RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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North Carolina Supreme Court

Criminal Law and Procedure

Insufficient Evidence To Support Instruction on Voluntary Intoxication in First-Degree Murder Prosecution

State v. Long, 354 N.C. 534, 557 S.E.2d 89 (18 December 2001). The defendant was convicted of first-degree murder based on premeditation and deliberation. The court noted that although the defendant was substantially impaired when officers found him several hours after the murder, the defendant did not present any evidence of his condition before or at the time of the murder. The court ruled, based on these and other facts, that there was insufficient evidence to support an instruction on voluntary intoxication.

Evidence Was Sufficient to Prove Defendant Constructively Possessed Cocaine Located Between Seat Pad and Back Pad in Back Right Seat of Vehicle Where Defendant Was Sitting—Court of Appeals Affirmed

State v. Matias, 354 N.C. 549, 556 S.E.2d 269 (18 December 2001), *affirming*, 143 N.C. App. 445, 550 S.E.2d 1 (15 May 2001). The defendant was convicted of possession of cocaine. After smelling the odor of marijuana emanating from a car, officers removed the driver and ordered three other occupants from the car. They found—located between the seat pad and back pad in the back right seat where the defendant was sitting—a small clear plastic bag containing marijuana and a small balled-up tin foil. Cocaine was found in the tin foil. One of the officers testified that the defendant was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat. The court ruled, based on these and other facts, that the evidence was sufficient to prove the defendant's constructive possession of the cocaine to support his conviction.

Evidence Was Sufficient to Prove Intent-to-Permanently-Deprive Element in Armed Robbery Involving Theft of Car

State v. Mann, 355 N.C. 294, 560 S.E.2d 776 (5 April 2002). The defendant was convicted of first-degree murder, armed robbery involving the theft of the murder victim's car, and other offenses. The evidence showed that the defendant lured the victim from her place of employment to the defendant's apartment, beat her there, transported her to various ATM locations to make withdrawals, forced her into the trunk of her car, and eventually shot and killed her. The victim's car was found later in a subdivision near the location of the victim's body. The court ruled, relying on State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986), that evidence the defendant took and later abandoned the car was sufficient to prove the intent-to-permanently-deprive element of armed robbery. This element may be inferred when a defendant shows a complete lack of concern whether the owner ever recovers his or her property.

Defendant's Evidence Was Insufficient to Show He Withdrew from Common Plan to Commit Armed Robbery

State v. Wilson, 354 N.C. 493, 556 S.E.2d 272 (18 December 2001). The defendant was convicted of two counts of first-degree murder based on premeditation and deliberation and felony murder, the underlying felony being armed robbery. The court ruled that the defendant failed to present sufficient evidence that he had withdrawn from a common plan with an accomplice to commit an armed robbery. The court applied the ruling in State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966) (withdrawal from a felony based on aiding and abetting) to this case, which was based on acting in concert. A defendant must renounce the common purpose and make it plain to others that he or she has done so and does not intend to participate further. The court noted that in this case any withdrawal by the defendant was done silently in his own mind without any outward manifestation or communication with his accomplice. Such evidence was insufficient to withdraw from the prior common plan to commit the armed robbery.

Trial Judge Properly Ruled That Prior Conviction Used in Habitual Felon Hearing Was Not Obtained in Violation of Defendant's Right to Counsel—Court of Appeals Ruling Reversed

State v. Fulp, 355 N.C. 171, 558 S.E.2d 156 (1 February 2002), *reversing*, 144 N.C. App. 428, 548 S.E.2d 785 (19 June 2001). The court ruled that the trial judge properly ruled that a prior conviction used in a habitual felon hearing was not obtained in violation of the defendant's right to counsel. The defendant did not meet his burden of proving by a preponderance of evidence that he had not waived his right to counsel—G.S. 15A-980(c). The court noted, citing State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), that a waiver of the right to counsel need not be in writing. G.S. 7A-457(a) ("may, in writing, waive") is directory, not mandatory. The court also stated that although a trial judge must consider the factors in G.S. 7A-457(a) in deciding whether a waiver of counsel is valid, the judge is not required to find and state that it considered those factors. (See the court's discussion of the particular facts in this case to support the trial judge's ruling.)

