bullet was fired into an exterior wall of an apartment building; the bullet need not penetrate an inner wall or enter an apartment.

Court Upholds Convictions for Both Felonious Possession of More 1.5 Ounces of Marijuana and Possession of Marijuana With Intent to Sell or Deliver, Based on Same Marijuana

State v. Spencer, 192 N.C. App. 143, 664 S.E.2d 601 (19 August 2008). The court, relying on State v. Pipkins, 337 N.C. 431 (1994), and State v. Perry, 316 N.C. 87 (1986), and discussing in footnote four the overruling of a contrary ruling in State v. Pagon, 64 N.C. App. 295 (1983), upheld the defendant's convictions for both felonious possession of more 1.5 ounces of marijuana and possession of marijuana with intent to sell or deliver, based on the same marijuana.

Insufficient Evidence to Support Second-Degree Kidnapping When Defendant During Armed Robbery Ordered Victims to Lie on Floor, But They Were Not Bound

State v. Taylor, 191 N.C. App. 561, 664 S.E.2d 375 (5 August 2008). The court ruled, relying on State v. Ripley, 360 N.C. 333 (2006), State v. Beatty, 347 N.C. 555 (1998), and other cases, that there was insufficient evidence to support the defendant's second-degree kidnapping convictions when the defendant during an armed robbery ordered the victims to lie on the floor, but they were not bound.

(1) Sufficient Evidence to Support Conviction of Attempted First-Degree Burglary
(2) Trial Judge Did Not Err in Not Submitting Attempted Misdemeanor Breaking or Entering as Lesser Offense of Attempted First-Degree Burglary

State v. Martin, 191 N.C. App. 462, 665 S.E.2d 471 (5 August 2008). The defendant was convicted of attempted first-degree burglary that was committed on March 29, 2007. A person taking a bath in a house heard a loud noise, looked out the bathroom window, and saw the defendant walk around the corner of her house. She then heard scratching at her bedroom window. She pulled back the window shade and saw the defendant on the other side of the window, pulling on the window and a cord attached to the window. The defendant had put his fingers around the window screen and had pushed the window off its track. The defendant then left the area. (1) The court ruled that the evidence was sufficient to support the defendant's conviction of attempted first-degree burglary. (2) The court ruled that the trial judge did not err in not submitting attempted misdemeanor breaking or entering as a lesser offense of attempted first-degree burglary. The court stated that there was no evidence presented at trial to suggest that the defendant's intent was anything other than to commit a felony within the home. There was no

evidence to support the defendant's appellate argument that the defendant could have been attempting to look at the person while she was bathing.

Sufficient Evidence That Victim Was "Physically Helpless" to Support Conviction of Second-Degree Rape

State v. Atkins, 193 N.C. App. 200, 666 S.E.2d 809 (7 October 2008). The court ruled that there was sufficient evidence that the victim was "physically helpless" [defined in G.S. 14-27.1(3)] to support the defendant's conviction of second-degree rape under G.S. 14-27.3(a)(2). The victim was 83 years old, suffered from severe arthritis, walked with the assistance of a walker, and needed assistance with household chores and daily errands. The court stated the jury could reasonably conclude that she was unable to actively oppose or resist her attacker. (The court stated in footnote 1 that not all elderly victims will necessarily be considered physically helpless.)

(1) Proof in Trial of Possessing Stolen Goods of Defendant's Knowledge or Reasonable Grounds to Believe Property Was Stolen May Be Inferred From Defendant's Buying Property at Fraction of Its Actual Cost
(2) Jury's Guilty Verdict of Felony Possessing Stolen Goods Must Be Set Aside When Jury Found Defendant Not Guilty of Felony Breaking or Entering and Judge Had Instructed Jury on Charge of Felony Possessing Stolen Goods Only on Theory That Property Was Stolen Pursuant to Breaking or Entering

State v. Tanner, 193 N.C. App. 150, 666 S.E.2d 845 (7 October 2008). **(Author's note: The North Carolina Supreme Court on November 5, 2009, granted the state's petition to review the ruling in (2) below.)** The defendant was convicted of felony possession of stolen goods. (1) The defendant purchased a box full of hair products for three dollars and later purchased from the same person a refrigerator, CD player, and small television set for eighteen dollars. The court ruled, relying on State v. Parker, 316 N.C. 295 (1986), that this was sufficient evidence to prove that the defendant knew or had reasonable grounds to believe the property was stolen because such knowledge or belief may be inferred from defendant's buying property at a fraction of its actual cost. (2) The court ruled, relying on State v. Marsh, 187 N.C. App. 235, 652 S.E.2d 744 (2007), and other cases, that a jury's guilty verdict of felony possessing stolen goods must be set aside when the jury found the defendant not guilty of felony breaking or entering and the judge had instructed the jury on the charge of felony possessing stolen goods only on the theory that the property was stolen pursuant to a breaking or entering. Although the indictment in this case had alleged that the value of the stolen goods exceeded $1,000.00 and evidence was presented at trial to support this valuation, the trial judge failed to submit this theory to the jury.

