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RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
[June 15, 1993 - October 8, 1993]

North Carolina Supreme Court

Jury Selection

Trial Judge Must Exercise Discretion In Deciding Whether To Allow Defense Counsel To Rehabilitate Prospective Jurors Challenged For Cause By Prosecutor

State v. Brogden, 334 N.C. 39, 430 S.E.2d 905 (2 July 1993). The court ruled that, during jury selection in a capital resentencing hearing, the trial judge erred when he refused to permit defense counsel to question any prospective juror whom the prosecutor had challenged for cause based on the juror's views on capital punishment. Court discussed its prior cases in which it had ruled that the trial judge had not committed error in denying, *in the exercise of the judge's sound discretion*, a defendant's request to attempt to rehabilitate prospective jurors challenged for cause by the prosecutor. Court distinguished those cases from this case by noting that the trial judge in this case refused the defendant's request to question the jurors under an apparent misapprehension of law that a defendant's attempt to rehabilitate is never permitted. Court then determined that, although a particular prospective juror's responses supported the prosecutor's initial challenge for cause, they were not unequivocal about the death penalty, and further questioning by defense counsel would likely have produced different answers if the trial judge had allowed counsel's attempt to rehabilitate the juror. Court ordered a new resentencing hearing.

[Although this ruling involved defense attempts to rehabilitate prospective jurors, it would apply to a prosecutor's attempt to rehabilitate as well.]

(1) Judge Did Not Err In Refusing Defense Request To Rehabilitate Prospective Juror (2) When Prosecutor Committed *Batson* Error, Judge Properly Used New Jury Panel

State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (30 July 1993). (1) Trial judge properly exercised his discretion in refusing to allow defense counsel to examine or rehabilitate two prospective jurors after prosecutor challenged them for cause because of their unequivocal opposition to the death penalty, when the record showed that further questioning would not have caused either of them to alter their expressed beliefs. (2) Trial judge did not err in ordering that jury selection process begin again with a new panel of forty prospective jurors after judge had ruled that prosecutor had committed *Batson* error in exercising peremptory challenges to three black prospective jurors. Trial judge properly rejected defendant's request that the improperly challenged jurors be seated. Court stated that "[w]e believe that the better practice is that followed by the trial court in this case," and federal case law does not require a different procedure.

Prosecutor's Reasons For Peremptory Challenges Upheld Under *Batson*

State v. Wiggins, 334 N.C. 18, 431 S.E.2d 755 (2 July 1993). Court examined reasons offered by prosecutor for exercising peremptory challenges of four black prospective jurors and found them proper under Batson v. Kentucky, 476 U.S. 79 (1986). Reasons included jurors' uncertainty about the death penalty and potential juror bias resulting from prior contact with defense counsel, the defendant or the victim and his family members.

Criminal Offenses

Voluntary Intoxication Defense Inapplicable to Second-Degree Murder And Acting In Concert

State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (30 July 1993). Voluntary intoxication defense does not apply to (1) second-degree murder, because specific intent is not an element of that offense, and (2) the acting in concert theory because the defense applies only to an element of a *crime*.

(1) Taking Contraband Constitutes Larceny (Or Robbery)
(2) Sufficient Evidence Of Constructive Breaking For Burglary

State v. Oliver, 334 N.C. 513, 434 S.E.2d 202 (10 September 1993). (1) Taking contraband (in this case, illegal drugs) constitutes larceny or robbery—in this case, armed robbery. (2) There was sufficient evidence of constructive breaking in burglary case when the victim was induced to open the door by the defendant's knocking on the door under the pretense of business.

Attempted Murder Is Common Law Crime That Is Lesser-Included Offense Of Murder, But Various Assaults Are Not Lesser-Included Offenses Of Murder In Short Form Indictment

State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (2 July 1993). Defendant was tried for first-degree murder charged in short form indictment authorized under G.S. 15-144 ("unlawfully, willfully and feloniously and of malice aforethought did kill and murder _____"). State's evidence showed that defendant shot the victim in the chest, resulting in the victim's death about a month after the shooting. Defendant's evidence included testimony by an expert in forensic pathology (Dr. Page Hudson, former Chief Medical Examiner of North Carolina), who gave an unequivocal opinion that victim had died of complications from gallbladder disease, entirely unrelated to the gunshot wound (i.e., the shooting did not hasten or cause the victim's death). Trial judge instructed on first-degree murder and not guilty; defense counsel did not object to instructions and did not request instructions on lesser offenses.

The court ruled that (1) attempted murder is common law infamous offense [thus, a Class H felony under G.S. 14-3(b)] and a lesser-included offense of murder, and trial judge erred in failing to submit this offense to jury, and (2) misdemeanor and felony assaults are not lesser-included offenses under short form murder indictment, since the indictment does not allege a murder

accomplished by assault; court reaffirms State v. Whiteside, 325 N.C. 389, 383 S.E.2d 911 (1989).

Court also ruled that defendant is barred under Rule 10(b)(2) of Rules of Appellate Procedure from assigning error to trial judge's failure to instruct on lesser-included offenses. Court then reviewed error under "plain error" standard of State v. Odom, 307 N.C. 655, 300 S.E.2d 375 (1983), and concluded, based on the unusual facts surrounding the victim's death, that this is one of the rare cases when trial judge's error in failing to instruct on lesser-included offense was so fundamental that it denied defendant a fair trial.

Court Upholds Two Separate Conspiracy Convictions

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (10 September 1993). Defendant was convicted of conspiracy to commit murder and conspiracy to commit first-degree burglary. Court upheld both convictions because the conspiracy to commit murder was committed weeks before the murders (and there was no specific plan on how to accomplish the murders), and the conspiracy to commit first-degree burglary was a separate agreement formed on the morning of the murders.

Evidence

Court Clarifies Scope Of Impeachment By Prior Conviction

State v. Lynch, 334 N.C. 402, 432 S.E.2d 349 (30 July 1993). The court ruled, clarifying and overruling cases to the contrary [e.g., State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992) and State v. Harrison, 90 N.C. App. 629, 369 S.E.2d 624 (1988)], that a prosecutor under Rule 609(a) at the guilt-innocence phase of a trial is prohibited from eliciting details of a prior conviction other than the name of the crime, the time and place of the conviction, and the punishment. The court ruled that prosecutor in this case improperly elicited details of prior convictions under Rule 609(a) and was not permitted to do so alternatively under Rule 611(b), Rule 404(a)(1), or Rule 404(b).

Court noted, however, when a defendant opens the door by misstating his or her criminal record or the facts of the crimes or actions, or when the defendant has used his or her criminal record to create a favorable inference for himself or herself, the prosecutor may cross-examine the defendant about the details of those prior crimes or actions. However, the court ruled that in this case the defendant did not open the door because his brief summary of his criminal record was accurate and complete.

