Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Criminal Law and Procedure

Court Rules Unconstitutional Under Art. I, Sec. 30 of North Carolina Constitution (Right of People to Keep and Bear Arms) Application of 2004 Amendment to G.S. 14-415.1 (Convicted Felon Cannot Possess Firearm, With No Exceptions) to Person With Specified History Since 1979 Felony Conviction—Ruling of Court of Appeals Is Reversed

Britt v. State of North Carolina, 363 N.C. 546, 681 S.E.2d 320 (28 August 2009), *reversing*, 185 N.C. App. 610 (2007). Plaintiff in 1979 was convicted of a felony drug offense that did not involve violence or the use of a firearm. He completed probation in 1982 and in 1987 his civil rights were restored, including his right to possess a firearm. Then-existing G.S. 14-415.1 prohibited possession of a handgun and certain short-barreled firearms within five years of the later date of a conviction, discharge from prison, or termination of a suspended sentence, probation, or parole. In 1995, G.S. 14-415.1 was amended to prohibit the possession of such firearms by a convicted felon regardless of the date of conviction; it still allowed possession of a firearm in the convicted felon's own house or lawful place of business. In 2004, G.S. 14-415.1 was amended to prohibit possession of all firearms, even within one's own home or place of business. As a result of the 2004 amendment, the plaintiff divested himself of all his firearms, including rifles and shotguns he had used for game hunting on his own land. In the thirty years since the plaintiff's conviction, he had not been charged with any other crime nor was there any evidence that he had misused a firearm. No court or agency had determined that the plaintiff was violent, potentially dangerous, or more likely than the general public to commit a crime involving a firearm. The plaintiff in 2004 brought a civil action against the State of North Carolina, alleging G.S. 14-415.1 as amended violated various constitutional rights. The court ruled that the 2004 amendment to G.S. 14-415.1 (prohibiting a convicted felon from possessing any kind of firearm, with no exceptions), as applied to the plaintiff, violated Art. I, Sec. 30 of North Carolina Constitution (right of people to keep and bear arms). The court stated that it was unreasonable to assert that a nonviolent citizen who had responsibly, safely, and legally owned and used firearms for seventeen years (from 1987 to 2004) was in reality so dangerous that any possession of a firearm would pose a significant threat to public safety.

Capital Case Issues

Trial Court Erred in Capital Case Mental Retardation Hearing in Denying Defendant's Request for Jury Instruction That Verdict Finding Defendant Mentally Retarded Would Result in Sentence of Life Imprisonment Without Parole

State v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (28 August 2009). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial court erred in a mental retardation hearing in denying the defendant's request for a jury instruction that a

verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without parole.

Because Trial Court's Instructions to Individual Juror Violated Defendant's Right to Unanimous Verdict Under Art. I, Sec. 24 of North Carolina Constitution, Error Was Preserved for Appellate Review Despite Defendant's Failure to Object—Ruling of Court of Appeals Is Affirmed

State v. Wilson, 363 N.C. 478, 681 S.E.2d 325 (28 August 2009), *affirming*, 192 N.C. App. 359, 665 S.E.2d 751 (2008). The defendant was on trial for armed robbery. The jury during its deliberations notified the court that there was a problem with the foreperson that needed to be addressed. Instead of summoning all the jurors to the courtroom to hear the jury's request, the trial court proposed to the attorneys for the state and defendant that only the foreperson be summoned. They agreed. After the foreperson told the court on the record that the jury seemed to believe that he had already had his "mind made up," the court conducted an unrecorded bench conference with the foreperson and both attorneys, then a conversation on the record, and then another unrecorded bench conference. The court summoned all the jurors to the courtroom and instructed them on their duty to consult with one another. The court then directed the jurors, except the foreperson, back to the jury room but not to resume deliberations. The court then held a third unrecorded bench conference with the foreperson and two attorneys. The court instructed the foreperson not to discuss what occurred during the bench conference with the other jurors, kept the foreperson as a juror because the court determined he could be fair and impartial, and brought the other jurors back into the courtroom and instructed all jurors to continue their deliberations. The court ruled that because trial court's instructions to the individual juror, the foreperson, violated the defendant's right to a unanimous verdict under Art. I, Sec. 24 of the North Carolina Constitution, the error was preserved for appellate review despite the defendant's failure to object. The court also ruled that the error was not harmless beyond a reasonable doubt and ordered a new trial. The court in footnote one stated that the dissent characterized the conversations between the court and foreperson as mere bench conferences and surmised that the court's opinion will lead to inconsistency and confusion in future cases and a chilling effect on juror communication. The court stated that those dire consequences will be avoided because its ruling is limited to instructions and not all communications between a judge and juror.

Arrest, Search, and Confession Issues

Seizure and Search of Defendant's Cell Phone Was Justified as Incident to His Arrest

State v. Wilkerson, 363 N.C. 382, 683 S.E.2d 174 (28 August 2009). The defendant was convicted of two first-degree murders and sentenced to death. The defendant was arrested for the two murders shortly after they were committed, and while in custody received a call on his cell phone. When a detective asked the defendant who the caller was, he answered that it was his friend, "Will." When the detective asked who else had called the defendant that morning, the defendant scrolled through his cell phone's log, showing her the numbers of the telephones that had called his phone and the times the calls were made. At trial, the cell phone was admitted into evidence, including the serial number located inside the phone, to prove that this phone was used to make calls to a person who was involved with the murder. The court ruled, relying on United States v. Edwards, 415 U.S. 800 (1974), and State v. Steen, 352 N.C. 227 (2000), the detective's seizure and subsequent search of the cell phone was justified as incident to the defendant's arrest.