Inconsistency of Verdicts in Sexual Assault Prosecution Did Not Require That Guilty Verdicts Be Set Aside

State v. Shaffer, 193 N.C. App. 172, 666 S.E.2d 856 (7 October 2008). The defendant was found guilty of first-degree sexual offense (forcible anal intercourse) and crime against nature (based on forced fellatio), but rejected a verdict of guilty for first- or second-degree sexual offense for the forced fellatio. The defendant was also found not guilty of first-degree rape and assault by strangulation. The court ruled, relying on State v. Rosser, 54 N.C. App. 660 (1981), State v. Reid, 335 N.C. 647 (1994), and United States v. Powell, 469 U.S. 57 (1984), that inconsistency of verdicts does not require that the guilty verdicts be set aside.

Prosecutor Had Discretion to Not Seek Habitual Felon Status Even Though Defendant Had Been Indicted for Habitual Felon

State v. Murphy, 193 N.C. App. 236, 666 S.E.2d 880 (7 October 2008). The defendant was indicted for armed robbery, attempted armed robbery, possession of a firearm by a felon, and habitual felon. The defendant was convicted of armed robbery, attempted armed robbery, and possession of a firearm by a felon. The prosecutor then informed the trial judge that the state would only be seeking habitual felon status for the conviction of possession of a firearm by a felon. The defendant was found guilty of being an habitual felon, which was applied at sentencing only to the conviction of possession of a firearm by a felon. The court ruled that the prosecutor had the discretion to not seek habitual felon status as to some or all of the underlying felony charges up until the time the jury returns a guilty verdict that the defendant had attained the status of an habitual felon.

Court Rules That Provision in G.S. 20-138.1(a)(2) ("The Results of a Chemical Analysis Shall Be Deemed Sufficient Evidence to Prove a Person's Alcohol Concentration") Establishes Prima Facie Evidence Standard and Does Not Create Unconstitutional Presumption

State v. Narron, 193 N.C. App. 76, 666 S.E.2d 860 (7 October 2008). The court ruled that the provision in G.S. 20-138.1(a)(2) ("The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration") establishes a prima facie evidence standard and does not create an unconstitutional presumption. The court concluded that the meaning of the phrase "shall be deemed sufficient evidence to prove" is that properly admitted results of a chemical analysis "must be treated as prima facie evidence of" a defendant's alcohol concentration. The provision simply authorizes the jury to find that the report of the defendant's alcohol concentration is what it purports to be—the results of a chemical analysis showing the defendant's alcohol concentration. The jury may find it adequate proof of a fact in issue. No presumption is created concerning some other element or factual issue. The court stated that because the statutory provision simply codifies the common law threshold for prima facie evidence of a defendant's alcohol concentration, there was no need in this case for the trial judge to call to the jury's attention that the chemical analysis was the basis of the judge's determination that the state had presented prima facie proof of the element (0.08 alcohol concentration). However, the court found no prejudice to the defendant by the court's statement to the jury that "results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration."

(1) Defendant's Failure to Request Hearing to Contest Validity of 30-Day Civil DWI Revocation Barred Appellate Review of Revocation's Validity in Criminal Appeal
(2) State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal
(3) State Properly Showed That Person Who Withdrew Blood Sample for DWI Chemical Testing Was Qualified Person Under G.S. 20-139.1(c)
(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under Crawford v. Washington, 541 U.S. 36 (2004)
(5) 30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge

State v. Hinchman, 192 N.C. App. 657, 666 S.E.2d 199 (16 September 2008). The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004,

indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (1) The court ruled that the defendant's failure to request a hearing to contest the validity of the revocation order barred appellate review of the revocation order's validity in the criminal appeal of the DWI conviction. (2) The court ruled that the state's motion to appeal to superior court the district court judge's order dismissing the DWI prosecution properly specified a legal basis of the appeal. The state's motion to appeal asserted there was no competent evidence to support the dismissal order, and the dismissal was contrary to law. (3) The court ruled that the state properly showed that the person who withdrew the blood sample for DWI chemical testing was a qualified person under G.S. 20-139.1(c). The trooper testified that he saw a person draw the blood sample at a hospital blood lab. The person was working at the lab and had a lab tech I uniform and name tag, and there was limited access to that area. (4) The court ruled, relying on State v. Heinricy, 183 N.C. App. 585 (2007), and State v. Forte, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36 (2004). (5) The court ruled, relying on State v. Evans, 145 N.C. App. 324 (2001), that the 30-day DWI civil license revocation was not punishment under Double Jeopardy Clause to bar the later prosecution of the DWI charge. The court rejected the defendant's argument that the delay of 135 days between the defendant's arrest and the license revocation in effect was punishment under the Double Jeopardy Clause.

