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RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(June 18, 1992 - October 20, 1992)

North Carolina Supreme Court

Arrest, Search, and Confessions

(1) Court Adopts Inevitable Discovery Exception Under State Constitution
(2) Court Interprets State Constitution As Same As Fourth Amendment

State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992). After the arrest of the defendant for murder and recovery of a .25 caliber Beretta pistol (the alleged murder weapon), officers obtained a search warrant to search the defendant's residence, and they seized (1) a Beretta box showing model 950BS, serial number BR88945V from Jim's Pawn Shop; (2) a receipt from Jim's Pawn Shop showing a purchase on 20 December 1986 of a Beretta PPGGG Model 950BS with the same serial number; and (3) five .25 automatic bullets. As a result of the seizure of this evidence, officers went to Jim's Pawnshop and obtained (i) a copy of the Beretta pistol purchase receipt that they had seized under the search warrant, and (ii) defendant's ATF (federal Alcohol, Tobacco, and Firearms Bureau) application to purchase the Beretta weapon. The trial judge ruled that the search warrant was invalid because probable cause did not exist to search the residence; therefore, the evidence found at the residence was inadmissible at trial. However, the judge ruled that the evidence obtained from Jim's Pawnshop was admissible under the inevitable discovery exception to the Fourth Amendment's exclusionary rule. The judge found that by a preponderance of evidence that (a) it is routine procedure in firearms cases to check PIN (Police Information Network) and ATF; and (b) "but for" the fact the information was readily ascertainable by the pawn receipt that officers found in the illegal search of the defendant's home (with the invalid search warrant), the officers would have conducted a routine check and discovered by lawful means at Jim's Pawnshop the duplicate Beretta pistol purchase receipt and defendant's ATF application to purchase the weapon.

The court adopted, under the state constitution, the inevitable discovery exception to the Fourth Amendment's exclusionary rule, which was recognized in Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L.Ed.2d 377 (1984). The court rejected the defendant's contention that the state always must show that an independent investigation (that would have inevitably led to the discovery of the evidence by lawful means) must be ongoing when the illegality occurred that resulted in the discovery of the evidence. Instead, the court adopts a case-by-case approach, "recognizing that the particular facts of any given case will determine whether, absent other means, proof of an ongoing, independent investigation is necessary to show inevitability." The court also ruled that (a) the state's burden of proof to show inevitable discovery is by the preponderance of the evidence, not by clear and convincing evidence; (b) the officer's bad faith in conducting the illegal search is irrelevant in applying the inevitable discovery exception; and (c) the court's suppression of the primary evidence (evidence seized under the invalid search warrant)

was not necessary in applying the inevitable discovery exception. The court reviewed the evidence in this case and affirmed the trial judge's ruling that the inevitable discovery exception applied to admit the evidence found at Jim's Pawnshop.

The court rejected the defendant's contention that the court should not recognize the inevitable discovery exception under Article I, Section 20 of the North Carolina Constitution. The court stated: "While this Court has held that Article I, Section 20 of our Constitution, like the Fourth Amendment to the United States Constitution, prohibits unreasonable searches and seizures, e.g., State v. Arrington, 311 N.C. 633, 319 S.E.2d 254; State v. Ellington, 284 N.C. 198, 200 S.E.2d 177 (1973), and requires the exclusion of evidence obtained by unreasonable search and seizure, e.g., State v. Carter, 322 N.C. 709, 370 S.E.2d 553, there is nothing to indicate anywhere in the text of Article I, Section 20 any enlargement or expansion of rights beyond those afforded in the Fourth Amendment as applied to the stated by the Fourteenth Amendment." The court later stated: "We therefore hold the defendant's contention that Article I, Section 20 of our Constitution should be read as an extension of rights beyond those afforded in the Fourth Amendment is misplaced." The court's general statements indicated that in other cases it may not interpret this constitutional section more broadly in favor of defendant's rights than the Fourth Amendment. It appears that *Garner* may undermine its ruling in State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1988), which had rejected under this constitutional section the "good-faith exception" to the exclusionary rule under the Fourth Amendment, as set out in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L.Ed.2d 677 (1984) and Massachusetts v. Sheppard, 468 U.S. 981, 104 S. Ct. 3424, 82 L.Ed.2d 737 (1984).