Defendant Was Not Entitled to Instruction on Self-Defense in Murder Trial

State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109 (1 February 2002). The defendant was convicted of two counts of first-degree murder. He shot and killed a law enforcement officer who was attempting to serve an arrest warrant on him, and he also shot and killed his wife. The trial judge instructed on self-defense, and the defendant on appeal assigned as error issues concerning self-defense. The court ruled that the trial judge erred in instructing on self-defense because the evidence did not support an instruction. The court stated that there was no evidence to support a finding that the defendant in fact formed a belief that it was necessary to kill either his wife or the law enforcement officer to protect himself from death or serious injury. The defendant had testified that he felt afraid and fired two shots into the floor of the trailer as he ran outside. He asserted that he did not intend to hit anyone and denied shooting either his wife or the law enforcement officer. He further testified that he was could not have caused the wounds that killed his wife, even when he was firing his weapon, and speculated that her stepfather was actually responsible for the killings.

Court Affirms, Per Curiam and Without Opinion, Court of Appeals Ruling That Evidence Was Insufficient to Support Theory of Second-Degree Kidnapping Alleged in Indictment

State v. Morris, 355 N.C. 488, 562 S.E.2d 421 (10 May 2002), *affirming*, 147 N.C. App. 247, 555 S.E.2d 353 (20 November 2001). The court affirmed, per curiam and without an opinion, the court of appeals ruling that the evidence was insufficient to support the theory of second-degree kidnapping alleged in the indictment—the defendant kidnapped the victim for the purpose of facilitating a felony. The defendant raped the victim in an apartment and then took her to an outside storage room and left her there. The court

of appeals noted that all the elements of rape were committed before the defendant removed her to the storage closet, and the continuous transaction doctrine does not apply because the two acts were not inseparable or concurrent. The court of appeals also noted that the defendant's acts may have supported the theory of kidnapping for the purpose of facilitating flight, but that theory was not alleged in the indictment.

Trial Judge Did Not Abuse Discretion in Denying Defense Challenge for Cause of Prospective Juror Who Expressed Concern About Potential Financial Impact of Jury Service—Court of Appeals Ruling Reversed

State v. Reed, 355 N.C. 150, 558 S.E.2d 167 (1 February 2002), *reversing*, 143 N.C. App. 155, 545 S.E.2d 249 (17 April 2001). The court ruled, distinguishing State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992), that the trial judge did not abuse her discretion in denying a defense challenge for cause of a prospective juror who had expressed concern about the potential financial impact of jury service. (See the court's discussion of the particular facts in this case to support the trial judge's ruling.)

Court Comments on Trial Judges' Excusal During Voir Dire of Prospective Jurors Who Are 65 or Older

State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (10 May 2002). The court ruled that the trial judge during jury voir dire did not abuse his discretion in granting the requests of two jurors, ages 68 and 69, to be excused. The court then commented that, in light of the statutory admonition contained in G.S. 9-6(a) (jury service is solemn obligation of all qualified citizens), "we remind the trial courts that excusing prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion. Defendant correctly points out that such jurors often bring to the jury pool both a wealth of experience and a willingness to serve."

Arrest, Search, and Confession Issues

Court Affirms, Per Curiam and Without Opinion, Court of Appeals Ruling That Officers Did Not Have Exigent Circumstances to Enter Residence to Seize Marijuana

State v. Nowell, 355 N.C. 273, 559 S.E.2d 787 (7 March 2002), *affirming*, 144 N.C. App. 636, 550 S.E.2d 807 (17 July 2001). The court affirmed, per curiam and without an opinion, the court of appeals ruling that officers did not have exigent circumstances to enter a residence to seize marijuana, based on the following facts. A drug courier working with law enforcement officers and wearing a "body wire" delivered approximately fifty pounds of marijuana to a residence where the purchaser and his accomplice were waiting for the delivery of the marijuana. When an officer heard through a radio transmitter that the purchaser and his accomplice were about to roll a marijuana cigarette from the marijuana and smoke it, law enforcement officers entered the residence without a search warrant.

Court Affirms Trial Judge's Ruling That Defendant Was in Custody Under *Miranda*, Based on Facts in This Case

State v. Buchanan, 355 N.C. 264, 559 S.E.2d 785 (7 March 2002). On remand to determine whether the defendant was in custody to require *Miranda* warnings under the appropriate standard for custody [see State v. Buchanan, 353 N.C. 332, 543 S.E.2d 823 (2001)], the trial judge ruled that the defendant was in custody when, after admitting to officers that he had participated in a murder, the interrogating officers accompanied him to the bathroom with an officer staying with him at all times. The court affirmed the trial judge's ruling.