Partially Inaudible Tape Recording Was Admissible

State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (10 September 1993). Trial judge has discretion to determine whether a partially inaudible tape recording is admissible, and the court ruled that the judge did not err in admitting it.

Trial Judge's Instruction On Defendant's Flight Was Proper

State v. Barnes, 334 N.C. 67, 430 S.E.2d 914 (2 July 1993). The court ruled that the trial judge properly instructed jury on defendant's flight (N.C.P.I.—Crim. 104.36) when the evidence showed that following a shooting, defendant roamed the woods, stayed in Virginia for two days, and then was in South Carolina for two days. In addition, defendant wrote to his sister outlining a plan to escape from prison while awaiting trial.

Defense Cross-Examination Did Not Open Door For State's Redirect Examination, Based On Facts In This Case

State v. Quarg, 334 N.C. 92, 431 S.E.2d 1 (2 July 1993). State's expert witness testified on direct examination about initial screening of child sexual assault victim and the admission assessment. Then, after defense objection and voir dire hearing, trial judge ruled that witness's proposed testimony (whether he had diagnosed victim as suffering from any kind of trauma) was inadmissible because the state had failed to provide the defense with the expert's final report as required by a discovery request (state had provided defense only with expert's initial 13 August 1990 report). Thereafter, the defense on cross-examination of the witness asked him about the victim's statement made to the expert which he had noted in his initial 13 August 1990 report. State, on redirect examination, was permitted by the trial judge to question the expert about diagnosis of post-traumatic stress disorder [such testimony is admissible only as corroborative evidence under State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992)], which was based on series of consultations with the victim that occurred beyond the time of the initial report. The court ruled that trial judge erred in permitting this redirect examination, because the defendant did not open the door to this testimony by asking the expert about the initial report on cross-examination.

Search and Seizure and Confessions

Physical Evidence Found As Result Of *Miranda* Violation Is Admissible

State v. May, 334 N.C. 609, 434 S.E.2d 180 (10 September 1993). The court ruled that physical evidence found as a result of a *Miranda* violation (in this case, the defendant's statement led officers to a knife, pair of gloves, and rag in the defendant's backyard) is admissible when defendant was not coerced into giving the statement (i.e., the statement was voluntarily given). Court relied on Michigan v. Tucker, 417 U.S. 433 (1974) and Oregon v. Elstad, 470 U.S. 298 (1985) in ruling that the officers violated the prophylactic rule of *Miranda* and *Edwards v. Arizona*, but not the defendant's right against compelled self-incrimination. The rule's deterrent value is satisfied by excluding the defendant's statement, but not the physical evidence.

Defendant Impliedly Waived *Miranda* Rights, Although He Was Silent After *Miranda* Warnings

State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (10 September 1993). Officer gave *Miranda* rights to defendant and defendant responded, "yes," when officer asked him if he understood the rights. Defendant remained silent when the officer asked defendant, first, whether he wished to

waive his right to remain silent and, second, whether he wished to waive his right to have counsel present during questioning. Soon thereafter, someone else asked defendant whether anything in the room belonged to him. Defendant responded that he owned the boxes. Officer then asked if he would consent to a search of the boxes, to which the defendant responded, "yes." Relying on North Carolina v. Butler, 441 U.S. 369 (1979), court ruled that defendant properly waived his rights. Court noted that although defendant remained silent when asked if he would waive his rights, he had previously affirmatively stated that he understood his rights. He appeared coherent then and capable of understanding his rights. Also, officers did not pressure him in any way to answer their questions. Thus, one can infer that, in answering the officers' questions after expressly acknowledging that he understood his right not to do so in the absence of counsel, defendant impliedly waived his rights to remain silent and to counsel.

(1) Order Denying Motion To Suppress Was Valid
(2) *Miranda* Warnings Were Sufficient For Defendant's Waiver Of Sixth Amendment Right To Counsel

State v. Palmer, 334 N.C. 104, 431 S.E.2d 172 (2 July 1993). (1) Order denying motion to suppress was valid even though written order was filed after superior court term had concluded and 57 days after notice of appeal had been entered, when judge had verbally denied motion in open court after suppression hearing was held. See, e.g., State v. Smith, 320 N.C. 404, 358 S.E.2d 329 (1987) and State v. Horner, 310 N.C. 274, 311 S.E.2d 281 (1984). (2) Giving *Miranda* warnings was sufficient to establish defendant's waiver of his Sixth Amendment and state constitutional right to counsel. To constitute a valid waiver, the officer was not required to explain specifically to the defendant that he was waiving his right to counsel under these constitutional provisions.

State Employee's Fifth Amendment Rights Were Not Violated When He Was Fired

Debnam v. Department of Correction, 334 N.C. 380, 432 S.E.2d 324 (30 July 1993). The court ruled that state did not violate public employee's Fifth Amendment right against compelled self-incrimination by firing employee for refusing to answer questions relating to his employment (in this case, an incident involving a ring allegedly stolen from an inmate), when the employee was informed that his failure to answer might result in his dismissal, and the state did not seek the employee's waiver of his immunity from the state's use of any of his answers in a criminal action against him. Court rejected employee's argument that Fifth Amendment prohibited the state from firing him for refusing to answer questions during its internal investigation, because he was not advised that his responses could not be used against him in any criminal prosecution and that the questions would relate specifically and narrowly to his performance of official duties.

Capital Case Issues

(1) Peremptory Instructions Required For Nonstatutory And Statutory Mitigating Circumstances

(2) Judge Must Instruct On Not Using Same Evidence In Finding Aggravating Circumstances

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (10 September 1993). (1) At sentencing, defendant submitted written request for peremptory instructions for all mitigating circumstances. The court ruled that trial judge must, if requested, give peremptory instruction for any mitigating circumstances, statutory or nonstatutory, if supported by uncontroverted evidence. Court granted new sentencing hearing because trial judge erred in failing to give peremptory instruction for several nonstatutory mitigating circumstances supported by uncontroverted evidence (individual jurors may still reject nonstatutory mitigating circumstance because supporting evidence was not convincing or they did not consider it to have mitigating value). (2) Court determined that separate evidence supported each of three aggravating circumstances. And it is not improper to submit aggravating circumstances even though evidence supporting each may overlap. However, trial judge must instruct the jury in such a way to ensure that jurors will not use the same evidence in finding more than one aggravating circumstance.

Defendant Was Not Entitled To Instruction On Mitigating Circumstance Of No Prior Significant Criminal History

State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (8 October 1993). The court ruled that trial judge did not err in refusing to instruct on the statutory mitigating circumstance [G.S. 15A-2000(f)(1)] that defendant had no significant prior criminal history. Defendant, age 20, had prior convictions for provisional license violation; failure to stop at scene of accident; possession of alcoholic beverage by person under 21; drunk and disruptive in public; 14 counts of felonious breaking and entering; 13 counts of felonious larceny; and conspiracy to break and enter. Defendant's psychiatrist testified that defendant told him he was convicted at age 17 for stealing a woman's pocketbook to get drugs and he had also broken into about 60 houses to support his drug problem. Court concluded that no rational juror could have found that defendant had no significant history of prior criminal activity.