Evidence

(1) Trial Court Erred in Admitting Testimony of State's Forensic Expert Who Offered Evidence from Autopsy Report of Forensic Analyses Performed by Non-Testifying Forensic Pathologist and Forensic Dentist

(2) Trial Court Did Not Err Under Rule 404(b) or Rule 403 in Admitting Evidence of Another Murder Committed by Defendant That Occurred Thirty-Two Months Before Murder Being Tried

State v. Locklear, 363 N.C. 438, 681 S.E.2d 293 (28 August 2009). The defendant was convicted of first-degree murder and sentenced to death. (1) Dr. John Butts, a forensic pathologist, testified for the state concerning a state's exhibit, a copy of an autopsy report of the murder victim prepared by another forensic pathologist (Dr. Karen Chancellor) who did not testify at trial. Dr. Butts testified that according to the autopsy report, the cause of death was blunt force injuries to the chest and head. Dr. Butts also testified to the results of a forensic dental analysis performed by Dr. Jeffrey Burkes that was included in the autopsy report in which Dr. Burkes, who did not testify at trial, positively identified the autopsied body through dental records as that of the murder victim. The court ruled that the trial court erred in admitting the testimony of Dr. Butts in violation of Crawford v. Washington, 541 U.S. 36 (2004), and Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). The state did not show that the non-testifying experts were unavailable to testify and the defendant had been given a prior opportunity to cross-examine them. (2) The court ruled that the trial court did not err under Rule 404(b) or Rule 403 in admitting evidence of another murder committed by the defendant that occurred thirty-two months before the murder being tried. The evidence was admitted to show the defendant's knowledge, plan, opportunity, intent, modus operandi, and motive to kill the victim in the case being tried. The court detailed the similarities between both murders. The court rejected the argument that the evidence could not be admitted under Rule 404(b) because the trial court had previously determined that the two murders would be tried separately. The decision to join two or more offenses for trial is discretionary and does not necessarily indicate a lack of a transactional connection between the two offenses.

Sentencing

Prosecutor's Jury Argument at Sentencing Hearing on Aggravating Factor That Discussed Effect of Jury's Finding of Aggravating Factor on Defendant's Sentence Was Inaccurate and Misleading—Result of Court of Appeals Opinion Is Affirmed

State v. Lopez, 363 N.C. 535, 681 S.E.2d 271 (28 August 2009), *affirming result*, 188 N.C. App. 553 (2008). The court ruled that a prosecutor's jury argument (at a sentencing hearing on an aggravating factor) that discussed the effect of the jury's finding of an aggravating factor on the defendant's sentence was inaccurate and misleading. The prosecutor's discussion of the sentencing grid was inaccurate. In addition, the prosecutor's argument was misleading because it indicated potential sentencing ranges for the defendant when the defendant's sentencing range had not been, and in this case could not be, determined when the argument was made. The court stated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

North Carolina Court of Appeals

Criminal Law and Procedure

Drug Loitering Ordinance Was Unconstitutionally Overbroad and Unconstitutionally Vague

State v. Mello, ___ N.C. App. ___, 684 S.E.2d 477 (3 November 2009). The court ruled, distinguishing State v. Evans, 73 N.C. App. 214 (1985) (upholding loitering for prostitution statute, G.S. 14-204.1), that a city drug loitering ordinance was unconstitutionally overbroad and unconstitutionally vague. Unlike G.S. 14-204.1, the city ordinance does not require proof of an intent to violate a drug law, but imposes liability solely for conduct that "manifests" such purpose. Because the ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct. (See the court's opinion for its analysis why a provision in the ordinance was unconstitutionally vague.)

Double Jeopardy Does Not Prohibit Convictions of Both Possession With Intent to Sell or Deliver Marijuana and Felony Possession of Same Marijuana

State v. Springs, ___ N.C. App. ___, 683 S.E.2d 432 (6 October 2009). The court ruled that double jeopardy does not prohibit convictions of both possession with intent to sell or deliver marijuana and felony possession of the same marijuana. The court relied on the ruling in State v. Pipkins, 337 N.C. 431 (1994) (defendant properly convicted of both felony possession of cocaine and trafficking by possessing cocaine), and its explicit overruling of State v. Williams, 98 N.C. App. 405 (1990) (defendant may not be convicted of both felonious possession of cocaine and possessing with intent to sell or deliver the same cocaine), and State v. Oliver, 73 N.C. App. 118 (1985) (same ruling).

Sufficient Evidence to Support Indecent Liberties Conviction Based on Letter Defendant Gave to Child Victim

State v. McClary, ___ N.C. App. ___, 679 S.E.2d 414 (7 July 2009). The defendant was convicted of indecent liberties with a child. The defendant was the next-door neighbor of the victim. While following the victim as she walked home alone from a park, the defendant handed her a letter written on notebook paper. He told her not to show the letter to anyone or tell anyone about it. After the victim arrived home, she read the letter to her brother. It contained sexually graphic language soliciting her for sexual intercourse and oral sex. It also offered to pay her ten dollars. The court ruled that this evidence was sufficient to support the defendant's conviction.