Evidence

(1) Court Notes That Under Rule 806 Defendant Should Have Been Permitted on Cross-Examination to Ask State's Witness, Who Had Testified About Hearsay Statements of Nontestifying Witnesses, Impeachment Questions That Would Have Been Proper If Witnesses Had Testified
(2) State Violated Constitutional Duty to Provide Exculpatory Evidence
(3) Trial Judge Erred in Failing to Either Suppress Testimony of State's Firearm Expert or Order State to Retest Weapon When State Lost Test-Fired Bullets

State v. Canady, 355 N.C. 242, 559 S.E.2d 762 (7 March 2002). The defendant was convicted of two counts of first-degree murder and other offenses. (1) The court noted that under Rule 806 the defendant should have been permitted on cross-examination to ask a state's witness, who had testified about hearsay statements of nontestifying witnesses, impeachment questions that would have been proper if the witnesses had testified. [Author's note: The court ruled in this case that the trial judge had erred in admitting the hearsay statements, but the court also noted that this error was compounded by the additional error in not allowing the defendant to ask questions under Rule 806.] (2) The trial judge denied the defendant's motions that the state disclose the name of the informant who implicated five other people as being involved in the murders and the name and address of the person returned from Mississippi by officers who had named a person, not the defendant, who had arranged the murders. The court ruled that the defendant needed access to these people to interview them and develop leads [State v. Taylor, 344 N.C. 31, 473 S.E.2d 742 (1996) ("to make effective use of the evidence")], and there was a reasonable possibility that such information could have resulted in different verdicts. (3) The state's firearm expert test fired a gun recovered from a river, and the spent bullets were compared to those found at the murder scene. The expert testified that the gun appeared to be the murder weapon. The state lost the spent bullets. The defendant requested that the state either retest the gun and provide the defendant with the new tested bullets or that the expert's testimony be excluded. The trial judge denied the motion. The court ruled that the trial judge erred in failing to either suppress the testimony of the state's firearm expert or order the state to retest the weapon.

Expert May Not Offer Opinion in Child Sexual Abuse Case That Sexual Abuse Had In Fact Occurred Absent Physical Evidence Supporting Diagnosis of Sexual Abuse

State v. Stancil, 355 N.C. 266, 559 S.E.2d 789 (7 March 2002), *modifying and affirming*, 146 N.C. App. 234, 552 S.E.2d 212 (18 September 2001). The court ruled, citing State v. Trent, 320 N.C. 610, 359 S.E.2d 463 (1987) and State v. Grover, 142 N.C. App. 411, 543 S.E.2d 179, *affirmed per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001), that an expert may not offer an opinion in a child sexual abuse case that sexual abuse had in fact occurred absent physical evidence supporting a diagnosis of sexual abuse. However, an expert may testify, with a proper foundation, about the profiles of sexually-abused children and whether a particular child has symptoms or characteristics consistent with such profiles—the court cited State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992); State v. Aguallo, 322 N.C. 818, 370 S.E.2d 676 (1988); State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

(1) Defense Counsel Was Properly Barred from Asking State's Witness a Question that Asked Witness to Vouch for Veracity of Another Witness
(2) Defense Counsel Was Properly Barred from Asking State's Witness Whether Another Nontestifying Witness Did Not Identity Anyone, Because Question Improperly Called for Hearsay Response

State v. Robinson, 355 N.C. 320, 561 S.E.2d 245 (5 April 2002). (1) Defense counsel was not permitted by the trial judge to ask state's witness Baker, "But, if he [the detective] testified that you told him that,

he would be telling the truth, wouldn't he, Ms. Baker?" Defense counsel was also not permitted to ask state's witness Bullock, "And, if Jesse Hill testified that he saw you at 6:00 on Monday afternoon, he would be mistaken then?" The court ruled that these questions were improper because defense counsel sought to have the witnesses vouch for the veracity of another witness—a lay opinion that is impermissible under Rule 701. The court noted that defense counsel may, for example, question the detective about the statements made by Baker to the detective and then argue to the jury about any inconsistencies in the statements and testimony (and the same with inconsistencies between Bullock and Hill). (2) Defense counsel sought to elicit information from Steve Gardner whether Jennifer Aycock, who did not testify at trial, had identified anyone when shown mug shot books. Defense counsel was not permitted by the trial judge to ask Gardner, "Ms. Aycock didn't identify anyone, did she?" The court ruled that the defense counsel's question called for a hearsay response, citing State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986), and was properly barred from asking the question.