Miscellaneous

Defendant Must Clearly And Unequivocally Request To Represent Himself Or Herself

State v. Williams, 334 N.C. 440, 434 S.E.2d 588 (10 September 1993). The court ruled that a defendant must clearly and unequivocally request to represent himself or herself. Court stated that

this rule is required to prevent defendants from manipulating trial courts by recording an equivocal request at trial and then arguing on appeal either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel. There is no right to represent oneself if one's statements or actions create "any ambiguity" about the desire to do so. Court discussed the facts in this case and ruled that the defendant did not make a clear and unequivocal request to represent himself.

Defendant Had No Right To Enforce Plea Bargain

State v. Marlow, 334 N.C. 273, 432 S.E.2d 275 (30 July 1993). Prosecutor made proposed plea agreement with defendant and codefendant in which defendant would plead guilty to second-degree murder and other offenses and codefendant would plead guilty to first-degree murder. Trial judge stated he could not accept plea from codefendant unless state had no evidence of aggravating circumstances (apparently there were aggravating circumstances). Prosecutor then stated that proposed plea agreement with both defendants was contingent on both pleading guilty. Judge then rejected pleas from both defendants. The court ruled that judge did not err in rejecting pleas, because a prosecutor may rescind an offer of a proposed plea agreement before *actual entry of the guilty plea* and acceptance and approval of proposed sentence by judge. In this case, defendant tendered a guilty plea that was not accepted and approved by the trial judge. Furthermore, defendant was not prejudiced at trial by rejection of the proposed plea agreement.

Defense Counsel Declining Lesser-Included Instructions May Not Raise Issue On Appeal

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (10 September 1993). Trial judge asked defense counsel at jury instruction conference if there were any lesser-included offenses to submit for the first-degree burglary charge. Defense counsel responded, "[n]ot based on the evidence, I don't think so your honor." The court ruled that defendant therefore may not raise on appeal the failure to instruct on lesser-included offenses.

Defense Counsel Did Not Concede Defendant's Guilt In Closing Argument

State v. Harvell, 334 N.C. 356, 432 S.E.2d 125 (30 July 1993). Defense counsel during closing argument asserted that defendant was not guilty of first- or second-degree murder but stated that the evidence was most closely related to voluntary manslaughter. The court ruled, relying on State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992), that defense counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence established the commission of any crime, it was voluntary manslaughter.

Prosecutor's Comment On Defendant's Failure To Testify Required New Trial

State v. Reid, 334 N.C. 551, 434 S.E.2d 193 (10 September 1993). Prosecutor's statement in jury argument, "The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him," was error and required the trial judge to give a curative instruction to the jury when the statement was made. In this case, the judge overruled the defendant's objection to the prosecutor's statement. The court stated that a judge's later instructions to the jury about the

defendant's right not to testify does not cure the error. Court noted that a prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute the state's evidence, but prosecutor may not comment that a defendant has failed to testify.

Court Finds No *Brady v. Maryland* Violations In Two Separate Cases

State v. Howard, 334 N.C. 602, 433 S.E.2d 742 (10 September 1993). The court ruled that trial judge properly denied defendant's motion for appropriate relief that alleged that the state failed to disclose that a witness—who did not testify for the state—had failed to positively identify the defendant as the assailant. Evidence showed that the witness's testimony was not material under the due process standard—based on the facts in this case (strong and cumulative testimony of three eyewitnesses and circumstantial evidence), there was no reasonable probability that disclosure of the witness's information to the defense would have affected the outcome of defendant's trial

State v. Potts, 334 N.C. 575, 433 S.E.2d 736 (10 September 1993). The court ruled that testimony of a witness, who was not disclosed by the state, about a note stating that others (not the defendant) committed the murder would have been inadmissible as hearsay and did not point directly to the guilt of another. Nor would this evidence have led to other admissible evidence. Therefore, trial judge properly denied defendant's motion for appropriate relief.

Proceeds From Civil RICO Forfeiture Must Go To County School Fund

State ex rel. Thornburg v. House and Lot, 334 N.C. 290, 432 S.E.2d 684 (30 July 1993). The court ruled that since civil RICO act [see G.S. 75D-1 through -14] provides that proceeds from the sale of RICO forfeited property accrues to the state, Sec. 7, Art. IX of the North Carolina Constitution requires that proceeds from the forfeiture must go to the county school fund.

Motion For Appropriate Relief Under G.S. 15A-1415 Must Be Made In Appellate Division After Defendant Gives Notice Of Appeal

State v. Ginyard, 334 N.C. 155, 431 S.E.2d 11 (2 July 1993). When a defendant is convicted in superior court and gives notice of appeal to the appellate division, a motion for appropriate relief under G.S. 15A-1415 must be made in the appellate division. Superior court does not have jurisdiction to hear the motion. See G.S. 15A-1418(a).

Indigent Person May Not Be Incarcerated for Civil Contempt For Failing To Pay Child Support Unless Provided With Court-Appointed Lawyer

McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (2 July 1993). The court ruled that the due process clause of Fourteenth Amendment requires that an indigent person held in civil contempt for failing to pay child support may not be incarcerated unless that person was provided with a court-appointed lawyer to represent him or her at the civil contempt hearing. To extent Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980) is inconsistent with this ruling, it is overruled.

North Carolina Court of Appeals

Evidence

Admissiblity Of Statements Against Penal Interest Under Rule 804(b)(3)

State v. Eggert, 110 N.C. App. 614, 430 S.E.2d 699 (15 June 1993). Defendant was convicted of trafficking by possessing LSD. Officers approached a van, detected a strong odor of marijuana, and arrested Burton, Malezewski, and the defendant. An officer searched the defendant and found 80 hits of LSD in his pocket. A small box containing 698 doses of LSD was found where the defendant was sitting in the van before he was arrested. The defendant called Malezewski as a witness, who testified outside the jury's presence that when he was in a holding cell with Burton, Burton said he felt bad because [the defendant] was busted and that Burton pretty much admitted that the LSD was his. Malezewski also testified that Burton "did admit" that LSD found in the box was his, although he never said that it was not the defendant's. The court ruled that statement made by Burton [who was unavailable as a witness because he had asserted his Fifth Amendment privilege not to testify] was against Burton's penal interest and that there were sufficient corroborating circumstances to indicate clearly the trustworthiness of the statement: (1) Burton was seated next to defendant in the van; (2) LSD was found where the defendant was seated, necessarily in close proximity to Burton; and (3) Burton admitted owning a bag found by officers that contained drug paraphernalia and one hit of LSD. Therefore, trial judge erred in refusing to allow statement to be admitted under Rule 804(b)(3).