Sufficient Evidence of Malice to Support Defendant's Convictions of Second-Degree Murder Based on Vehicle Crash

State v. Davis, ___ N.C. App. ___, 678 S.E.2d 385 (7 July 2009). The court ruled that, relying on State v. Rich, 351 N.C. 386 (2000), there was sufficient evidence of malice to support the defendant's second-degree murder convictions based on a vehicle crash. The state's evidence showed that the defendant had consumed nine to twelve beers in a two-hour period and had a 0.13 blood alcohol concentration. He drove his truck on a well-traveled highway and ran over a sign and continued driving. The court noted that the defendant should have known then that he was a danger to the safety of others. He continued weaving side to side. He eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into a pickup truck, knocking it into the air. Two people in the pickup truck died.

(1) Defendant May Not Be Sentenced for Both Involuntary Manslaughter and Felony Death by Vehicle Based on Same Death
(2) Defendant May Not Be Sentenced for Both Felony Death by Vehicle and DWI Based on Same Incident
(3) Trial Court Did Not Commit Error Concerning Defendant's Right to Unanimous Verdict When Involuntary Manslaughter Jury Instruction on Culpable Negligence Allowed Jury to Consider One or More Traffic Violations to Establish Element
(4) Court Orders Remand for Resentencing

State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009). The defendant was convicted of DWI, involuntary manslaughter, and felony death by vehicle arising from a crash in which the defendant was impaired and one person died as a result of the crash. The trial court imposed sentences for all three convictions. (1) Although the court, based on North Carolina Supreme Court cases, rejected the ruling in State v. Williams, 90 N.C. App. 614 (1988), that the offenses of felony death by vehicle and involuntary manslaughter have the same elements, it ruled that the legislature did not intend that a defendant could be sentenced for convictions of both offenses. (2) The court ruled, relying on State v. Richardson, 96 N.C. App. 270 (1989), that the defendant could not be sentenced for both DWI and felony death by vehicle. (3) The court ruled, relying on State v. Funchess, 141 N.C. App. 302 (2000), that the trial court did not commit error concerning the defendant's right to a unanimous verdict when the involuntary manslaughter jury instruction on culpable negligence allowed the jury to consider one or more traffic violations to establish the element. (4) The court ordered that on remand for resentencing, if the trial court vacates the conviction of involuntary manslaughter and sentences the defendant for felony death by vehicle, then the court must arrest the DWI judgment. If the trial court vacates the felony death by vehicle conviction, the defendant may be sentenced for both involuntary manslaughter and DWI.

(1) Defendant Cannot Be Convicted of Kidnapping for Purpose of Facilitating Commission of Felony Murder
(2) Although State Need Not Allege Felony That Was Purpose of Kidnapping, It Must Prove That Felony If It Does
(3) Defendant Was Not Entitled to Jury Instruction on Defense of Accident When Shotgun Discharged After Defendant Broke Into Home With Intent to Commit Robbery and Struggled With Victim Over Shotgun

State v. Yarborough, ___ N.C. App. ___, 679 S.E.2d 397 (7 July 2009). The defendant was convicted of first-degree murder, first-degree burglary, first-degree kidnapping, and three counts of second-degree kidnapping. (1) The defendant was charged with kidnapping to facilitate the commission of murder. The court ruled, relying on State v. Lea, 126 N.C. App. 440 (1997), and State v. Coble, 351 N.C. 448 (2000), that a defendant cannot be convicted of kidnapping for the purpose of facilitating felony murder. Thus, because the indictment alleged murder as the kidnapping's purpose, the state had to prove the defendant's purpose was to facilitate the commission of murder committed with premeditation and deliberation. The court examined the evidence in this case and found insufficient evidence to support that theory. (2) The court ruled, relying on State v. White, 307 N.C. 42 (1982), and distinguishing State v. Freeman, 314 N.C. 432 (1985), that although the state is not required to allege the felony that was the purpose of a kidnapping, the state must prove the particular felony if it does. Under these circumstances, there may be a fatal variance between the indictment's allegations and proof at trial. (3) The court ruled that the defendant was not entitled to a jury instruction on the defense of accident when a shotgun discharged after the defendant had broken into a home with the intent to commit a robbery and within a few minutes of the entry struggled with the victim over the shotgun. The court stated that

the defense of accident is unavailable if the defendant has engaged in misconduct when a killing occurs. The court also stated that even assuming that the killing occurred after the defendant had decided to abandon the intended robbery and attempted to leave, this would not constitute a "break" in the events resulting in the shooting because it was undisputed that the victim was shot without a few minutes of the break-in.

Determination of "More Than Four" Years Older in G.S. 14-27.7A (Statutory Rape or Sexual Offense) Is Based on Comparison of Birthdates of Victim and Defendant

State v. Faulk, ___ N.C. App. ___, 683 S.E.2d 265 (15 September 2009). The court ruled, distinguishing State v. Moore, 167 N.C. App. 495 (2004), that the determination of "more than four" years older in G.S. 14-27.7A (statutory rape or sexual offense) is based on a comparison of birthdates of the victim and the defendant. The defendant's date of birth was June 9, 1987, and the victim's date of birth was November 6, 1991, making their respective ages on the date of the offense 19 years, 7 months, and 5 days old for the defendant and 15 years, 2 months, and 8 days old for the alleged victim. That is sufficient evidence that the defendant was more than four years older than the alleged victim. The court reversed the trial court's pretrial ruling that had considered the whole ages of the defendant (19 years old) and alleged victim (15 years old) in determining whether the defendant was more than four years older than the alleged victim.