Sentencing

Trial Judge in Noncapital Sentencing Hearing Improperly Found Aggravating Factor Under G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense)

State v. Mann, 355 N.C. 294, 560 S.E.2d 776 (5 April 2002). The court ruled that the trial judge improperly found in noncapital sentencing the aggravating factor under G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust or confidence to commit offense). The defendant lured the victim to lunch to talk about a work-related matter, committed armed robbery and financial transaction card theft against her, and eventually killed her. The defendant and victim worked together. While the evidence showed that they enjoyed an amiable working relationship, perhaps even a friendship, it did not show a relationship between them generally conducive to reliance on the other to support this aggravating factor; the court cited State v. Daniel, 319 N.C. 308, 354 S.E.2d 216 (1987).

Capital Case Issues

(1) Trial Judge Erred in Submitting Both Aggravating Circumstances G.S. 15A-2000(e)(7) (Murder Committed to Disrupt Exercise of Governmental Function) and G.S. 15A-2000(e)(8) (Murder Committed Against Witness While Engaged in Official Duty or Because of Exercise of Official Duty) Because They Were Based on Same Evidence

(2) Defense Counsel in Jury Argument in Capital Sentencing Hearing Was Properly Prohibited from Reading Facts from North Carolina Supreme Court Case on Aggravating Circumstance of Especially Heinous, Atrocious, or Cruel

State v. Anthony, 354 N.C. 372, 555 S.E.2d 557 (18 December 2001). The defendant was convicted of first-degree murder and sentenced to death for the murder of his wife. (1) A domestic violence protective order had been issued after the murder victim had filed a domestic violence complaint against the defendant. The victim was scheduled to return to court the morning after her murder. The defendant was aware of this hearing and was extremely upset about this proceeding. Although the court ruled that there was evidence to support the submission of both aggravating circumstances G.S. 15A-2000(e)(7) (murder committed to disrupt exercise of governmental function) and G.S. 15A-2000(e)(8) (murder committed against witness because of exercise of official duty as witness), the court also ruled that the trial judge erred in submitting both aggravating circumstances because they were based on the same evidence. Both circumstances referred to the domestic violence matter previously initiated by the murder victim and scheduled for hearing the day after the murder. The relationship between the defendant, the murder victim, and their children was a reason the victim had instituted the action and was to be a witness at the upcoming hearing. The court distinguished State v. Gray, 347 N.C. 143, 491 S.E.2d 491 S.E.2d 538

(1997), in which the court upheld the submission of both (e)(7) (referring to a show cause order served on defendant for accounting of marital monies in upcoming divorce) and (e)(8) (referring to a pending criminal case in which murder victim was to be witness against defendant). (2) The court ruled, relying on State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986) and other cases, that defense counsel was properly prohibited from reading facts from a North Carolina Supreme Court case on the aggravating circumstance of especially heinous, atrocious, or cruel for the purpose of urging the jury not to find this aggravating circumstance.

Trial Judge Erred in Submitting Aggravating Circumstance G.S. 15A-2000(e)(8) (Murder Committed Against Witness While Engaged in Official Duty or Because of Exercise of Official Duty); Court Articulates Two Prongs of Aggravating Circumstance (e)(8) and Disavows Language in *State v. Gray*