(1) Defendant Was Not Seized Under Fourth Amendment
(2) Probable Cause Existed To Arrest Defendant
(3) No Violation Of Defendant's Sixth Amendment Right To Counsel

State v. Bromfield, 332 N.C. 24, 418 S.E.2d 491 (1992). (1) Facts showed that defendant voluntarily went with officers from Raleigh to Spring Lake (for example, the defendant signed a form indicating he was volunteering to return), and thus the defendant had not been seized under Fourth Amendment before he confessed. (2) Probable cause existed to arrest defendant for accessory after fact of murder, since the defendant left town with Monroe and defendant knew (i) Monroe had murdered two people, (ii) Monroe was leaving town because the "heat was coming," and (iii) location of murder weapons. (3) Defendant's Sixth Amendment right to counsel had attached because he had had his district court first appearance (defendant also had requested counsel then and had been appointed counsel). An officer went to jail to serve arrest warrants for related charges. Defendant indicated that he wished to talk with the officer about the situation and gave incriminating statements. Since the defendant initiated the conversation, there was no Sixth Amendment violation.

Taped Telephone Conversation Did Not Violate Defendant's Rights

State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992). Defendant—who was not in custody, had not been charged or arrested, and had his lawyer present—was interviewed about a murder. After the interview, the defendant (who voluntarily had driven to North Carolina from Florida) gave officers his home and work telephone numbers before returning to Florida. Officers and

prosecutors used an accomplice to make two telephone calls to the defendant in Florida, in which the defendant made incriminating statements. Defendant's motion to suppress the statements was denied. The court ruled: (1) there was no *Miranda* violation since there was no custodial interrogation [in any event, *Miranda* does not apply to questioning by a person who is not known by the defendant to be a law enforcement officer or agent, Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L.Ed.2d 243 (1990)]; (2) defendant's Sixth Amendment right to counsel was not violated, since he had not been charged with the murder and therefore he had no Sixth Amendment right to counsel; (3) defendant's Fourth Amendment rights were not violated—see United States v. White, 401 U.S. 745, 91 S. Ct. 1122, 28 L.Ed.2d 453 (1971); and (4) prosecutor did not violate any ethical rules, based on facts in this case, because he acted in good faith belief that defendant was willing to maintain contact with the state.

Unconstitutional Arrest Under Fourth Amendment Made Later Confession Inadmissible

State v. Allen, 332 N.C. 123, 418 S.E.2d 225 (1992). Defendant was arrested in violation of the Fourth Amendment because officers had no authority to enter the defendant's house without an arrest warrant, based on the facts in this case. The defendant's confession, given two hours later while she still was in the house, was inadmissible under the analysis of Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L.Ed.2d 416 (1975), because there was insufficient attenuation from the unconstitutional arrest to the time when she confessed, based on the facts in this case. [Note that if the confession had been taken outside the home, then it would probably have been admissible under New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L.Ed.2d 13 (1990).]

Jail Inmate Was Not Agent Of State; No Sixth Amendment Violation

State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). Defendant was in jail awaiting trial for murder. An inmate reported defendant's incriminating statements to SBI agent. The SBI agent told the inmate that he should not make any further contact with the defendant, and that the inmate was not working for anyone on behalf of the state. The agent also refused to make any deals with the inmate for the information. The agent had five more meetings with the inmate, who revealed additional incriminating statements by the defendant. Relying on Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L.Ed.2d 364 (1986), the court ruled that the defendant's statements to the inmate were not taken in violation of the defendant's Sixth Amendment right to counsel.