Defendant testified out of the jury's presence that while Burton and he were in jail that "basically [Burton] said that he felt bad for me being arrested, and I said why, and he said because that wasn't your stuff." When the defendant asked Burton who owned the LSD, Burton "declined to answer." The court ruled that trial judge properly refused to allow statement to be admitted under Rule 804(b)(3) because it was not against Burton's penal interest—it is not a crime to know that drugs do not belong to a particular individual.

Similar Sexual Acts Against Person Other Than Victim Was Admissible Under Rule 404(b)

State v. Matheson, 110 N.C. App. 577, 430 S.E.2d 429 (15 June 1993). Defendant was convicted of two counts of rape of his stepdaughter. Evidence showed that the defendant assaulted the victim weekly from 1984 to 1991. The state also offered evidence [under Rule 404(b) to show common scheme and plan] that defendant sexually assaulted another stepdaughter on a weekly basis from 1979 to 1981 in a similar manner to the sexual assaults being tried. Defendant had been in prison from 1982 to 1984. The court ruled, based on the facts in this case, that the sexual assaults on the other person were not so remote in time that they were inadmissible

under Rule 404(b), and the trial judge did not abuse his discretion in admitting the evidence under Rule 403.

(1) Evidence Of Prior Sexual Activity Properly Excluded Under Rule 412
(2) No Right To Cross-Examine Expert With Exhibits Not Used In Forming Expert's Opinion And When Exhibits Were Not Learned Treatises

State v. Black, 111 N.C. App. 284, 432 S.E.2d 710 (3 August 1993). (1) At *in camera* hearing to determine admissibility of evidence of prior sexual behavior of alleged sexual assault victim with two particular men, victim denied having sexual relations with them. Defense counsel asserted that one of them would testify to the contrary, but that person never testified nor was any other evidence offered to contradict the victim. Trial judge properly refused to allow the cross-examination since defendant never offered proof of the prior sexual behavior and its relevancy. (2) Defendant sought to cross-examine state's medical expert with medical records that expert had not reviewed in formulating her opinion concerning sexual abuse. The court ruled that defendant improperly sought to question expert concerning contents of data that the expert had never before contemplated nor used in any way to formulate her opinion, and it also was not contained in any recognized learned treatises. Court noted that defendant properly had been permitted to cross-examine expert about facts and data on which her opinion had been based and to use counter-hypotheticals to point out the overlooked sources of information.

(1) Doctor Was Properly Qualified As Expert
(2) Expert Testimony That Child Had Been Sexually Abused Was Improper, Based On Facts In This Case

State v. Parker, 111 N.C. App. 359, 432 S.E.2d 705 (3 August 1993). (1) Based on doctor's training and experience, he was properly qualified as an expert in pediatrics and in detection of child abuse and trauma. (2) Relying on State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987), court ruled that doctor was improperly permitted to testify that child had been sexually abused, based on the facts in this case. The expert based his opinion only on the fact that her hymeneal ring was not intact and his interview with the child in which she related a history of sexual abuse. With this limited basis for the expert's opinion, he was not in a better position than the jury to determine whether the child was sexually abused.

Lay Opinion Testimony About Defendant's Behavior Was Admissible

State v. Dukes, 110 N.C. App. 695, 431 S.E.2d 209 (6 July 1993). The court ruled that the following opinion testimony was admissible under Rule 701, based on witnesses' observation of defendant's behavior: (1) testimony by state's witnesses that the defendant was feigning mental illness after the murder of his wife; and (2) law enforcement officers' testimony that the defendant was faking distress at the scene of his wife's death and in route to and at the law enforcement center.

Defendant Failed To Satisfy Burden Of Proof In Establishing *Boykin* Error

State v. Hester, 111 N.C. App. 110, 432 S.E.2d 171 (20 July 1993). Defendant moved to suppress the use of three district court convictions for use in sentencing under the Fair Sentencing Act, based on Boykin v. Alabama, 395 U.S. 238 (1969) error. At the suppression hearing, the

defendant offered into evidence the district court files of his prior convictions, which demonstrated that he had pled guilty while being represented by an attorney. Defendant did not present any additional evidence, and the state did not present evidence. Relying on State v. Smith, 96 N.C. App. 235, 385 S.E.2d 349 (1989), the court ruled that defendant failed to meet his burden of proof. Court noted that "[n]othing in the record affirmatively indicates the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases . . . Defendant presented no testimony on this issue, and his assertion to the court below that the resultant convictions were invalid, without more, is insufficient. While waiver may not be 'presumed' from a silent record . . . neither may lack of waiver be inferred, particularly in favor of a party with the burden of proving it.

Judicial Notice Of Time Of Sunset And Phase Of Moon Based On Newspaper Is Not Required

State v. Canady, 110 N.C. App. 763, 431 S.E.2d 500 (6 July 1993). Trial judge was not required to take judicial notice of the time of sunset and phase of moon on a particular date, based on a report in a local newspaper. Such facts are not generally known and a newspaper is not a document of such indisputable accuracy as to justify judicial reliance. Court noted that records of U.S. Naval Observatory would be such a document.

State Allowed To Use State Witness's Grand Jury Testimony To Impeach Witness

State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (20 July 1993). The day before defendant's drug trafficking trial, key state's witness informed prosecutor that he would not testify at trial. State called witness at trial, who testified that he could not "recall right offhand" if he told detective the he brought defendant to North Carolina to help him sell drugs. He denied making such a statement before investigative grand jury, and stated that he would be willing to accept the punishment for perjury before the grand jury. Trial judge declared this witness as adverse witness and allowed the state to introduce witness's grand jury testimony to impeach the witness. The court ruled that trial judge did not err, based on the "extraordinary facts" of this case.

Criminal Offenses

Sufficient Evidence Of Kidnapping To Facilitate Commission Of Felony

State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (3 August 1993). Defendant was convicted of kidnapping infant for the purpose of facilitating the commission of a felony (sexual assault against mother). Defendant's accomplice pointed a gun at mother's head while defendant ordered mother to place her infant in a crib. When baby began to cry, accomplice pointed the gun at the infant and the mother while defendant refused the mother's pleas to hold the child. Defendant then forced the mother into another room where she was bound, gagged, and sexually assaulted. The court ruled that there was sufficient evidence that (1) infant was unlawfully confined, restrained, and removed, and (2) removal of child facilitated the commission of the sexual assault felony against the mother. Court also ruled that with kidnapping by facilitating the commission of a felony, the underlying felony need not be committed against the victim (in this

case, the infant) of the kidnapping. It was sufficient that the felony was committed against the mother.

Unoccupied Condominium Unit, Available For Rental, Is Dwelling For Burglary Offense

State v. Hobgood, 112 N.C. App. 262, 434 S.E.2d 881 (5 October 1993). Condominium unit, available for rental but unoccupied at the time of a break-in, was a dwelling to constitute the offense of second-degree burglary.