State v. Long, 354 N.C. 534, 557 S.E.2d 89 (18 December 2001). The defendant was convicted of first-degree murder and sentenced to death for the murder of his mother. She was killed five days before the defendant's trial for a charge of assault against her. The trial judge submitted aggravating circumstance G.S. 15A-2000(e)(8), which the court noted has two prongs: the murder was committed against a witness (1) while engaged in the performance of official duties (the "engaged in" prong), or (2) because of the exercise of his or her official duty (the "because" prong). The court ruled that the fact that the murder victim was waiting to testify against the defendant may be considered in making the factual determination whether the victim was a witness for either prong of the aggravating circumstance. However, this factual determination is only the first step. To submit the "because" prong, the state also must show that the defendant's motivation for killing the victim was that she was a witness. To submit the "engaged in" prong, the state also must show that the victim was actively engaged at the time of the murder in performing a duty expected of a witness, such as swearing out a warrant, discussing the case with a prosecutor, going to court to testify, or actively testifying. The court explicitly disavowed language in State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), that implied that a witness is engaged in his or her official duties from the time the witness swears out a warrant until the witness completes his or her testimony. The court ruled that the trial judge erred in submitting the "engaged in" prong of (e)(8) when there was no evidence that the victim was engaged in her duties as a witness when she was murdered. The court added that despite a comment in the notes to the pattern jury instructions, nothing in its opinion is intended to suggest that the fact that a victim witness has not yet testified precludes submission of the "because of" prong of this aggravating circumstance.

(1) Trial Judge Properly Admitted State's Victim Impact Evidence
(2) Trial Judge Properly Excluded Proffered Defense Evidence of How His Death Would Impact His Family
(3) Trial Judge Properly Submitted Both Aggravating Circumstances G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest) and G.S. 15A-2000(e)(8) (Murder Committed Against Law Enforcement Officer While Engaged in Performing Official Duty)

State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109 (1 February 2002). The defendant was convicted of two counts of first-degree murder. He shot and killed a law enforcement officer who was attempting to serve an arrest warrant on him, and he also shot and killed his wife. (1) The court ruled that the trial judge properly admitted victim impact testimony by the mother of the defendant's wife. She described the effect of the death on the victim's children, her brother, and on herself and her husband. She related how her granddaughter now lacked the mother figure on whom she had always relied. She also described the murder's effect on the victim's brother, who was an eyewitness to the murder—he cried constantly, could not bear to turn the lights off, and began to do poorly in school. (2) The court ruled that the trial judge properly excluded proffered defense evidence of how his death would impact his family. Such evidence does not relate to an aspect of the defendant's character or record or the circumstances of the murder. (3)

Concerning the murder of the law enforcement officer, the court ruled, relying on State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) and State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the trial judge properly submitted both aggravating circumstances G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest) and G.S. 15A-2000(e)(8) (murder committed against law enforcement officer while engaged in performing official duty). Submission of (e)(4) addresses the defendant's subjective motivation for the murder. Submission of (e)(8) addresses the factual basis of the murder.

Court Rules That Prosecutor's Jury Argument During Capital Sentencing Hearing Was Improper and Prejudicial and Orders New Sentencing Hearing; Court Offers Guidance to Lawyers and Judges Concerning Proper Jury Argument

State v. Jones, 355 N.C. 117, 558 S.E.2d 97 (1 February 2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the prosecutor's jury argument during the capital sentencing hearing was improper and prejudicial to the defendant and ordered a new sentencing hearing. The prosecutor's jury argument was improper for two reasons. First, the court stated that the prosecutor referred to the Columbine school shootings and the Oklahoma City federal building bombing in a thinly veiled attempt to appeal to the jury's emotions by comparing the defendant's crime with these two heinous acts. This argument (1) referred to events and circumstances outside the record; (2) by implication, urged jurors to compare the defendant's acts with the infamous acts of others; and (3) attempted to divert jurors from the evidence by appealing instead to passion and prejudice. Second, the court stated that the prosecutor engaged in improper name-calling: "You got this quitter, this loser, this worthless piece of . . . who's mean . . . . He's as mean as they come. He's lower than the dirt on a snake's belly." The court also offered guidance to lawyers and judges concerning proper jury arguments (see the discussion in the court's opinion).

Prosecutor's Improper Cross-Examination of Defense Expert Psychiatrist and Improper Jury Argument in Capital Sentencing Hearing Sufficiently Prejudiced Defendant to Require New Capital Sentencing Hearing

State v. Rogers, 355 N.C. 420, 562 S.E.2d 859 (10 May 2002). The court ruled that the prosecutor's improper cross-examination of a defense expert psychiatrist and improper jury argument in a capital sentencing hearing sufficiently prejudiced the defendant to require a new capital sentencing hearing. The court stated that the prosecutor ascribed the basest of motives to the defendant's expert. He also indulged in ad hominem attacks, disparaged the expert's field of expertise, and distorted his testimony. (See the discussion of the facts in the court's opinion.) The court also stated: "We admonish counsel to refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services. We also instruct trial judges to be prepared to intervene ex mero motu if such arguments continue to be made."