Miscellaneous

(1) Trial Judge Did Not Err in Failing to Conduct *Ex Parte* Hearing on Indigent Defendant's Request for Funds to Employ Fingerprint Expert
(2) Funds for Hiring Defense Private Investigator Properly Denied

(3) Defendant Not In Custody To Require *Miranda* Warnings
(4) Second-Degree Murder Should Have Been Submitted To Jury

State v. Phipps, 331 N.C. 427, 418 S.E.2d 178 (1992). (1) The court ruled that the trial judge did not err in failing to conduct an *ex parte* hearing on the indigent defendant's request for funds to employ fingerprint expert. (2) The court ruled that the trial judge did not err in deny indigent defendant's request for funds to hire defense private investigator. (3) Defendant was not in custody to require *Miranda* warnings, based on facts in this case, when defendant voluntarily came to police station several times for questioning and voluntarily went with officers to take a polygraph test. (4) Based on facts in this case, judge should have submitted second-degree murder as a lesser-included offense.

(1) Reconstruction Of Private Conversation With Prospective Juror Not Allowed
(2) Defendant May Be Entitled To State-Funded Experts Even If Retained Counsel

State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992). (1) Content of judge's private conversation with prospective juror, in violation of capital defendant's right to be present at all stages of trial, cannot be reconstructed after trial (there was no transcript of conversation). (2) Defendant may be entitled to state-funded expert if defendant has insufficient funds after hiring counsel.

Sufficient Evidence of Felony Murder If Arson Committed During Same Time As Victim's Murder

State v. Campbell, 332 N.C. 116, 418 S.E.2d 476 (1992). If murder and arson are part of one continuous transaction, it is felony murder even if arson is committed after victim is murdered. In this case, defendant beat victim to death, searched house for valuables, and then set house on fire—this was sufficient evidence for felony murder conviction. The court distinguished State v. Ward, 93 N.C. App. 682, 379 S.E.2d 251 (1989) (defendant set fire to uninhabited trailer several days after homicide; no arson committed).

Judge Not Required To Conduct In Camera Pretrial Inspection Of State's Files For Exculpatory Evidence

State v. Soyars, 332 N.C. 47, 418 S.E.2d 480 (1992). Trial judge did not err in denying defendant's request that judge conduct an *in camera* inspection of the state's files to search for exculpatory evidence, based on the facts in this case.

(1) Error To Require Appointed Defense Experts To Provide State With Reports
(2) State Has Right To Discovery Of Reports To Be Used At Sentencing

State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992). (1) Judge erred when, as condition of defense mental experts' being paid and testifying for defendant, he required them to submit reports of their examination to the state before trial. Judge exceeded authority of G.S. 15A-905 by ordering such pretrial discovery (state has right to discovery of reports that defendant intends to introduce in evidence at trial or prepared by witness whom defendant intends to call at trial). (2) State is entitled to discovery under G.S. 15A-905 if reports are to be used at sentencing as well as at trial.

(1) Capital Statutory Mitigating Circumstance Must Be Submitted Over Defendant's Objection

(2) Serving Life Sentence For Another Murder Is Not Capital Nonstatutory Mitigating Circumstance

State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992). (1) Judge must submit capital statutory mitigating circumstance (in this case, lack of capacity to appreciate criminality of conduct) even if defendant wants to make tactical decision not to have it submitted. (2) It is not a nonstatutory mitigating circumstance that defendant already has received life sentence for another murder, which therefore provides additional protection to society.

Capital Aggravating Circumstance G.S. 15A- 2000(e)(8) May Include Off-Duty Officer

State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992). Charlotte police officer was working for motel while off-duty, in uniform, and pursuant to department regulations. Defendants left motel after dispute with officer about their visiting a particular motel room, and they later returned and killed officer by shooting him while he sat in motel lobby. The court ruled that aggravating circumstance under G.S. 15A-2000(e)(8) includes duly sworn law enforcement officers when they are performing off-duty, secondary law enforcement related duties, when it is clear that such duties and compensation are incidental and supplemental to their primary duties of law enforcement on behalf of the general public. Evidence in this case was sufficient to submit -2000(e)(8) under both prongs [killed (i) while engaged in performing official duties, or (ii) on account of exercising official duties]. [Note*:* This ruling's rationale would likely apply to assault statutes when officers are victims, such as G.S. 14-33(b)(8) and 14-34.2.]