G.S. 20-38.6(f) and G.S. 20-38.7(a) Do Not Violate Separation of Powers Provision in North Carolina Constitution

State v. Mangino, ___ N.C. App. ___, 683 S.E.2d 779 (20 October 2009). The court ruled that G.S. 20-38.6(f) (district court judge in implied consent case shall preliminarily indicate whether pretrial suppression motion should be granted, but shall not enter final judgment on motion until state has appealed to superior court or decided not to appeal) and G.S. 20-38.7(a) (state may appeal to superior court a district court's preliminary determination granting motion to suppress or to dismiss) are within the General Assembly's constitutional power to make rules of practice and procedure in the district and superior courts. Thus, the statutes do not violate the separation of powers provision in the North Carolina Constitution. The court overruled a contrary ruling by the trial court.

G.S. 14-208.40B (Satellite-Based Monitoring—SBM) Requires Department of Correction to Notify Offender, in Advance of Hearing, of Basis For Its Determination That Offender Falls Within One of Categories Set Out in G.S. 14-208.40(a), Making Offender Subject to SBM

State v. Stines, ___ N.C. App. ___, 683 S.E.2d 411 (6 October 2009). The court ruled that G.S. 14-208.40B (satellite-based monitoring—SBM) requires the Department of Correction to notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories set out in G.S. 14-208.40(a), making the offender subject to SBM. In this case the Department of Correction letter notifying the defendant of the hearing was insufficient because it did not identify which of the criteria in G.S. 14-208.40(a) the department had concluded the defendant met.

Trial Court Committed Plain Error By Instructing Jury That It Could Return Guilty Verdicts for Both First-Degree Murder and Accessory After Fact to First-Degree Murder; Trial Court Should Have Submitted Them as Alternative Verdicts

State v. Melvin, ___ N.C. App. ___, 682 S.E.2d 238 (1 September 2009). **(Author's note: The North Carolina Supreme Court on January 28, 2010, granted the state's petition to review**

this ruling.) The defendant was on trial for first-degree murder and accessory after the fact to first-degree murder. The defendant was convicted of both offenses. The trial court arrested judgment on the conviction of accessory after the fact and entered judgment for the first-degree murder conviction. (Author's note: Although first-degree murder and accessory after the fact arising from the same transaction may be joined for trial, a defendant may not be convicted of both because they are mutually exclusive.) The court ruled, relying on State v. Speckman, 326 N.C. 576 (1990), and State v. Jewell, 104 N.C. App. 350, *aff'd per curiam*, 331 N.C. 379 (1992), that the trial court committed plain error because the jury should have been instructed on these offenses as alternative verdicts. The court also found that the error was prejudicial and ordered a new trial for both offenses.

Defendant's Entry Into Manager's Video Store Office Not Open to Public to Steal Money in Bank Deposit Bag Was Sufficient Evidence to Support Conviction of Felonious Breaking or Entering

State v. Rawlinson, ___ N.C. App. ___, 679 S.E.2d 878 (4 August 2009). The court ruled, relying on In re S.D.R., ___ N.C. App. ___, 664 S.E.2d 414 (5 August 2008), that the defendant's entry into the manager's video store office that was not open to the public to steal money in a bank deposit bag was sufficient evidence to support a conviction of felonious breaking or entering.

Sufficient Evidence to Support Defendant's Conviction of Possession of Firearm by Felon Based on Constructive Possession

State v. Mewborn, ___ N.C. App. ___, 684 S.E.2d 535 (3 November 2009). Officers patrolling a high crime area in a marked car saw the defendant and another person walking in the middle of the street. They pulled alongside them and asked if they would wait a minute because they needed to speak with them for a few minutes. As the officers were getting out of their car, the defendant turned and started to run away. A chase ensued, and the officers eventually took physical control of the defendant. During the chase, the defendant appeared to throw a gun from his pocket. Based on this evidence, he was convicted of possession of a firearm by a felon. The court ruled that there was sufficient evidence to support the defendant's conviction of possession of a firearm by a felon based on constructive possession of the firearm. The defendant ran through an open field in a high traffic area. He appeared to have something heavy in his back pocket and appeared to make throwing motions from that pocket. The grass in the field was wet. When officers found the weapon, it was dry, clean, and had no leaves or other debris on it.

State in Prosecution of Possession of Weapon of Mass Death and Destruction Is Not Required to Prove That Defendant Knew Barrel of Shotgun Was Less Than Eighteen Inches

State v. Watterson, ___ N.C. App. ___, 679 S.E.2d 897 (4 August 2009). The court ruled that the state in the prosecution of possession of a weapon of mass death and destruction (G.S. 14-288.8) is not required to prove that the defendant knew that the barrel of a shotgun was less than eighteen inches.

Juvenile Petitions Alleging First-Degree Sexual Offense Were Fatally Defective and Deprived Court of Jurisdiction to Accept Juvenile's Admission of Delinquency Because They Failed to Name Victim

In re M.S., ___ N.C. App. ___, 681 S.E.2d 441 (18 August 2009). Juvenile petitions alleging first-degree sexual offense did not name the victim or give the victim's initials. The petitions simply stated "a child under the age of 13 years." The court ruled, noting that State v. McKoy, ___ N.C. App. ___, 675 S.E.2d 406 (2009) (victim's initials were sufficient based on the facts in the case), implicitly acknowledged that an indictment must name the victim in some way, ruled that the petitions were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency. Challenges to a court's subject matter jurisdiction may be raised at any time, including for the first time on appeal.