Jury May Determine Defendant's Age By Observing Defendant In Court

State v. Bynum, 111 N.C. App. 845, 433 S.E.2d 778 (7 September 1993). Defendant, forty-one years old, was charged with indecent liberties with a minor. State did not offer any evidence of defendant's age, and the defendant did not testify. The court ruled that jury could reasonably infer—by observing him in the courtroom and considering testimony that the defendant drank alcoholic beverages for many years and had married the victim's mother in 1987—that the defendant was at least sixteen and five years older than the victim, particularly since he was twenty-four years older than the age element of the crime.

Jury Instruction Inconsistent With Conspiracy Indictment

State v. Minter, 111 N.C. App. 40, 432 S.E.2d 146 (20 July 1993). Indictment alleged defendant conspired with Branch to commit drug offense (apparently, it did not allege that defendant conspired with Branch and unnamed others). The court ruled that jury instruction that defendant "agreed with at least one other person" was error because it did not limit the agreement to the only person alleged in the indictment, Branch.

Failure To Submit Common Law Robbery Was Error When Evidence Of Missing Firing Pin

State v. Everette, 111 N.C. App. 775, 433 S.E.2d 802 (7 September 1993). In armed robbery trial, judge erred in failing to submit common law robbery to jury. State's witness testified that when accomplice got back into car after robbery had occurred, he looked at the gun and the firing pin was missing and two barrels fell out of it.

State Failed To Allege Prior Conviction Properly To Elevate Misdemeanor To Felony

State v. Sullivan, 111 N.C. App. 441, 432 S.E.2d 376 (3 August 1993). State failed to allege a prior conviction properly under G.S. 15A-928 to elevate a violation of G.S. 14-56.1 (breaking into coin-operated machine) from a misdemeanor to a felony. A separate indictment alleging habitual felon does not substitute for the pleading requirements of G.S. 15A-928.

Arrest, Search, and Interrogation Issues

(1) Officer's Interaction With Defendant At Train Station Was Not A Seizure

(2) Officers Had Reasonable Suspicion To Stop Vehicle

(3) Officers Did Not Have Probable Cause To Search Defendant After Vehicle Stop

State v. Pittman, 111 N.C. App. 808, 433 S.E.2d 822 (7 September 1993). Two officers were on patrol at train station at 1:30 a.m. They saw the female defendant and a man speaking, and they parted company when they saw the officers. Officer Gunn approached defendant and Officer Ferrell approached the man. Defendant showed Gunn a train ticket and stated she was traveling alone and did not know the man with whom she had been seen. Gunn noticed that defendant was constantly looking over at the man, who was twenty feet away. Defendant consented to a search of her bag; nothing was found. Meanwhile, Ferrell spoke with the man, who said he was traveling alone and did not know the defendant. The man consented to a search of his bag; nothing was found. Later a vehicle pulled up to the train station, and the man put his bag in the trunk. The man then motioned to the defendant to approach the car, he placed her bag in the trunk, and the two of them got in the car and left. The officers compared information they had learned from their encounters with the man and the defendant and had the car stopped by a uniform officer. A female officer was called to the scene to search the defendant (she had refused to consent to a search); instead the defendant was taken to the police station and searched. (1) The court ruled that officer Gunn did not seize the defendant when he approached her at the train station. He merely approached her, asked a few questions, and she voluntarily gave him her train ticket and consented to a search of her bag. Court relies on Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d. 389 (1991). (2) The court ruled that officers had reasonable suspicion to stop the vehicle in which the defendant was a passenger, based on the facts discussed above. (3) The court ruled that officers did not have probable cause to search the defendant after the vehicle stop, based on the facts discussed above.

Officers Had Probable Cause To Arrest Defendant For Possessing Drugs

State v. Trapp, 110 N.C. App. 584, 430 S.E.2d 484 (15 June 1993). On 3 January 1991 a confidential informant advised Detective Hines that Steven James would be driving from Jacksonville to Maysville that night to make a cocaine purchase, and James would return to Jacksonville and go to 106 Circle Drive and then to the Triangle Motel. Another confidential informant advised Detective Selogy that drugs were being sold at 106 Circle Drive and that James and his girlfriend, defendant Trapp, lived at that address; the informant also said that defendant Trapp hid the drugs in her vagina while they were being transported. [It does not appear from the court's opinion that either informant told the detectives their basis of knowledge about James's and defendant Trapp's activities.] That night the detectives saw people matching one of the informant's descriptions leave a car and enter 106 Circle Drive and later leave that address in the same car and arrive at the Triangle Motel. When they left the motel, Detective Selogy followed

the car and activated his blue lights. He saw the female passenger, later identified as defendant Trapp, move closer to the driver, later identified as James, and then saw the male driver put his hand over the female's lap as he was looking in the rearview mirror. After the car was stopped, defendant Trapp was taken to the police station. The court ruled that, based on the informants' information and the officer's corroboration of that information, the detectives had probable cause to arrest the defendant when they stopped the car. Court relies on several cases, including Draper v. United States, 358 U.S. 307 (1959) and Illinois v. Gates, 462 U.S. 213 (1983).

(1) Discovery Of Marijuana On Defendant's Property Was Constitutional
(2) Search Of Property By Probation Officer, With Assistance From Law Enforcement Officers, Was Authorized By Probation Condition

State v. Church, 110 N.C. App. 569, 430 S.E.2d 462 (15 June 1993). Based on a first-time informant's information that marijuana was being grown near a white frame house located behind an oil company, officers went there to investigate. They saw a white frame house and a second house with wood siding, which was about 150 feet west of the white frame house. Officers walked to front porch of the white house, knocked on the door, and received no answer. From the front porch, they saw two marijuana plants growing along a fence that went from the white house to another residence east of the white house and a third marijuana plant growing directly behind the second house. After seeing these marijuana plants, officers walked to the second house to determine who lived in the houses. One officer knocked on front and side doors and then saw the defendant walk from the garage that was next to the second house. The defendant informed the officers that he owned both houses, but lived in the second house. Officers asked the defendant if they could search the houses and garage, but he refused. After arresting the defendant, officers asked him for a garage door key, which he produced. An officer inserted the key in the lock, found that it fit, and withdrew the key without opening the door. Officers learned that the defendant was on probation, contacted his probation officer, and were informed by her that as a condition of probation, the defendant was obligated to submit to warrantless searches by his probation officer. An officer informed his probation officer of the discovery of marijuana and asked her if she would be interested in conducting a warrantless search under the probation condition. She told the officer that she would be willing to conduct a warrantless search if she saw marijuana growing outside the defendant's house and determined that the plants more than likely belonged to him. She went to the house, saw the plants, determined that the plants probably belonged to the defendant, and authorized a warrantless search of the defendant's premises. She and nine law enforcement officers conducted the search.