Error Not To Allow Defendant's Challenge For Cause

State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992). Trial judge erred, based on facts in this case, in not allowing defendant's challenge for cause of prospective juror who indicated he might have trouble being fair to defendant if the defendant did not testify. Juror's answers showed he could not follow the law.

Capital Mitigating Circumstances Instruction Should Avoid Word "Sympathy"

State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992). Trial judge properly rejected defendant's request to instruct jury during capital sentencing hearing that "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." The court stated that trial judges should not refer to "sympathy" in instructions on mitigating circumstances—to avoid giving jurors the suggestion that they have unbridled discretion in sentencing decision.

(1) Unrecorded Bench Conferences With Prospective Jurors In Capital Case Was Error
(2) Defendant's Right To Be Present During Capital Case Applies Even If Life Sentence Is Imposed

State v. Johnston, 331 N.C. 680, 417 S.E.2d 228 (1992). (1) Trial judge's private unrecorded bench conferences with prospective jurors violated capital defendant's state constitutional right to be present during trial. (2) Violation of capital defendant's state constitutional right to be present during trial will be subject to reversal on appeal even if defendant receives life sentence. See also State v. Moss, 332 N.C. 65, 418 S.E.2d 213 (1992) (court reaffirms prior rulings that when new trial is ordered for capital offense because defendant's right to be present is violated, defendant also receives new trial for non-capital offenses that were tried with capital offense).

(1) Error To Allow Defendant To Represent Himself
(2) AOC Form Insufficient Evidence Of Conviction As Capital Aggravating Circumstance

State v. Thomas, 331 N.C. 671, 417 S.E.2d 473 (1992). (1) Trial judge erred in allowing defendant to represent himself when defendant did not "clearly and unequivocally" state a desire to represent himself. Instead, he was confused about the available choices (he incoherently said that he needed an attorney as his assistant, but not the lawyers appointed for him). (2) AOC "Criminal Record Check" form was insufficient evidence of the capital aggravating circumstance—a prior violent felony conviction—based on facts in this case.

Imperfect Self-Defense Does Not Include Unreasonable Belief To Defend Oneself

State v. Maynor, 331 N.C. 695, 417 S.E.2d 453 (1992). Trial judge in murder trial did not err in failing to instruct the jury that it should find that the defendant exercised imperfect self-defense, if it found that he killed victims under an honest but *unreasonable* belief that it was necessary to save himself from imminent death or serious bodily harm. The court ruled that such a belief must be reasonable, even with imperfect self-defense, and court disavows contrary statements in prior decisions. See also State v. McAvoy, 331 N.C. 583, 417 S.E.2d 489 (1992) (similar ruling).

Diminished Capacity Instruction Sufficient As To Specific Intent to Kill

State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992). Single jury instruction on first-degree murder that related diminished capacity defense to specific intent to kill, formed after premeditation and deliberation, was not error; separate instructions relating diminished capacity defense to specific intent, on the one hand, and premeditation and deliberation, on the other, is not required.

Defendant Has No Right To Compel Joinder of Trial With Co-Defendant

State v. Jeune, 332 N.C. 424, 420 S.E.2d 406 (1992). Defendant has no statutory basis to compel joinder of his or her case for trial with a co-defendant.

Sufficient Evidence Of Force For Sexual Assault

State v. Brown, 332 N.C. 262, 420 S.E.2d 147 (1992). The court ruled that there was sufficient evidence of "force" to support second-degree sexual offense (finger in victim's vagina) when defendant entered hospital in middle of night, went into room of patient, pulled back bedclothing, and pulled up victim's gown, pulled aside victim's panties, and put his finger in her vagina (victim's eyes were closed up to time when he inserted finger; victim was also attached to intravenous tubing). The court reserved question whether "force" element of a sexual assault may be shown simply by evidence of force inherent in sexual act itself. The court distinguished State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984), which the court describes as involving evidence so peculiar that the decision in that case may well be *sui generis*.