Defense Counsel Was Properly Prohibited from Arguing Residual Doubt as Mitigating Evidence in Capital Resentencing Hearing, Based on Facts in This Case

State v. Fletcher, 354 N.C. 455, 555 S.E.2d 534 (18 December 2001). The court ruled that defense counsel was properly prohibited from arguing residual doubt as mitigating evidence in a capital resentencing hearing, based on the facts in this case. (See the court's detailed discussion of the facts and procedural aspects of this resentencing hearing.) The court stated that just as defense counsel may not argue residual doubt about the first-degree murder conviction during a capital sentencing or resentencing hearing, counsel may not argue residual doubt about the basis underlying a first-degree murder conviction, such as premeditation and deliberation.

North Carolina Court of Appeals

Criminal Law and Procedure

Assault Inflicting Serious Bodily Injury Is Not Lesser-Included Offense of Assault with Deadly Weapon With Intent to Kill Inflicting Serious Injury

State v. Hannah, 149 N.C. App. 713, 563 S.E.2d 1 (16 April 2002). The defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury [G.S. 14-32(a)]. The court ruled that the trial judge erred in submitting assault inflicting serious bodily injury (G.S. 14-32.4) as a lesser-included offense. Proof of "serious bodily injury" in G.S. 14-32.4 requires proof of a more severe injury than "serious injury" in G.S. 14-32.4. The court noted that although there may be assaults in which the injury satisfies both elements (serious injury and serious bodily injury), this does not satisfy the definitional approach required to determine whether one offense is a lesser-included offense of another; the court cited State v. Hudson, 345 N.C. 729, 483 S.E.2d 436 (1997).

Evidence Was Sufficient to Prove Serious Bodily Injury in Prosecution of Assault Inflicting Serious Bodily Injury

State v. Williams, 150 N.C. App. 497, 563 S.E.2d 616 (4 June 2002). The defendant was convicted of assault inflicting serious bodily injury under G.S. 14-32.4. The victim was punched and kicked in the face and body. The court ruled that the following evidence was sufficient to prove "serious bodily injury" (as confined by the judge's jury instruction to "permanent or protracted condition that causes extreme pain"): The victim suffered a broken jaw that was wired shut for two months, during which he lost 30 pounds. The jaw injury resulted in $6,000 in damages to his teeth. His ribs were broken and he twice suffered back spasms that required trips to the emergency room. The back spasms continued up to the date he testified. A doctor testified that the victim's broken jaw would cause a person "quite a bit" of pain and discomfort. The court noted that "serious bodily injury" in G.S. 14-34.4 requires proof of a more severe injury than the "serious injury" element of other assault offenses.

Pretrial Thirty-Day Disqualification With No Limited Driving Privilege for Commercial Motor Vehicle License Was Not Punishment under Double Jeopardy Clause to Bar Later Prosecution for DWI

State v. Reid, 148 N.C. App. 548, 559 S.E.2d 561 (5 February 2002). The court ruled, relying on State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2001), Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), and other cases, that a pretrial thirty-day disqualification with no limited driving privilege for a commercial motor vehicle license was not punishment under the Double Jeopardy Clause to bar a later prosecution for DWI.

(1) Because State Is Not Required to Charge Underlying Felony in Prosecuting First-Degree Felony Murder, Any Variance in Indictment Charging Underlying Felony and Jury Instruction on Underlying Felony in First-Degree Felony Murder Was Not Error
(2) First-Degree Arson Indictment Was Insufficient Because It Failed to Allege That Dwelling Was Occupied When Arson Was Committed