The court ruled that officers entry onto the defendant's property (i.e., walking to front and side doors to look for the resident) was permissible, based on State v. Prevette, 43 N.C. App. 450 (1979). Court also noted that the "inadvertence" component of the plain view doctrine was deleted in Horton v. California, 496 U.S. 128 (1990), and ruled that plain view doctrine was satisfied in this case. [Note, however, that the plain view doctrine must be satisfied only when there is a seizure of property, not when only a search takes place. See Farb, *Arrest, Search, and Investigation in North Carolina*, 112 at n. 31 (2d ed. 1992). The officer's initial *observation* of the marijuana, before any *seizure* took place, did not need to satisfy the plain view doctrine.] Court also ruled that insertion of key in lock was not an unlawful search. [Other courts have disagreed about whether inserting a key in a lock is a search, compare United States v. Lyon, 898

F.2d 210 (1st Cir. 1990) (inserting key is not a search) with United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991) (inserting key is a search, but only reasonable suspicion is required to do so).]

The court ruled that the warrantless search of the defendant's premises, conducted under the probation condition in G.S. 15A-1343(b1)(7), was valid. It was not improper that law enforcement officers assisted the probation officer to conduct the search. The court noted that the probation officer in this case had withheld her commitment to search the premises until she corroborated the officer's information (although the court does not state that the corroboration was a necessary precondition to the search).

Warrantless Entry Of Home Was Improper

State v. Wallace, 111 N.C. App. 581, 433 S.E.2d 238 (17 August 1993). Officers received information that marijuana was being grown in the basement of a residence. However, the officers were unable to corroborate the informant's information. Therefore, they went to the residence to confirm or deny the information. After knocking on the door, Jolly came out and closed the door behind him. Officers told him why they were there and asked him if there were others in the residence. Jolly told officers that one or his roommates was asleep inside. Officers then asked for consent to search the residence. Before Jolly could answer, Wallace came out of the residence. Officers then asked for consent to search, which Wallace and Jolly denied. Court's opinion then stated that *"Jolly then stated that 'there might be some drug paraphernalia and marijuana seeds in the house,' and that he would not consent to a search until he had time to get rid of the contraband."* After the officers were denied consent to search, they heard footsteps in the residence and a door shut on the inside. The officers asked Wallace and Jolly about who was in the residence and they said they did not know because they had just arrived. Officers then went inside to execute a protective sweep before leaving the residence to obtain a search warrant. Officers saw what appeared to be marijuana plants while inside. Defendants were detained in the residence while other officers obtained a search warrant, which included information about their observation of marijuana in the house.

The court ruled: (1) Uncorroborated information initially given officers was insufficient to establish probable cause to search the residence. (2) Officers did not violate defendants' rights by going to residence to investigate the information they had received. (3) Probable cause to search the residence existed when Jolly made the statement noted in italics above. (4) Officers did not have exigent circumstances to enter the residence without a search warrant. Court stated that the "record is devoid of any evidence that the officers entered the residence with a reasonably objective belief that evidence was about to be removed or destroyed." Court noted that the only purpose of officers' entry into the residence was to conduct a protective sweep until a search warrant could be obtained, and the officers did not believe they were in danger at any time. (5) State could not justify the search of the residence under the independent source exception to the exclusionary rule, Murray v. United States, 487 U.S. 533 (1988) and Segura v. United States, 468 U.S. 796 (1984). In this case, the search warrant was prompted by what the officers saw in their unlawful entry and the information obtained during the illegal entry was presented to the magistrate and affected the decision to issue the search warrant.

Inventory Search Was Invalid

State v. Peaten, 110 N.C. App. 749, 431 S.E.2d 237 (6 July 1993). Officers executed a search warrant to search a night club to determine if taxpaid alcoholic beverages were being illegally sold there. An executing officer decided to impound and to conduct an inventory of a BMW parked in the club's parking lot, because he believed it would have been vandalized if left there. The court ruled, relying on State v. Phifer, 297 N.C. 216, 254 S.E.2d 586 (1979), that the impoundment and inventory search was invalid because the reason stated (that vehicle would be vandalized) was not a ground authorized by departmental policy. Court noted that defendant was not present to make a disposition about the car, the car was not hazard to traffic (since it was parked in the club parking lot), and towing the car was not necessary in conjunction with any arrest.

Random Drug Testing Of Public Airport Authority Employee Was Constitutional

Boesche v. Raleigh-Durham Airport Authority, 111 N.C. App. 149, 432 S.E.2d 137 (20 July 1993). Public airport authority employee was discharged for refusing to submit to a random urine drug test. Employee performed preventive maintenance and repairs on airport terminal air conditioning, ventilating, and heating systems, and he had a security clearance to drive a motor vehicle 10 m.p.h. in a designated area on the apron of the flight area to get access to systems located on the outside of buildings. (The Federal Aviation Administration requires that all employees who drive a motor vehicle on the airside of the airport must be drug tested). Court finds that employee, if drug impaired while operating a motor vehicle, could increase the risk of harm to others and therefore ruled that the random drug testing policy was constitutional, based on Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

(1) Defendant Was Subject To Custodial Interrogation Requiring *Miranda* Warnings
(2) Defendant's Statement During Reading of *Miranda* Rights Was Admissible

State v. Dukes, 110 N.C. App. 695, 431 S.E.2d 209 (6 July 1993). Officer Moore arrived at a trailer park to investigate the murder of the defendant's wife. Both the defendant and a baby he was holding (outside trailer where body was located) had blood on their clothing. Defendant gave an exculpatory statement to the officer. Officer Moore accompanied the defendant and the baby to the defendant's trailer (defendant lived in a different trailer than his wife). Officer Moore instructed officer Thompson to guard the defendant, not allow him to leave his trailer, not allow any other person to enter the trailer, and not allow defendant to wash or change his clothes. Officer Thompson allowed the defendant to make telephone calls after he asked permission from the officer to do so. Officer Thompson accompanied the defendant to the bathroom to ensure that defendant did not wash or change his clothes. Officer Thompson later asked the defendant "do you know what happened?" (1) The court ruled that defendant was in custody while at his trailer with officer Thompson to require *Miranda* warnings—a reasonable person, knowing that his wife had just been killed, kept under constant police supervision, told not to wash or change his clothing and never informed that he was free to leave his own home, would not feel free to get up and go. Court also ruled that the officer's question constituted interrogation under the *Miranda* ruling. (2) Defendant was later arrested and taken to a law enforcement center. While the officer was advising the defendant of his *Miranda* rights, the defendant said, "I stabbed her." The court ruled that this statement was voluntary and not the result of custodial interrogation.