Composite Pictures Prepared By Officer Were Not Hearsay

State v. Patterson, 332 N.C. 409, 420 S.E.2d 98 (1992). Reversing ruling of Court of Appeals at 103 N.C. App. 195, 405 S.E.2d 200 (1991), court ruled that composite pictures prepared by law enforcement officer, with participation and descriptions by eyewitnesses to crime, were not hearsay. However, pictures were not properly authenticated because state did not show that the composite pictures accurately portrayed the men the eyewitnesses had seen committing the crime.

Rule 803(3): Hearsay Exception, Then Existing Mental, Emotional, Physical Condition: (1) Victim's Statement about Future Act Admissible; (2) Declarant's Statement about Past Act Was Inadmissible

State v. Taylor, 332 N.C. 372, 420 S.E.2d 414 (1992). (1) Murder victim's statement that he planned to meet the defendant and then buy a boat was admissible under Rule 803(3) as stating his then-existing intent and plan to engage in a future act. Rule does not require that declarant's statement must be closely related in time to the intended future act. (2) Declarant's statement that he had discussed the sale of a gun shop was not admissible under Rule 803(3) because it was a statement of his memory of a past act to prove the fact remembered.

(1) Implied Admission Does Not Require Defendant's Physical Presence
(2) Rule 106 Did Not Require Statement To Be Admitted During State's Case
(3) State Allowed To Call Accomplice Who Asserted Fifth Amendment Privilege

State v. Thompson, 332 N.C. 204, 420 S.E.2d 395 (1992). (1) Defendant's silence in response to accomplice's questions during telephone conversation (set up by law enforcement officers) qualified as implied admission. Defendant need not be in physical presence of accomplice under Rule 801(d)(B). (2) When defendant's telephone conversations were inculpatory, defendant was not entitled under Rule 106 (related writings or statements) to require admission during state's case of his exculpatory interview that he gave two days earlier to law enforcement officers. (3) Accomplice at time of defendant's trial had been convicted of first-degree murder and his case was on appeal. His lawyer informed the trial judge that the accomplice would not answer any

questions and would invoke Fifth Amendment. Trial judge allowed the prosecutor to call accomplice to witness stand in jury's presence and give his name and invoke his rights. The court ruled that this was permissible, because prosecutor's case would be "seriously prejudiced" by state's failure to offer accomplice as witness, in light of his role in the murder.

Conjunctive In Indictment Required State To Only Prove One Of Alternatives

State v. Montgomery, 331 N.C. 559, 417 S.E.2d 742 (1992). When indictment alleges in conjunctive two alternative ways to commit offense ["from the person and presence of (victim)"], state only has to prove one of the alternatives.

North Carolina Court of Appeals

(1) Officer's Stop Of Illegally Parked Car In Highway Rest Area Not Pretextual
(2) Officer's Request for Consent Search Did Not Exceed Scope of Stop
(3) Defendant-Passenger Had No Standing To Contest Search

State v. Hunter, 107 N.C. App. 402, 420 S.E.2d 700 (1992). Trooper saw car illegally parked in truck parking area of rest stop off of I-95. Trooper advised defendant-driver that he was illegally parked and issued a warning ticket for improper parking. Defendant had vehicle rental agreement for car in name of person not present in car; trooper asked defendant questions about other occupants of car. Trooper then asked and received consent to search car from defendant. The court ruled (1) trooper's stop of car was not pretextual—reasonable officer in trooper's position would have conducted stop, State v. Morocco, 99 N.C. App. 421, 393 S.E.2d 545 (1990) [note: ruling in *Morocco* on pretextual stop was later effectively overruled in Whren v. United States, 517 U.S. 806 (1996)]; (2) trooper's questions about other occupants were legitimate to confirm defendant's identity, considering the rental agreement was not in defendant's name, and that trooper's asking for consent to search car, after issuing warning ticket, did not exceed scope of his investigation; and (3) defendant-passenger had no standing to contest search of portable radio found in backseat when his lawyer stated at suppression hearing that he did not have any possessory or proprietary interest in the radio.