State v. Scott, 150 N.C. App. 442, 564 S.E.2d 285 (4 June 2002). The defendant was convicted of first-degree arson, first-degree felony murder based on the underlying felony of first-degree burglary, and other offenses. (1) The defendant was indicted for first-degree murder using the short-form indictment. He also was indicted for first-degree burglary, alleging he broke and entered with the intent to commit

murder. The trial judge's jury instruction for first-degree felony murder based on the underlying felony of first-degree burglary described the intent element as the intent to commit murder *or* rape. The defendant argued that the variance between the first-degree burglary indictment (intent to commit murder) and the jury instruction on burglary (intent to commit murder or rape) as the underlying felony of first-degree felony murder tainted the first-degree felony murder conviction. The court ruled that because the state is not required to charge the underlying felony in prosecuting first-degree felony murder, citing State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982) and State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), any variance in the indictment charging the underlying felony (first-degree burglary) and the jury instruction on the underlying felony (first-degree burglary) in first-degree felony murder was not error. (2) The court ruled that the first-degree arson indictment was insufficient because it failed to allege that the dwelling was occupied when arson was committed.

(1) In Felonious Assault Trial, When Jury Was Split on Lesser Misdemeanor Assault or Not Guilty, Mistrial Declaration Did Not Bar State from Retrying Defendant for Felonious Assault
(2) Defendant's Stipulation to Being Habitual Felon Does Not Constitute Guilty Plea

State v. Edwards, 150 N.C. App. 544, 563 S.E.2d 288 (4 June 2002). (1) During a jury's deliberations on felonious assault, misdemeanor assault, and not guilty, the jury sent a note that it was split seven jurors for misdemeanor assault and five jurors for not guilty. The judge declared a mistrial. Relying on State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982), the court ruled that the mistrial declaration did not bar the state from retrying the defendant for the felonious assault charge. (2) During a habitual felon hearing, the defendant admitted to the three prior felony convictions and stipulated to being a habitual felon. The judge then adjudged the defendant to be a habitual felon and imposed a sentence. Relying on State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001), the court ruled the defendant's admission and stipulation did not constitute a guilty plea in the absence of a judge's establishing that the plea was voluntary, knowing, and intelligent. The court remanded the case for a new habitual felon hearing.

Evidence Was Insufficient to Support Two Conspiracy Convictions

State v. Tabron, 147 N.C. App. 303, 556 S.E.2d 584 (20 November 2001). The defendant was convicted of two conspiracies to commit common law robbery. Both convictions involved failed robbery attempts of the same victim, one occurring on December 8, 1999 and the other occurring on January 14, 2000. The court ruled that there was insufficient evidence of two separate agreements to support two conspiracy convictions; the conspiracy was not abandoned after the first failed robbery attempt. (See the court's discussion of the facts in its opinion.)

Husband and Wife Are Legally Capable of Entering Criminal Conspiracy Between Themselves

State v. Stroud, 147 N.C. App. 549, 557 S.E.2d 544 (18 December 2001). **(Note: There was an opinion dissenting in part, but not on the issue discussed below.)** The defendants, husband and wife, were both convicted of conspiracy to commit murder and first-degree murder. The court rejected the female defendant's argument that a criminal conspiracy cannot exist between a husband and wife because under the common law they are considered to be one entity. The court ruled that a husband and wife are legally capable of entering a criminal conspiracy with each other.

Defendant Was "Other Person Providing Care to or Supervision of a Child" to Support Felonious Child Abuse as Felony in First-Degree Felony Murder Conviction

State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47 (2 April 2002). The defendant was convicted of first-degree felony murder based on the felony of felonious child abuse under G.S. 14-318.4. The court ruled that the evidence showed that the defendant was an "other person providing care to or supervision of a

child" under G.S. 14-318.4 to support the submission of first-degree felony murder. The defendant had resided with the child's mother and the child for two months before the murder, shared the same bedroom with them, and the child's mother had left the child in the defendant's care for short periods of time.

Jury Instruction on Intentional Infliction of Injury in N.C.P.I.—Crim. 206.35 in Second-Degree Child Murder Prosecution Was Not Error

State v. Smith, 150 N.C. App. 138, 564 S.E.2d 237 (7 May 2002). The defendant was convicted of second-degree murder for the killing of a two-year-old child. The court ruled that the trial judge did not err in using the jury instruction on intentional infliction of injury in N.C.P.I.—Crim. 206.35. (The charging language is provided in "Third" on page three of the pattern instruction.) The court noted that the jury may properly consider the credibility of any explanations offered by the defendant for other injuries sustained by the victim beside the injury that resulted in the victim's death.