Defendant's Assertion Of His Sixth Amendment Right To Counsel Did Not Bar Custodial Interrogation About Unrelated Offense Under Federal And State Constitutions

State v. Harris, 111 N.C. App. 58, 431 S.E.2d 792 (20 July 1993). Defendant was arrested for armed robbery of Fast Fare store, committed to jail, and given his first appearance in district court where he declined appointed counsel (he stated he would hire his own attorney). He remained in jail for that charge. The next day he changed his mind and requested and was appointed counsel. Later that day, a detective who was investigating an unrelated armed robbery of a Circle K store interrogated the defendant after properly giving him *Miranda* warnings and obtaining a waiver of rights. Relying on *McNeil v. Wisconsin*, 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d. 158 (1991), the court ruled that defendant did not invoke his Fifth Amendment right to counsel for interrogation for the Circle K robbery (and he did not have a Sixth Amendment right to counsel since he had not even been charged yet for that offense) when he invoked his Sixth Amendment right to counsel for the Fast Fare robbery. Court also rejected defendant's arguments under Article I, Section 23 of the North Carolina Constitution.

Drug Cases

Drug Trafficking Conspiracy Includes Cumulative Amount Sold Over Period Of Conspiracy

State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (15 June 1993). Defendant was convicted of trafficking conspiracy to sell more than 100 but less than 2,000 pounds of marijuana. Evidence showed that over the period of the conspiracy from December 1986 until May 1989 coconspirator Dixon sold two to three pounds, and occasionally up to five pounds of marijuana per week. Relying on State v. Wilson, 106 N.C. App. 342, 416 S.E.2d 603 (1992) and State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984), the court ruled that there was only one conspiracy between defendant and Dixon over this period of time. Court also ruled that a drug trafficking conspiracy may exist even when there is an open-ended agreement that does not refer to the quantity of drugs to be sold—evidence of the cumulative quantity that a defendant sells in the course of a single open-ended conspiracy is sufficient to support a conviction for drug trafficking conspiracy to sell that quantity, even though the coconspirators' agreement is silent about the exact quantity.

Sufficient Evidence Of Drug Trafficking By Transportation

State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (15 June 1993). Relying on State v. Greenidge, 102 N.C. App. 447, 402 S.E.2d 639 (1991) and State v. Outlaw, 96 N.C. App. 192, 385 S.E.2d 165 (1989), the court ruled that the defendant's removal of drugs from a dwelling house and bringing them an undercover agent in a car was sufficient evidence of transportation to support the conviction of drug trafficking by transportation.

Sufficient Evidence Of Distance From Place of Drug Sale To School Under G.S. 90-95(e)(8)

State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (3 August 1993). Defendant was convicted of felonious sale of cocaine to an undercover officer within 300 feet of school property under G.S. 90-95(e)(8). The court ruled that evidence was sufficient to prove that sale of cocaine was within 300 feet of school property, based on school board employee's oral testimony that he was familiar with school property, his identification of the location of the middle school, and the officer's testimony that sale occurred 100 feet from school boundary. Introduction of maps and plats was unnecessary.

Defendant's Reputation As Drug Dealer Inadmissible When Character Not In Evidence

State v. Morgan, 111 N.C. App. 662, 432 S.E.2d 877 (17 August 1993). Trial judge erred in admitting evidence of the defendant's reputation in the community as a drug dealer before defendant had put on any evidence, since defendant had not offered any evidence of a pertinent character trait.

Prayer For Judgment Continued (PJC) Cases

PJC With Mental Health Treatment Condition Was A Final Judgment

State v. Brown, 110 N.C. App. 658, 430 S.E.2d 433 (15 June 1993). Defendant in district court was found guilty of communicating threats, and a PJC was entered on conditions that defendant pay court costs, that he continue with any mental health treatment he was currently undergoing, and that he not contact his ex-wife, the prosecuting witness. Several weeks later, the state moved to hold the defendant in contempt of court for violating the condition that he not contact the prosecuting witness. Instead, the judge entered a judgment imposing a suspended sentence with supervised probation. The court ruled that the condition that the defendant continue with mental health treatment was punishment and therefore the original PJC was a final judgment, not a PJC, and judge did not have authority to later impose a judgment with supervised probation. Court remanded the case for a hearing on contempt. [Court expressly did not decide whether the condition that the defendant not contact his ex-wife was punishment.]

PJC To Certain Date Still Permits Sentencing After That Date

State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (15 June 1993). Defendant pled guilty on 24 May 1991 in superior court to two charges, and prayer for judgment was continued several times to specific dates, with the last date being 3 June 1991. Sentencing did not occur on that date. When the failure to act on the case was discovered, the defendant's sentencing hearing was rescheduled for 16 July 1991, and judgment was imposed then. Court rejected defendant's argument that court did not have jurisdiction to impose judgment on 16 July 1991. Court noted that there was not any improper purpose for the delay in sentencing and no evidence that defendant suffered actual prejudice from the delay from 3 June 1991 to 16 July 1991. Defendant never requested before 16 July 1991 that sentence be imposed, and his failure to do so is an implied consent to continuation of sentencing hearing beyond 3 June 1991. The court ruled that

the delay in sentencing was not unreasonable, and trial judge (different from the judge who accepted the original guilty pleas) had authority to sentence defendant on 16 July 1991.

Miscellaneous

Prosecutor Violated Plea Bargain Agreement By Statement At Sentencing Hearing

State v. Rodriguez, 111 N.C. App. 141, 431 S.E.2d 788 (20 July 1993). The court ruled that prosecutor violated terms of a plea agreement, which provided that the prosecutor agreed to "take no position on sentencing," when the prosecutor suggested to the trial judge certain non-statutory aggravating factors at the sentencing hearing—even though the trial judge did not find the factors that the prosecutor had suggested (judge found a different non-statutory aggravating factor) and defense counsel did not object to the prosecutor's actions. Court ordered a new sentencing hearing before a different trial judge.

Joinder Of Defendants Was Proper Even Though They Had Conflicting Defenses

State v. Pendergrass, 111 N.C. App. 310, 432 S.E.2d 403 (3 August 1993). Defendant was tried with codefendant for robbery and various kidnappings and sexual assaults that occurred in retail store. Codefendant held gun to victims and later defendant took victims to another room in the store where he sexually assaulted them. At joint trial, codefendant testified to assisting defendant in the robbery but denied knowledge or participation in the sexual assaults. She said that the defendant had planned the crime, obtained the cuffs and gun used in the crimes, and gagged and tied the victims and removed them to another room. She said after their arrest that defendant told her that he did not rape any of the women but that he had masturbated on "the girl." Defendant did not testify. Court noted that prior case law provides that severance is not necessarily required simply because two defendants may offer antagonistic or conflicting defenses. A defendant is not prejudiced if the state presents plenary evidence of defendant's guilt, independent of the codefendant's testimony, and defendant had the opportunity to cross-examine the codefendant. Court reviewed all the evidence and determined that trial judge not err in denying defendant's motion to sever his trial from codefendant. Codefendant's evidence merely corroborated the state's evidence. Additionally, codefendant was not present in room where sexual assaults occurred and did not testify about those events.