(1) Although Phrase "And/Or" Should Not Be Used in Indictments, Rape Indictment Was Not Fatally Defective
(2) No Unanimity-of-Verdict Violation When Judge Instructed on Victim Being Mentally Incapacitated or Physically Helpless
(3) Trial Judge Erred in Instruction on Mental Incapacity Because Instruction Must Require State to Prove That Mental Incapacity Was Due to Act Committed on Victim

State v. Haddock, 191 N.C. App. 474, 664 S.E.2d 339 (5 August 2008). The defendant was convicted of second-degree rape in a case when the victim had lost consciousness from excessive alcohol consumption. (1) The indictment alleged that the victim was "mentally disabled, mentally incapacitated and/or physically helpless." The court noted that the State v. Call, 353 N.C. 400 (2001), had criticized the use of the phrase "and/or" in indictments, although it is not necessarily fatal. The indictment in this case had followed the short-form indictment language in G.S. 15-144.1(c) except for the substitution of "and/or" for "or." The court ruled that the indictment was not fatally defective; it was sufficient to notify the defendant of the charge against him to prepare an adequate defense and to protect him from being punished a second time for the same act. The court noted that the indictment would have been clearer if the word "or" or "and" had been used. (2) The court ruled, relying on State v. Hartness, 326 N.C. 561 (1990), that there was no unanimity-of-verdict violation when the judge instructed on the victim being mentally incapacitated or physically helpless. The victim's condition (mentally incapacitated or physically helpless) constituted alternative ways of proving one rape, not separate rapes. (3) The court ruled that the trial judge erred in the instruction on mental incapacity because the instruction must

require the state to prove that the mental incapacity was due to an act committed on the victim. The judge's instruction omitted the words in G.S. 14-27.1(2): "due to any act committed upon the victim." The court stated that the statute does not negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined in G.S. 14-27.1(3).

(1) Insufficient Evidence to Support Conviction of Resisting, Delaying, or Obstructing Officer
(2) Officer Did Not Have Reasonable Suspicion for Investigative Stop
(3) Sufficient Evidence to Support Conviction of Possession of Cocaine
(4) Indictment Was Not Defective When Grand Jury Foreperson Did Not Place Check by Witness Who Testified Before Grand Jury

State v. Sinclair, 191 N.C. App. 485, 663 S.E.2d 866 (5 August 2008). The defendant was convicted of possession of cocaine; resisting, delaying, or obstructing an officer; and being an habitual felon. A detective and other officers approached the defendant and others at a local hangout known for drug activity. The detective on prior dates had searched the defendant for drugs. The defendant asked the detective whether he wanted to search him, and the detective responded affirmatively and walked toward the defendant. The defendant quickly shoved both of his hands in his front pockets and then removed them. The defendant made his hands into fists as the detective got closer. The defendant said he had to leave and took off running across an adjacent vacant lot. The officers chased the defendant through the lot. The defendant eventually stopped and laid down. A search revealed a pack of cigarettes and $170.00 in cash. An officer getting out of a vehicle saw the chase and how the grass had been bent where the chase had taken place. This officer followed the path and found a clear, plastic bag on top of the bent grass. The bag was clean and undisturbed, and cocaine was found inside. (1) The court determined that the initial encounter between the officer and the defendant was consensual and then ruled that the defendant's flight from a consensual encounter was not evidence that the defendant was resisting, delaying, or obstructing the officer. Thus, there was insufficient evidence to support the defendant's conviction of resisting, delaying, or obstructing an officer (RDO). (2) Alternatively, the court ruled that even if the detective was attempting to effectuate an investigatory stop, there was not reasonable suspicion to support the stop. Thus, concerning the RDO charge, the officer was not discharging or attempting to discharge a lawful duty of his office. (3) The court ruled that there was sufficient evidence to support the defendant's conviction of possession of cocaine based on the following: the defendant's flight upon learning that the detective wanted to search him; the defendant's keeping his hands in front of him during the chase; the bag with the cocaine was found on the precise route of the chase; the bag was on top of the bent grass; and the bag was clean and undisturbed. (4) The court ruled, relying on State v. Gary, 78 N.C. App. 29 (1985), that the habitual felon indictment was not fatally defective when the grand jury foreperson did not place a check by the witness who testified before the grand jury.