Sufficient Evidence to Prove Defendant, Registered Sex Offender, Changed His Address to Support Conviction Under G.S. 14-208.11(a)(2)

State v. Worley, ___ N.C. App. ___, 679 S.E.2d 857 (21 July 2009). The court ruled, relying on State v. Abshire, ___ N.C. ___, 677 S.E.2d 444 (18 June 2009), that there was sufficient evidence to show the defendant had changed his address and did not report the change to the sheriff within 10 days to support the defendant's conviction of willfully failing to comply with the change of address requirements applicable to registered sex offenders under G.S. 14-208.11(a)(2). The court stated that everyone has at all times an "address" of some sort, even if it is a homeless shelter, a location under a bridge, or a some similar place. The defendant had a "place of abode" of some type after his departure by eviction from housing authority premises.

In Trial of Sexual Act by Custodian [G.S. 14-27.7(a)], State Is Not Required to Prove That Defendant Knew or Should Have Known That Victim Was in Defendant's Custody or Custody of Defendant's Employer

State v. Coleman, ___ N.C. App. ___, 684 S.E.2d 513 (3 November 2009). The court ruled that the state in a trial of sexual act by custodian [G.S. 14-27.7(a)] is not required to prove that the defendant knew or should have known that the victim was in the defendant's custody or the custody of the defendant's employer.

Defendant's Constitutional Rights Were Not Violated When There Was No Government Involvement in Victim's View of Defendant

State v. Williams, ___ N.C. App. ___, 685 S.E.2d 534 (17 November 2009). The victim's friend called her to see the defendant the night he was arrested. The friend did so on her own volition and was not acting on behalf of law enforcement. The court rejected the defendant's argument that the trial court erred by admitting the victim's identification testimony because it resulted from an improper showup. Absent government involvement, there was no violation of the defendant's constitutional rights.

Trial Court at Recommitment Hearing for Involuntarily-Committed Respondent Based on Verdict of Not Guilty by Reason of Insanity May Order Conditional Release As Alternative to Unconditional Release or Recommitment

In re Hayes, ___ N.C. App. ___, 681 S.E.2d 395 (18 August 2009). The court ruled that the trial court at a recommitment hearing for an involuntarily-committed respondent based on a verdict of not guilty by reason of insanity may order conditional release as an alternative to unconditional release or recommitment.

Arrest, Search, and Confession Issues

(1) Officer Did Not Have Authority Under *Arizona v. Gant* to Conduct Search of Vehicle Incident to Arrest of Defendant for Traffic Violations
(2) Officer Did Not Have Authority to Seize and Search Torn Papers on Vehicle's Passenger Seat Under Plain View Doctrine

State v. Carter, ___ N.C. App. ___, 682 S.E.2d 416 (15 September 2009). An officer noticed that a vehicle's temporary tag was old or worn and with an obscured expiration date. He stopped the vehicle, which was being driven by the defendant. The officer saw several whole pieces of paper lying on the passenger seat and noticed the defendant seemed unusually nervous. The officer investigated the vehicle's registration and then arrested the defendant for an expired registration tag and failing to notify the Division of Motor Vehicles of a change of address. The defendant was removed from the vehicle, handcuffed, and directed to sit on a curb while the vehicle was searched. The officer noticed that the whole pieces of paper had been ripped into smaller pieces. He placed the pieces together and discovered incriminating evidence that led to the defendant's guilty plea to several offenses, while reserving the right to appeal the trial court's order denying his motion to suppress the paper evidence. (1) The court ruled that the officer's search of the vehicle incident to the defendant's arrest violated the Fourth Amendment under the ruling in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). [Author's note: For an analysis of *Gant*, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf.] First, the defendant was not within the reaching distance or otherwise able to access the passenger compartment when the search began. He had been arrested, handcuffed, and was sitting on the curb. Second, there was no evidence that the papers were related to the offenses for which he had been arrested. (2) The court ruled that the officer's seizure and search of the papers were not justified under the plain view doctrine because it was not immediately apparent that the papers were evidence of a crime or contraband. [Author's note: The term "immediately apparent" is synonymous with probable cause. See note 44 on page 99 of *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).

Officer Did Not Violate Fourth Amendment When Stopping Vehicle in Which Person Who Had Been Reported Missing by His Parents Was an Occupant

State v. Wade, ___ N.C. App. ___, 679 S.E.2d 484 (21 July 2009). A police department issued a "be on the lookout" alert for the owner of a green Saturn bearing a specific license plate number and registered to a named twenty-six-year-old white male whose photo had been distributed to the department's officers. He had been reported missing by his parents, who did not know where he was and believed that he was in danger. An officer saw the green Saturn with the license plate number. He saw a black male driving it, a white female in the front passenger seat, and a white male in a rear passenger seat. Another officer pulled behind the car and stopped it. Later events resulted in the driver, the defendant, being charged with a drug offense. The court ruled that the stop of the vehicle did not violate the Fourth Amendment. The court stated that having received the missing person report, it was perfectly appropriate that the officers temporarily prevent the Saturn from being driven off, detain the occupants, and make sure that the missing person was not in any danger of harm. The mere fact that the officers did not observe the missing person to have sustained personal harm or that he was under direct physical restraint when he exited the vehicle did not make further investigative activities inappropriate, given the parents' concern that he might have been at risk of harm or consorting with people involved with illegal drugs.