Insufficient Foundation To Allow Expert's Statistical Probability Testimony

State v. Bridges, 107 N.C. App. 668, 421 S.E.2d 806 (1992) Hair expert's testimony about statistical probability of random hair match was not supported by a proper foundation, based on the facts in this case (although court majority did not order a new trial).

Trial Judge's Authority To Modify Sentence During Term Of Court

State v. Quick, 106 N.C. App. 548, 418 S.E.2d 291 (1992). Trial judge had authority to change sentence during same term of court to make it run consecutively instead of concurrently with sentence being served.

If Property Has No Market Value, Then Use Replacement Cost

State v. Helms, 107 N.C. App. 237, 418 S.E.2d 832 (1992). Defendant was charged with felonious larceny of a pay telephone, the property of Southern Bell. The court ruled that if stolen property is not commonly traded and has no ascertainable market value, a jury may determine the value from evidence of its replacement cost.

Drug Trafficking Convictions Upheld Without Introduction of Drug Evidence

State v. Crummy, 107 N.C. App. 305, 420 S.E.2d 448 (1992). Evidence was sufficient to support trafficking in cocaine of 400 grams or more when state's witnesses, who were involved in drug trade, described size of blocks of cocaine (no cocaine was introduced at trial).

Evidence of Child Sexual Abuse Accommodation Syndrome Inadmissible In Case

State v. Stallings, 107 N.C. App. 241, 419 S.E.2d 586 (1992). Evidence of child sexual abuse accommodation syndrome was inadmissible in this case because (1) record did not show that syndrome had been generally accepted in medical field, and (2) evidence was not limited to corroborative purposes, noting State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992) (limiting post traumatic stress syndrome to corroborative purposes only; inadmissible as substantive evidence).

Defendant Has Burden Proving Invalidity Of Prior Guilty Pleas

State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992). Trial judge properly used prior convictions in sentencing, rejecting defendant's challenge that guilty pleas were not voluntarily and knowingly made. State offered court judgments reflecting that defendant, represented by counsel, "freely, voluntarily, and understandingly pled guilty" to offenses. The court noted that defendant has burden of proving invalidity of convictions in such cases. Defendant had testified in this case that he had "no recollection of being advised of his rights by the judge before entering guilty pleas."

Warrantless Administrative Inspections of Commercial Fisheries Constitutional

State v. Nobles, 107 N.C. App. 627, 422 S.E.2d 78 (1992), *affirmed*, 333 N.C. 787, 429 S.E.2d 716 (1993). The court ruled that G.S. 113-136(k), which permits warrantless administrative inspections of licensed fish dealerships, among other places, is not unconstitutional on its face.

Trial Judge May Find Non-Statutory Aggravating Factor Not Requested By State

State v. Flowe, 107 N.C. App. 468, 420 S.E.2d 475 (1992). Trial judge may find non-statutory aggravating factor even if state did not request the judge to make such a finding, when evidence presented at trial or sentencing supports the finding.

Property Was Properly Forfeited Under North Carolina RICO Act

State v. Lot and Buildings, 107 N.C. App. 559, 421 S.E.2d 374 (1992). State instituted civil RICO action under G.S. Chapter 75D in superior court to forfeit building and personal property where misdemeanor gambling violations were committed (and for which defendant was convicted in district court). The court ruled (1) superior court had jurisdiction over action; (2) gambling convictions satisfied definition of "racketeering activity" in G.S. 75D-3(c)(2); and (3) evidence of "pattern of racketeering activity" was sufficient to support forfeiture.