Court Rules That State Violated Defendant's Constitutional Right to Speedy Trial and Orders Convictions Vacated and Charges Dismissed With Prejudice

State v. Washington, 192 N.C. App. 277, 665 S.E.2d 799 (2 September 2008). The defendant was convicted of multiple offenses (first-degree burglary, armed robbery, attempted first-degree sexual offense, etc.) arising from a burglary that occurred in May 2002. The state brought the defendant to trial in February 2007. The court conducted an extensive analysis of the four factors set out in Barker v. Wingo, 407 U.S. 514 (1972) (length of delay; reason for the delay; defendant's assertion of the right to speedy trial; prejudice to the defendant) and ruled that the

state had violated the defendant's constitutional right to a speedy trial and ordered that the convictions be vacated and the charges dismissed with prejudice (which bars a retrial).

(1) Trial Judge Did Not Abuse Discretion in Precluding Defendant as Discovery Sanction From Asserting Defenses of Voluntary Intoxication and Diminished Capacity
(2) No Ineffective Assistance of Counsel When Defense Counsel Failed to Give Notice to State of Defenses of Voluntary Intoxication and Diminished Capacity

State v. McDonald, 191 N.C. App. 782, 663 S.E.2d 462 (5 August 2008). The defendant was convicted of attempted first-degree murder and a felonious assault. On the first day of trial, the state moved for an order precluding the defendant from asserting any of the defenses covered by G.S. 15A-905(c) because the defendant had not responded to the state's reciprocal motions for discovery and notice of defenses. The trial judge ruled that the defendant would be permitted to assert the defenses of accident and duress, but was barred from asserting any other defenses. The defendant had informed the judge that he also wanted to assert the defenses of voluntary intoxication and diminished capacity, but was barred from doing so by the judge's ruling. (1) The court ruled that the judge did not abuse his discretion in precluding the two defenses as a discovery sanction. (Author's note: The defendant waived a constitutional objection to the judge's ruling by failing to raise that objection at trial.) The court noted that the trial judge's decision to allow the defendant to use two defenses (accident and duress) demonstrates that the judge affirmatively exercised his discretion and precluded only those defenses that would have prejudiced the state (obtaining experts at a late date). (2) The court ruled that there was no ineffective assistance of counsel when defense counsel failed to give notice to the state of the defenses of voluntary intoxication and diminished capacity. Reviewing the evidence in this case, the court concluded that the defendant cannot show that there was a reasonable probability that the outcome of the trial would have been different.

Superior Court Judge Erred in Reversing District Court Judge's Order to Transfer Juvenile Cases For Trial as Adult in Superior Court

In re E.S., 191 N.C. App. 568, 663 S.E.2d 475 (5 August 2008). The court ruled that a superior court judge erred in reversing a district court judge's order to transfer juvenile cases for trial as an adult in superior court. The court noted, relying on State v. Green, 348 N.C. App. 588 (1998), and In re Bunn, 34 N.C. App. 614 (1977), that the standard for a superior court judge's review of the district court judge on this issue is abuse of discretion. The court stated that the superior court judge identified the correct standard of review, but failed to properly apply that standard. The judge incorrectly conducted a de novo review of the evidence and concluded that the transfer was inappropriate.

(1) Sufficient Evidence to Support Delinquency Adjudication of Resisting, Delaying, or Obstructing Officer
(2) Sufficient Evidence to Support Delinquency Adjudication of Felonious Breaking or Entering

In re S.D.R., 191 N.C. App. 552, 664 S.E.2d 414 (5 August 2008). The juvenile was brought to the library of a county cooperative extension service building (he was a participant in a community service and restitution after school program) and was directed to stay there until someone arrived. The building was nearly vacant. An employee was working in an office across from the library and noticed the juvenile. When she later returned from a brief trip to the restroom, the juvenile greeted her in her office doorway. She later discovered that her pocketbook had been unzipped and cash was missing from her wallet. An officer who arrived to investigate

asked the juvenile for a consent search, found nothing, and started to question the juvenile. The juvenile became unresponsive and did not make eye contact with the officer. The officer noticed what appeared to be something green in the defendant's mouth. The officer asked the juvenile to open his mouth. The juvenile attempted to swallow and the officer attempted to prevent him from swallowing. The officer and the juvenile began to physically struggle with each other and fell to the floor. Money emerged from the juvenile's mouth, and the defendant began to eat the money. (1) The court ruled there was sufficient evidence support the delinquency adjudication of resisting, delaying, or obstructing an officer under G.S. 14-223. (2) The court ruled, relying on State v. Brooks, 178 N.C. App. 211 (2006), and other cases, that there was sufficient evidence to support the delinquency adjudication of felonious breaking or entering. First, it was not necessary for the general public to have access to the employee's office, nor did the general public have access to her office. Second, stealing cash from the employee's purse constituted an act sufficient to render any possible implied consent to enter void ab initio.