(1) Passenger in Stopped Vehicle May Challenge Duration of Seizure
(2) Passenger Was Illegally Seized When Traffic Stop Had Ended, Driver's License and Registration Had Not Been Returned to Driver, and Officers Did Not Have Reasonable Suspicion to Further Detain Driver and Passengers

State v. Jackson, ___ N.C. App. ___, 681 S.E.2d 492 (18 August 2009). An officer stopped a vehicle and with other officers checked the driver's license and registration of the driver and determined that they were valid and there were no outstanding warrants for the driver and two passengers, one of whom was the defendant. After the traffic stop had ended but before the driver's license and registration had been returned, an officer asked questions about illegal drugs and weapons in the vehicle and then asked for consent to search the vehicle, which was granted. Cocaine was found in the vehicle, the three occupants were arrested, and cocaine was found in the defendant's sock at the jail. The court ruled, relying on Brendlin v. California, 551 U.S. 249 (2007), that the defendant was seized during the stop of the vehicle and could challenge the duration of the seizure as violating the Fourth Amendment. The court also ruled that once the traffic stop had ended and the driver's license and registration had not been returned, the officer's questioning about illegal drugs and weapons in the vehicle was an extension of the seizure beyond the scope of the original traffic stop, and reasonable suspicion did not exist to justify the extension of the seizure. The court rejected the argument that the encounter had become consensual after the traffic stop had ended, because a reasonable person under the circumstances would not believe he was free to leave without his driver's license and registration. The vehicle search was tainted by the illegality of the extended detention. Because the defendant was arrested based on the discovery of cocaine and a weapon in the vehicle, the cocaine found in the defendant's sock at the jail was the direct result of the officer's illegal search of the vehicle. Thus, the exclusionary rule prohibited the admission of the evidence found in the vehicle and the defendant's sock.

Court Remands to Trial Court to Determine Whether Officer's Handcuffing of Defendant During Investigative Stop Was Permissible

State v. Carrouthers, ___ N.C. App. ___, 683 S.E.2d 781 (20 October 2009). The trial court granted the defendant's motion to suppress evidence obtained by an officer during an encounter with the defendant leading to his arrest. The trial court had concluded that the defendant was arrested when handcuffed by the officer because a reasonable person would not have felt free to leave, and there was no probable cause for the arrest. The court ruled that the trial court applied an incorrect standard to determine whether the defendant was under arrest. Instead, the trial court should have determined whether special circumstances existed that would have justified the officer's use of handcuffs as the least intrusive means reasonable necessary to carry out the purpose of the investigative stop. The court remanded the case to the trial court to make this determination.

Defendant Fleeing From Officers Was Not Seized Under Fourth Amendment Until They Took Physical Control of Him

State v. Mewborn, ___ N.C. App. ___, 684 S.E.2d 35 (3 November 2009). Officers patrolling a high crime area in a marked car saw the defendant and another person walking in the middle of the street. They pulled alongside them and asked if they would wait a minute because they needed to speak with them for a few minutes. As the officers were getting out of their car, the defendant turned and started to run away. A chase ensued, and the officers eventually took physical control of the defendant. During the chase, the defendant appeared to throw a gun from his pocket. Based on this evidence, he was convicted of possession of a firearm by a felon. After he was stopped, he threw a bag of cocaine under the police car. Based on this evidence, he was convicted of possession of cocaine. The defendant moved to suppress all the evidence, arguing that the officers unconstitutionally stopped the defendant without reasonable suspicion. The court noted that the dispositive issue is a determination whether the defendant was seized under the Fourth

Amendment before or after he ran from the officers. The court ruled, relying on California v. Hodari D., 499 U.S. 621 (1991), that the defendant did not submit to the officers' authority before fleeing from them and was not seized until the officers took physical control of him. Thus, the flight from the officers could properly be considered in determining whether the officers has reasonable suspicion to stop him, and the court ruled that the officers did have reasonable suspicion.

Officer Had Probable Cause to Arrest Defendant Based on Information Given by Anonymous Caller Who Later Revealed His Identity Before Defendant's Arrest, and Caller's Information Was Corroborated by Officer's Investigation

State v. Brown, ___ N.C. App. ___, 681 S.E.2d 460 (18 August 2009). The court ruled that an officer had probable cause to arrest the defendant for murder based on information given by an anonymous caller who later revealed his identity to the officer before the arrest, and the caller's information was corroborated by the officer's investigation. (See the court's opinion for the facts establishing probable cause.)

Officer's Smell of Marijuana Odor Emanating From Vehicle Authorized Warrantless Search of Vehicle

State v. Corpening, ___ N.C. App. ___, 683 S.E.2d 457 (6 October 2009). The defendant approached a checkpoint in his vehicle, pulled over, and parked on the side of the road about 100 to 200 feet before the checkpoint. He sat alone in the vehicle for about thirty to forty-five seconds. An officer walked to the vehicle and smelled a marijuana odor emanating from it. The court ruled that the officer's "plain smell" of the marijuana provided probable cause to conduct a warrantless search of the vehicle. The court also ruled that the defendant's argument that the checkpoint was unconstitutional was irrelevant because the defendant stopped solely on his own volition (that is, the defendant was not seized under the Fourth Amendment). Also, the officer did not conduct a seizure by simply approaching the vehicle to investigate.