Defendant's Counsel Had Conflict Of Interest In Representing Defendant When He Had Previously Represented State's Witness

State v. James, 111 N.C. App. 785, 433 S.E.2d 755 (7 September 1993). Lawyer represented defendant in murder case and also represented simultaneously a key prosecution witness for unrelated federal and state charges. Lawyer disclosed this information before he cross-examined this key prosecution witness. Trial judge did not conduct inquiry into lawyer's alleged conflict of interest (court ruled that judge's failure to conduct inquiry was, by itself, reversible error.) The court ruled that lawyer's dual representation of defendant and key prosecution witness established conflict of interest that prevented lawyer from effectively representing defendant in murder case; it affected the lawyer's ability to impeach effectively the credibility of the key prosecution witness,

particularly since the lawyer negotiated a proposed plea bargain in the federal case that would give him a sentence reduction for substantial assistance. Court noted that the Sixth Amendment right to conflict-free representation may be waived by a defendant, but there was no such waiver in this case.

DWI Properly First Tried In Superior Court When Indictment Issued After Presentment

State v. Gunter, 111 N.C. App. 621, 433 S.E.2d 191 (17 August 1993). Defendant was charged with DWI in a citation. While the charge was pending in district court, the grand jury issued a presentment for DWI, the prosecutor submitted an indictment for DWI, and the grand jury then indicted defendant for DWI. The court ruled that superior court had original jurisdiction to try DWI, based on G.S. 7A-271(a)(2).

Trial Judge Erred In Ordering Defendant To Sign Confession Of Judgment

State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (17 August 1993). (Note: this opinion replaced the opinion of 6 July 1993, which had been withdrawn.) Trial judge erred in requiring defendant to sign confessions of judgment in favor of five victims as a condition of probation, in addition to ordering defendant to pay restitution to them, since imposition of restitution is not a legal obligation equivalent to a civil judgment.

Assault Victim Entitled To Compensation Although She Refused To Prosecute

Ellis v. N.C. Crime Victims Compensation Commission, 111 N.C. App. 157, 432 S.E.2d 160 (20 July 1993). Victim was assaulted by boyfriend and called police department. Officer responded to call. Victim told officer what had happened, refused medical treatment, and also told the officer that she did not wish to prosecute. She merely wanted her boyfriend to leave (which he apparently did). The court ruled that G.S. 15B-11(a) does not list a victim's failure to prosecute as a ground to deny an award, and G.S. 15B-11(c) ("victim has not fully cooperated with appropriate law enforcement agencies") does not permit a denial of an award when victim has failed to prosecute. Court also noted that G.S. 15B-14(a) provides that an award may be approved whether or not a prosecution occurs. Therefore, the victim was entitled to an award in this case—she fully cooperated with law enforcement; there was no evidence that the investigating officer asked her to prosecute.

Burden Of Proof On Insanity Acquittees At Commitment Rehearings Is Constitutional

In re Hayes, 111 N.C. App. 384, 432 S.E.2d 862 (3 August 1993). The court ruled that it is constitutional to place burden of proof on insanity acquittee at commitment rehearing to prove by a preponderance of evidence (to obtain his or her release) that the acquittee is no longer dangerous or mentally ill. Court also ruled that retroactive application of new statute placing burden of proof on acquittee did not violate federal or state *ex post facto* constitutional provisions.

Improper Statutory Aggravating Factor For Accessory After The Fact Of Murder

State v. Whitley, 111 N.C. App. 916, 433 S.E.2d 826 (7 September 1993). Defendant pled guilty to accessory after the fact of murder. Trial judge erred in finding as a statutory aggravating factor that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws, because that factor was based on evidence necessary to prove an element of the offense—that the accomplice personally aided the principal in an attempt to avoid personal liability.

Refusal To Appoint Substitute Counsel At Probation Hearing Was Not Error

State v. Tucker, 111 N.C. App. 907, 433 S.E.2d 476 (7 September 1993). At beginning of defendant's probation revocation hearing, defendant's counsel moved, at defendant's request, to withdraw as counsel. The trial judge granted the motion to withdraw but denied defendant's motion to appoint substitute counsel. The court ruled that trial judge did not violate defendant's constitutional rights, because—based on the facts in this case—defendant's counsel was reasonably competent to represent this defendant and the nature of the conflict did not render counsel incompetent or ineffective to represent this defendant.

Four-Year Revocation Of Defendant's Driver's License Was Proper

Wagoner v. Hiatt, 111 N.C. App. 448, 432 S.E.2d 417 (3 August 1993). The court ruled that Division of Motor Vehicles properly revoked driver's license for four years under G.S. 20-19(d) and (j) even though her two impaired driving convictions occurred in reverse order than the offense dates (i.e., arrest for first DWI, arrest for second DWI, conviction for second DWI, and then conviction for first DWI).

Prosecutors Entitled To Absolute Immunity For Actions Taken In Official Capacities

White v. Williams, 111 N.C. App. 879, 433 S.E.2d 808 (7 September 1993). Plaintiff sued seven state employees, including two prosecutors, in their individual capacities for actions involved in plaintiff's license being revoked for failing to appear in superior court for trial de novo of traffic offense. Clerk sent notice to DMV when defendant failed to appear in superior court, which resulted in plaintiff's license being revoked. (Plaintiff alleged that he did not receive proper notice of his scheduled trial in superior court and therefore his license should not have been revoked.) The district attorney refused to reopen defendant's case, which had been dismissed with leave by an assistant district attorney. The district attorney also refused to write to DMV on plaintiff's behalf to request that DMV's revocation order be withdrawn. The court ruled that prosecutors were entitled to absolute immunity for their actions in this case, which were taken in their official capacities; court relied on Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

Preliminary Injunction Prohibiting Abortion Protesters From Picketing At Doctor's Residence Did Not Violate Protesters' First Amendment Rights

Kaplan v. Prolife League of Greensboro, 111 N.C. App. 1, 431 S.E.2d 828 (20 July 1993). The court ruled that trial court properly issued preliminary injunction prohibiting abortion protesters from picketing within 300 feet of a doctor's residence. Order was content-neutral under the First Amendment because it focused on picketers' physical presence having a deliberate intimidating effect on doctor's household, rather than on the effect or impact of the protester's message. Trial court properly found that protesters were engaged in targeted residential picketing rather than some type of general public speech. Trial court also properly found that doctor established a likelihood of success on the merits of a private nuisance claim and potential for irreparable loss, but improperly found that the doctor established the likelihood of success on the merits of an intentional infliction of emotional distress claim. The injunction was appropriately narrowly tailored to prevent injury to the plaintiff and to allow other opportunities for speech.