Term "Explosive Device" in G.S. 15A-1343(b)(5) Does Not Include Firearm Ammunition, and Thus Possession of Bullets Was Not Ground for Probation Revocation

State v. Sherrod, 191 N.C. App. 776, 663 S.E.2d 470 (5 August 2008). The court ruled that the term "explosive device" in G.S. 15A-1343(b)(5) does not include firearm ammunition, and thus possession of bullets was not a ground for probation revocation.

Arrest, Search, and Confession Issues

(1) Court Remands to Trial Court for Additional Findings and Conclusions of Law on Constitutionality of Checkpoint
(2) Assuming Without Deciding That Checkpoint Was Constitutional, Officer Had Reasonable Suspicion at Checkpoint to Detain Driver for Additional Investigation

State v. Veazey, 191 N.C. App. 181, 662 S.E.2d 683 (1 July 2008). Two law enforcement officers established a checkpoint on a highway. The defendant was stopped and charged with DWI. The defendant made a motion to suppress, arguing that the checkpoint violated the Fourth Amendment. The trial judge ruled that the checkpoint was constitutional. The defendant pled no contest to DWI and preserved his right to appeal the trial judge's ruling on his suppression motion. (1) The court remanded to the trial court for additional findings and conclusions of law on the constitutionality of the checkpoint. First, the court concluded, given the conflicting evidence, the trial judge failed to make sufficient findings and conclusions of law concerning the officers' primary purpose in conducting the checkpoint. Second, relying on Brown v. Texas, 443 U.S. 47 (1979), and State v. Rose, 170 N.C. App. 284 (2005), the court concluded that the trial judge failed to properly apply the three-prong inquiry set out in *Brown* to determine whether the checkpoint itself was reasonable under the Fourth Amendment. (2) The court ruled, assuming without deciding that the checkpoint was constitutional, an officer had reasonable suspicion of criminal activity at the checkpoint to detain the driver for additional investigation. When the defendant presented his driver's license during the initial checkpoint detention, the officer detected a strong odor of alcohol in the vehicle and also saw that the defendant's eyes were red and glassy.

Court Remands to Trial Court for Additional Findings and Conclusions of Law on Constitutionality of Checkpoint

State v. Gabriel, 192 N.C. App. 517, 665 S.E.2d 581 (2 September 2008). Members of the State Highway Patrol (SHP) established a driver's license checkpoint. Several armed robberies had occurred near the checkpoint location in the preceding week, and suspects in the most recent robbery were seen driving a stolen sports utility vehicle in the vicinity of the checkpoint's location. The court reviewed two cases involving checkpoints: State v. Rose, 170 N.C. App. 284 (2005), and State v. Veazey, 191 N.C. App. 181, 662 S.E.2d 683 (2008), and noted that when there is no evidence to contradict the state's proffered purpose for a checkpoint, the trial judge may rely on the officer's assertion of a legitimate primary purpose. However, when there is evidence that could support a finding of either a lawful or unlawful purpose, the trial judge cannot rely solely on an officer's bare assertion of the checkpoint's purpose. A SHP officer was only witness to testify at the suppression hearing. He said that the reason for the checkpoint was several armed robberies having been committed in the area, and the purpose of the checkpoint was to issue citations for "anything that came through." The officer also testified about using the checkpoint to check for driver's licenses. The court concluded that because the officer's testimony varied concerning the primary programmatic purpose of the checkpoint, the trial judge could not simply accept the state's invocation of a proper purpose, but instead was required make independent findings of fact and conclusions of law concerning the primary purpose. Because the trial judge had not done so, the court remanded the case to the trial court to make those findings and conclusions. The court, citing *Rose*, stated that if the trial judge finds that the checkpoint had a proper primary programmatic purpose, the judge must also enter findings of fact and conclusions of law concerning its reasonableness.