Use of Drug Dog in Common Area of Storage Facility to Sniff Defendant's Storage Unit Did Not Violate Defendant's Fourth Amendment Rights

State v. Washburn, ___ N.C. App. ___, 685 S.E.2d 555 (17 November 2009). An informant told an officer that the defendant kept a large quantity of drugs in a toolbox in his garage and rented a climate-controlled storage unit somewhere within the Kearnersville town limits. The informant provided additional details about the defendant, his vehicle, etc. Another officer, provided with this information, went to the only climate-controlled storage facility in Kearnersville. The officer had confirmed that the defendant rented a unit there as well as other details provided by the informant. With the consent of the facility's manager, a drug dog was permitted to walk the hallway within one of the buildings containing the defendant's unit. The dog alerted to the defendant's unit, and officers then obtained a search warrant and searched it. Cocaine and drug paraphernalia were discovered, and officers then obtained a search warrant for the defendant's residence and searched it. The court ruled, relying on United States v. Place, 462 U.S. 696 (1983), and other cases, that the use of the dog to sweep the common area of the storage facility did not violate the defendant's Fourth Amendment rights. The dog sniff revealed only the presence of illegal drugs that does not compromise any legitimate privacy interest. In addition, the officers were legally in the common hallway of the building with the consent of the facility's manager. The defendant did not possess a reasonable expectation of privacy in the common hallway. The court also rejected the defendant's argument that there was no nexus between the presence of cocaine in the storage unit and the existence of illegal drugs at the defendant's residence to

provide probable cause to issue a search warrant for the residence. The court discussed in its opinion the informant's reliability and basis of knowledge.

Officers Had Probable Cause and Exigent Circumstances to Enter House

State v. Stover, ___ N.C. App. ___, 685 S.E.2d 127 (3 November 2009). The court ruled that officers had probable cause and exigent circumstance to enter a home based on the following facts: Officers stopped a vehicle, noticed a passenger with marijuana, who then told them the house at which she had purchased the marijuana. Officers went to the house to conduct a knock and talk. When they arrived there, they perceived a strong odor of marijuana emanating from the house. An officer heard a noise from the back of the house and saw the defendant, whose upper torso was partially out of a window. The court noted that the officer could reasonably believe that the defendant was attempting to flee the scene, and they were also concerned about a possible destruction of evidence.

Officers Had Implied Consent to Enter House to Search For and Seize Weapon

State v. McLeod, ___ N.C. App. ___, 682 S.E.2d 396 (7 July 2009). Officers responded to a disturbance between the defendant and his mother at a residence where both lived. After speaking with and calming both, the officers left. Within 30 minutes, the officers were called to the residence again. The defendant was locked out of the residence and sitting in the garage area. Officer A went into the residence and spoke with the mother. Officer B remained with the defendant. The mother told officer A that the defendant had a gun in his bedroom. Officer A then went outside to officer B. The defendant was asked if he had a weapon, and he responded yes, there was a gun in the house under his bed. After receiving this information, both officers accompanied the defendant inside the residence and went to the defendant's bedroom and seized the gun. The court ruled, relying on United States v. Hylton, 349 F.3d 781 (4th Cir. 2003), that the officers had implied consent to enter the house and search for and seize the defendant's gun. The court reasoned that both the defendant and his mother gave consent through their words and actions.

Defendant, Inmate at Detention Center, Give Implied Consent to Recording of His Telephone Calls to People Outside Detention Center

State v. Troy, ___ N.C. App. ___, 679 S.E.2d 498 (21 July 2009). The defendant was being held at a detention center in South Carolina. When he made telephone calls on March 31, 2002, both the defendant and the person he called heard a recorded message that stated, "[t]his call is subject to being monitored and recorded. Thank you for using Evercom." A fellow inmate arranged a three-way telephone on behalf of the defendant on April 2 and April 4, 2002. The defendant sought to suppress the contents of the recorded April telephone calls because the defendant was not provided with a recorded message that his conversations could be monitored or recorded. The court ruled, relying on State v. Price, 170 N.C. App. 57 (2005), that the recordings of the April telephone conversations did not violate federal or state eavesdropping laws because the defendant impliedly consented to the recordings. The defendant was aware from the March 31, 2002, calls that telephone calls from the detention center were subject to being recorded.

Trial Court Properly Sealed From Public Inspection Search Warrants Involving Ongoing Investigation of Murder

In re Cooper, ___ N.C. App. ___, 683 S.E.2d 418 (6 October 2009). The court ruled that the trial court properly sealed from public inspection search warrants involving the ongoing investigation

of a murder. (See the court's opinion concerning the facts and its legal analysis involving the sealing of these search warrants.)

(1) Defendant at Hospital for Treatment Was Not in Custody to Require *Miranda* Warnings When Officer Questioned Him
(2) Officer Did Not Violate Defendant's Assertion of Right to Counsel At Police Station When He Informed Defendant of Charge Against Him

State v. Allen, ___ N.C. App. ___, 684 S.E.2d 526 (3 November 2009). The defendant was involved in a knife fight in which the victim was killed and the defendant was also stabbed. The defendant went to a hospital for treatment for his wounds (the victim was also taken to the hospital). Officers arrived there and sought to determine what had occurred. An officer spoke to the defendant intermittently for about forty minutes. He was not handcuffed, nor was he told that he could not leave or that he was under arrest. (1) The court ruled that the defendant was not in custody when the officer questioned him at the hospital, and thus *Miranda* warnings were not required. The court noted that any restraint in movement that the defendant may have experienced at the hospital was due to his medical treatment and not the action of law enforcement officers. (2) After being advised of his *Miranda* rights at the police station, the defendant asserted his right to counsel by naming an attorney he wanted to be present before answering questions. During a conversation with the defendant about the officer's unsuccessful efforts to locate the attorney, the officer told the defendant that he was being detained and charged with second-degree murder. The defendant told the officer that he wanted to talk with the officer "right now." The court ruled, relying on State v. Leak, 90 N.C. App. 351 (1988), that the officer did not violate the defendant's assertion of the right to counsel when he informed the defendant of the charge against him.