(1) Reasonable Suspicion Existed to Support Stop of Vehicle for Failing to Display Proper Registration Tag
(2) Odor of Marijuana Emanating from Vehicle Provided Probable Cause to Make Warrantless Search of Vehicle

State v. Smith, 192 N.C. App. 690, 666 S.E.2d 191 (16 September 2008). The defendant was convicted of possession of firearm by felon. An officer stopped a Ford pick-up truck for failing to display a proper registration tag. After the stop, the officer smelled the odor of marijuana emanating from the vehicle. Two other officers conducted a warrantless search (the defendant refused to give consent) and recovered a handgun in the bed (cargo area) of the vehicle. The bed was fitted with a lift-up cover. The officers did not find any marijuana. (1) The court noted the recent ruling in State v. Styles, 362 N.C. 412, 665 S.E.2d 438 (27 August 2008) (reasonable suspicion is standard for all vehicle stops) and ruled the officer had reasonable suspicion to stop the defendant's vehicle for a violation of G.S. 20-79.1(e). The officer's testimony showed that it was dark when the officer saw the vehicle's license tag, the tag was just a piece of paper with "February '07" written on it, and the tag was not like a piece of cardboard that North Carolina auto dealers provide with a car purchase. (Author's note: The tag was issued by the State of Georgia. The court cited a federal case that had ruled a traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment). (2) The court ruled, citing State v. Greenwood, 301 N.C. 705 (1981), that the odor of marijuana emanating from the vehicle provided probable cause to make a warrantless search of the vehicle.

Reasonable Suspicion Did Not Exist to Support Stop of Vehicle When Officer Testified That He Had No Reason to Believe That Person in Vehicle Was Engaged in Unlawful Activity

State v. Murray, 192 N.C. App. 684, 666 S.E.2d 205 (16 September 2008). An officer was performing a property check in an industrial park at 3:41 a.m. He saw a vehicle coming out of the area and decided to pull behind it and run its license plate to determine if it was a local vehicle. The officer conceded at the suppression hearing that the vehicle was not violating any traffic

laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. The license plate check showed the vehicle was not stolen and was in fact a rental vehicle from a nearby city. Nevertheless, the officer stopped the vehicle. The court ruled that reasonable suspicion did not support the stop. Although the officer's patrol of the area was part of increased policing due to past break-ins, he saw no indication that night of damage to vehicles or businesses in the park and stopped the vehicle because he wanted to make sure there wasn't anything illegal taking place.

Magistrate Did Not Have Substantial Basis for Finding Probable Cause to Issue Search Warrant

State v. Taylor, 191 N.C. App. 587, 664 S.E.2d 421 (5 August 2008). Between August 2, 2006, and September 27, 2006, a reliable, confidential informant made six controlled purchases of cocaine at 3095 Brewer Road in Faison, North Carolina, under the supervision of a law enforcement officer. The search warrant application described two dwellings on the property to be searched: a mobile home and wood frame house located directly behind the mobile home. The application did not identify the owner or occupant of either dwelling. The affidavit was silent concerning where specifically on the property and from whom the informant made the controlled purchases. The affidavit lacked any facts concerning whether the officer saw the informant enter either the mobile home or the wood frame house to make the purchases. Distinguishing State v. Riggs, 328 N.C. 213 (1991), the court ruled that the magistrate did not have a substantial basis for finding probable cause to issue the search warrant.

(1) Hotel Personnel Have Implied Right to Enter Hotel Room to Keep Hotel in Reasonably Safe Condition and To Exercise Reasonable Care to Discover Criminal Acts That Might Cause Harm to Other Guests
(2) Officers' Entry into Hotel Room with Hotel Personnel Was Search Under Fourth Amendment and Was Not Justified

State v. McBennett, 191 N.C. App. 734, 664 S.E.2d 51 (5 August 2008). A waitress who delivered room service to the defendant's hotel room reported that the room was in disarray. A hotel manager decided to investigate and could not enter the room because the door caught on the interior lock. The defendant told the manager that he did not need housekeeping and did not open the door. The manager called law enforcement. When the defendant refused to open the door, the manager told the defendant that they would bust the door down. The defendant opened the door and an officer who was the first to enter the room saw marijuana and syringes in the room. (1) The court ruled that hotel personnel have the implied right to enter a hotel room to keep the hotel in a reasonably safe condition and to exercise reasonable care to discover criminal acts that might cause harm to other guests. The entry of hotel personnel for this purpose is not a search under the Fourth Amendment. (2) The court ruled that the officers' entry into the hotel room with the hotel personnel was a search under the Fourth Amendment and the discovery of the evidence in the room was not justified by the plain view theory because the officers' entry was not lawful. There were no exigent circumstances to authorize the entry. Also, the defendant did not voluntarily consent to allow the officers' entry.

Collective Knowledge of Officers Investigating Drug Sale Was Imputed to Officer Who Searched Vehicle

State v. Bowman, 193 N.C. App. 104, 666 S.E.2d 831 (7 October 2008). A team of officers was positioned near a bank where they had probable cause to believe that one person was about to make a drug sale to another person. The seller arrived at the bank in a Pontiac and left the vehicle

to make the drug sale. The Pontiac's driver, the defendant, remained in the vehicle. An officer confronted the seller and seized 100 Oxycodone pills. One officer radioed the other officers to block the Pontiac from leaving the bank's parking lot. An officer searched the vehicle although he was not specifically instructed to do so. Although some of the officers testified at the suppression hearing, the searching officer and the officer who had ordered the Pontiac to be blocked did not. The court ruled that the collective knowledge of the officers investigating the drug sale, which had established probable cause to search the vehicle, was imputed to the officer who searched the vehicle. The fact that some officers did not testify at the suppression hearing did not bar application of the collective knowledge theory.

Admission of Defendant's Confession Through Reading to Jury of Officer's Handwritten Notes Was Error Because Officer Did Not Have Defendant Review and Confirm Notes as Accurate Representation of Defendant's Answers, Nor Were Notes a Verbatim Account of Defendant's Confession

State v. Spencer, 192 N.C. App. 143, 664 S.E.2d 601 (19 August 2008). The court ruled, relying on State v. Walker, 269 N.C. 135 (1967), and State v. Bartlett, 121 N.C. App. 521 (1996), that the admission of the defendant's confession through the reading to the jury of an officer's handwritten notes was error because the officer did not have the defendant review and confirm the notes as an accurate representation of the defendant's answers, nor were the notes a verbatim account of the defendant's confession. [Author's note: For a discussion of the admissibility of a written confession, see page 236 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Evidence

Trial Judge Did Not Err in Prohibiting Defense Counsel From Showing State's Witness the Prosecutor's Notes of Interview With State's Witness When Witness Never Reviewed or Adopted Notes

State v. Milligan, 192 N.C. App. 677, 666 S.E.2d 183 (16 September 2008). A prosecutor interviewed a state's witness before trial and took notes of the interview. She typed her notes into narrative form and provided them in discovery to defense counsel with a notation that they may contain factual inaccuracies. The witness never reviewed or adopted the notes. During defense counsel's cross-examination of the witness at trial, counsel began a line of questioning based on the prosecutor's notes and then attempted to approach the witness to show her the prosecutor's notes. The trial judge prohibited defense counsel from showing the notes to the witness. The trial judge, however, permitted defense counsel to continue cross-examination on what, if anything, the witness told the prosecutor. The court ruled that because the prosecutor's notes were neither signed nor adopted in any other manner by the witness, the trial judge did not err in prohibiting defense counsel from showing the prosecutor's notes to the witness. The court also stated that the trial judge's ruling permitting continued cross-examination about what the witness told the prosecutor afforded the defendant a full, fair, and comprehensive opportunity to cross-examine the witness concerning any statements she had made to the prosecutor. The control of the examination of witnesses rests in the judge's sound discretion, and there was no abuse of that discretion in this trial. [Author's note: Although this case was decided on the version of G.S. 15A-903 as it existed before a 2007 amendment, the rationale for the ruling would appear to apply to a similar case under the 2007 amendment if the prosecutor took interview notes and provided them to defense counsel during discovery and the witness had never reviewed or adopted the notes.]

(1) Admission of Evidence of Prior Conviction in Trial of Possession of Firearm by Felon Did Not Violate Rules 403 and 404(b), Although Defendant Offered to Stipulate to Conviction

(2) Trial Judge Did Not Err in Prohibiting as Defendant's Evidence Admission of Statement of Unavailable Witness to SBI Agent

State v. Little, 191 N.C. App. 655, 664 S.E.2d 432 (5 August 2008). The defendant was on trial for attempted first-degree murder, a felonious assault, possession of firearm by felon, and discharging a firearm into occupied property. (1) The state was allowed to introduce evidence of the defendant's prior conviction of involuntary manslaughter to prove an element of possession of firearm by felon. The defendant had offered to stipulate to the prior conviction and objected to the admission of the conviction evidence under Rules 403 (exclusion of relevant evidence on grounds of prejudice, etc.) and 404(b) (other crimes, wrongs, or acts). The court ruled that the admission of the conviction evidence did not violate these rules. (2) An SBI agent investigated a shooting and took a statement from a witness several hours later while seated in the agent's vehicle outside a local police department. The defendant sought to admit the statement of the witness, who was unavailable at trial, under several hearsay exceptions. The court ruled that the statement was not admissible under present sense impression [803(1)], excited utterance [803(2)], reports of regularly conducted activity [803(6)], or public records and reports [803(8)]. (See the court's analysis in its opinion.)