Evidence

Lab Analyst's Testimony Concerning DNA Tests Performed by Other Non-Testifying Analysts Did Not Violate Confrontation Clause

State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009). The court ruled, distinguishing State v. Locklear, 363 N.C. 438 (2009), that a lab analyst's testimony concerning DNA tests performed by other non-testifying analysts did not violate Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), and the Confrontation Clause. The analyst testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. The court stated that Crawford v. Washington, 541 U.S. 36 (2004), noted that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause. In this case, the underlying report by the non-testifying analysts was used as a basis for the opinion of the testifying expert who independently reviewed and confirmed the results and was therefore not offered for the proof of the matter asserted.

Lab Supervisor's Testimony, Based Solely on Lab Report Prepared By Non-Testifying Lab Analyst, That Tested Cocaine Weighed 1,031.83 Grams Violated Confrontation Clause in Cocaine Trafficking Trial

State v. Galindo, ___ N.C. App. ___, 683 S.E.2d 785 (20 October 2009). The defendant was convicted of trafficking in cocaine and another drug offense. The court ruled, relying on Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), and State v. Locklear, 363 N.C. 438 (2009), that a laboratory supervisor's testimony, based solely on a laboratory report prepared by a non-testifying laboratory analyst, that the tested cocaine weighed 1,031.83 grams violated the

Confrontation Clause. The court also ruled that the constitutional error was harmless beyond a reasonable doubt based on the other evidence admitted at the defendant's trial.

Trial Judge at Retrial After Mistrial Was Not Bound By Evidentiary Ruling in First Trial Concerning Admissibility of Rule 404(b) Evidence

State v. Harris, ___ N.C. App. ___, 679 S.E.2d 464 (21 July 2009). In the defendant's first trial for possessing cocaine with the intent to sell or deliver, the trial judge barred the state from introducing proffered Rule 404(b) evidence of a prior cocaine offense to show the defendant's intent to possess cocaine, knowledge of cocaine, and absence of mistake. A mistrial was declared when the jury was unable to agree on a unanimous verdict. At the retrial, a different trial judge allowed the state to introduce the same Rule 404(b) evidence to show intent, knowledge, and lack of mistake. The court stated that there are no prior binding evidentiary rulings when a defendant is tried again following a mistrial. Neither the doctrine of collateral estoppel nor the rule that bars one judge from overruling another applies. The court ruled that the trial judge at the retrial did not err by failing to follow the first trial judge's discretionary ruling on the admissibility of the Rule 404(b) evidence.

Trial Court Erred in Admitting Conduct Under Rule 404(b) Involving Prior Offenses When Offenses Were Subject to Prior Trial and Case Was Dismissed for Insufficient Evidence

State v. Ward, ___ N.C. App. ___, 681 S.E.2d 354 (18 August 2009). The court ruled, relying on State v. Scott, 331 N.C. 39 (1992), and State v. Allen, 144 N.C. App. 386 (2001), that the trial court erred under Rule 404(b) in admitting conduct involving prior offenses when those offenses were subject to a prior trial and the cases were dismissed for insufficient evidence, and the probative value of the evidence depended on his having committed those offenses. [Author's note: This evidence was not similar to the facts in State v. Solomon, 117 N.C. App. 701 (1995), and State v. Agee, 326 N.C. 542 (1990), to be admissible under those rulings.]

Sentencing

Trial Court Did Not Abuse Its Discretion in Allowing Jury to Consider Existence of Aggravating Factors During Guilt-Innocence Stage of Non-Capital Trial

State v. Anderson, ___ N.C. App. ___, 684 S.E.2d 450 (6 October 2009). The defendant was convicted of second-degree murder and felonious child abuse inflicting serious bodily injury. The first-degree murder indictment alleged as aggravating factors that the offense was especially heinous, atrocious, and cruel, and the victim was very young. The felonious child abuse indictment alleged that the offense was especially heinous, atrocious, and cruel. After the state rested, the defendant did not offer any evidence. The trial court asked defense counsel whether she had any additional evidence to offer concerning aggravating factors, and counsel said no. Based on these facts, the court ruled that the trial court did not abuse its discretion in allowing the jury to consider the existence of aggravating factors during the guilt-innocence stage of the trial, which is authorized under G.S. 15A-1340.16(a1).

Trial Court Did Not Err in Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted)

State v. Williams, ___ N.C. App. ___, 684 S.E.2d 898 (3 November 2009). The defendant was convicted of delivery of a controlled substance, cocaine, and a sentencing hearing was held. The

defendant had a prior conviction for delivery of a controlled substance, marijuana. The court ruled, relying on State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (2009), that the trial court did not err in assigning one point to the defendant's prior record level under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted).

Sufficient Evidence in Adult Sentencing Hearing Before Jury to Prove Aggravating Factor (Juvenile Had Been Adjudicated Delinquent for Offense That Would Be Class B2 Felony If It Had Been Committed by Adult) When State Introduced Transcript of Admission by Juvenile

State v. Rivens, ___ N.C. App. ___, 679 S.E.2d 145 (7 July 2009). The defendant was convicted of possession of cocaine with the intent to sell or deliver. During the sentencing hearing before the jury, the state offered proof of an aggravating factor (juvenile had been adjudicated delinquent for offense that would be Class B2 felony if it had been committed by adult) by introducing the transcript of admission by juvenile. The court ruled, adopting the reasoning in State v. Hatcher, 136 N.C. App. 524 (2000), concerning proof of a conviction for sentencing purposes, that the state's evidence was sufficient to prove the aggravating factor.