Trial Judge Did Not Err Under Rule 404(b), Rule 401, and Rule 403 in Admitting Various Prior Criminal Acts in Trial of Attempted First-Degree Burglary

State v. Martin, 191 N.C. App. 462, 665 S.E.2d 471 (5 August 2008). The defendant was convicted of attempted first-degree burglary that was committed on March 29, 2007. A person taking a bath in a house heard a loud noise, looked out the bathroom window, and saw the defendant walk around the corner of her house. She then heard scratching at her bedroom window. She pulled back the window shade and saw the defendant on the other side of the window, pulling on the window and a cord attached to the window. The defendant had put his fingers around the window screen and had pushed the window off its track. The defendant then left the area. The court ruled that the trial judge did not err under Rule 404(b), Rule 401, and Rule 403 in admitting the following prior criminal acts: (i) breaking and entering a motor vehicle and misdemeanor larceny committed on April 28, 2005, and breaking and entering a residence and misdemeanor larceny committed on April 24, 2005, to show the defendant's motive and intent to commit a larceny; (ii) possession of marijuana on March 26, 2007, to show defendant's motive to commit the attempted burglary because he needed money and as evidence of the crime scenario (the marijuana possession having occurred three days before the attempted burglary); and (iii) breaking and entering a residence through a window on October 4, 2006, in the same neighborhood as the attempted burglary, to show identity and intent.

Trial Judge in Trial of Drug Sale to Undercover Officer Did Not Err Under Rules 404(b) and 403 in Admitting Evidence of Two Prior Drug Sales to Undercover Officers to Show Identity, Intent, and Common Plan or Scheme

State v. Welch, 193 N.C. App. 186, 666 S.E.2d 826 (7 October 2008). The defendant was convicted of possessing cocaine with the intent to sell and deliver and sale and delivery of cocaine. The convictions were based on the defendant's sale of crack cocaine to an undercover officer on February 22, 2006. The court ruled, relying on State v. Stevenson, 169 N.C. App. 797 (2005), and distinguishing State v. Carpenter, 361 N.C. 382 (2007), that the trial judge did not err under Rules 404(b) and 403 in admitting evidence of two prior cocaine sales to undercover

officers on February 16, 2006, and April 15, 2005, to show identity, intent, and common plan an scheme. The court in its opinion noted several similarities between these offenses and the offenses being tried.

Constitutional Error to Allow State to Introduce as Substantive Evidence Defendant's Pre-Arrest Silence to Law Enforcement; Such Evidence Is Admissible Only for Impeachment and Defendant Did Not Testify at Trial

State v. Boston, 191 N.C. App. 637, 663 S.E.2d 886 (5 August 2008). The state was allowed to introduce evidence that the defendant, who had not been arrested, refused a law enforcement officer's request to come to the police department to answer questions about an arson. This evidence was admitted as substantive evidence of the defendant's guilt. The defendant did not testify at trial. The court ruled it was constitutional error to admit this pre-arrest silence as substantive evidence. It could only be introduced as impeachment evidence. The court ruled, distinguishing Jenkins v. Anderson, 447 U.S. 231 (1980), and relying on several federal appellate cases, that the admission of the defendant's pre-arrest silence as substantive evidence was constitutional error.

Sentencing

Two Drug Trafficking Sentences Imposed at Same Sentencing Hearing Are Not Required Under G.S. 90-95(h)(6) to Be Imposed Consecutively to Each Other

State v. Walston, 193 N.C. App. 134, 666 S.E.2d 872 (7 October 2008). The court ruled, relying on State v. Bozeman, 115 N.C. App. 658 (1994), that two drug trafficking sentences imposed at the same sentencing hearing are not required under G.S. 90-95(h)(6) to be imposed consecutively to each other.

Juvenile Court Judge's Failure to Hold Dispositional Hearing Within Six Months Under G.S. 7B-2501(d) Did Not Deprive Court of Jurisdiction to Enter Disposition

In re S.S., 193 N.C. App. 239, 666 S.E.2d 870 (7 October 2008). The juvenile admitted to several offenses in return for a reduction of charges, a specified disposition level, and an agreement that the juvenile would testify truthfully in the hearing of another juvenile. The dispositional hearing was delayed for more than six months so the juvenile could testify at the other juvenile's hearing. The court ruled that the judge's failure to hold the dispositional hearing within six months under G.S. 7B-2501(d) (allows the court, after adjudication, to continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision or a through some other plan approved by the court) did not deprive the court of jurisdiction to enter the disposition. G.S. 7B-2501(d) is intended to provide an opportunity for families to seek non-judicial solutions for troubled juveniles and is not a limit on the jurisdiction of trial courts in juvenile matters.