BB Gun Was Not Dangerous Weapon to Support Conviction of Armed Robbery

State v. Fleming, 148 N.C. App. 16, 557 S.E.2d 560 (28 December 2001). The defendant was convicted of armed robbery. The court examined the facts and determined that the only reasonable inference in this case was that the defendant pointed a BB gun at the robbery victim (an officer arrested the defendant minutes after the robbery and the defendant only had a BB gun). Because the state failed to show that the BB gun was capable of causing serious injury or death, the court ruled that the evidence was insufficient to support the defendant's armed robbery conviction. The court noted that it was not ruling that a BB gun can never be a dangerous weapon.

Trial Judge Erred in Not Submitting Common Law Robbery as Lesser-Included Offense of Armed Robbery

State v. Frazier, 150 N.C. App. 416, 562 S.E.2d 910 (21 May 2002). The court ruled that the trial judge erred in not submitting common law robbery as a lesser-included offense of armed robbery when the defendant testified at trial that he unloaded his gun before entering the store where the robbery was committed.

Indictment Charging Obtaining Controlled Substance by Forgery under G.S. 90-108(a)(10) Was Properly Amended to Change Name of Controlled Substance

State v. Brady, 147 N.C. App. 755, 557 S.E.2d 148 (18 December 2001). The defendant was charged with obtaining a controlled substance by forgery under G.S. 90-108(a)(10). The indictment alleged the controlled substance as Xanax, a Schedule IV substance. The court ruled that the state was properly permitted to change the name of the controlled substance to Percocet, a Schedule II substance. The court ruled that it is not necessary to allege the specific controlled substance in charging a violation of G.S. 90-108(a)(10) and therefore the amendment did not substantially alter the charge against the defendant. Thus the trial judge did not err in permitting the state to amend the indictment.

(1) Insufficient Evidence of Maintaining Dwelling for Keeping Controlled Substances
(2) Sufficient Evidence of Defendant's Constructive Possession to Support Convictions of Possession of Marijuana and Possession of Drug Paraphernalia

State v. Kraus, 147 N.C. App. 766, 557 S.E.2d 144 (18 December 2001). The defendant was convicted of felonious possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling for keeping controlled substances. Upon entering a motel room after the defendant's friend, Henderson, opened the door, officers encountered a dense cloud of marijuana smoke and found the defendant sitting

in a chair alone in the room. Both the defendant and her friend were stoned. Marijuana, marijuana seeds and stems, a box cutter, cigar wrappers, small plastic bags, and pill bottles were on a nearby table. Officers also discovered a small bag containing 85 grams of marijuana in a trash can and a quantity of crack cocaine. In a closet was a duffle bag with a tag with Henderson's name on it; in the bag were digital scales and about five pounds of marijuana. (1) The court ruled that there was insufficient evidence of the defendant's maintaining the dwelling for keeping controlled substances. Although the evidence showed that the defendant had access to a key and spent the previous night in the room, there was no evidence that the defendant bore the expense of the room or maintained it in any way. The defendant did not rent the room or otherwise finance its upkeep. Moreover, the defendant had occupied the room for less than 24 hours. The court relied on State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000), and State v. Hamilton, 145 N.C. App. 152, 549 S.E.2d 233 (2001). (2) The court ruled that the evidence was sufficient to prove the defendant's constructive possession of the marijuana and drug paraphernalia to support her convictions of possession of marijuana and possession of drug paraphernalia.

(1) Defendant Was Properly Convicted of Possession of Cocaine Based on Residue of Crack Cocaine Found in Crack Pipe
(2) Double Jeopardy Did Not Bar Convictions of Both Possession of Cocaine and Possession of Drug Paraphernalia, Even Though Cocaine Was Found in Drug Paraphernalia

State v. Williams, 149 N.C. App. 795, 561 S.E.2d 925 (16 April 2002). (1) The state's evidence showed that the residue of cocaine in a crack pipe resulted from crack cocaine vaporizing from a solid into a gas. The court ruled that this evidence was sufficient to support the defendant's conviction of possession of cocaine. (2) The court rule that double jeopardy did not bar the defendant's convictions of both possession of cocaine and possession of drug paraphernalia, even though the cocaine was found in the drug paraphernalia—the crack pipe. Each crime has an element that is not included in the other crime; the court cited State v. Perry, 305 N.C. 225, 287 S.E.2d 810 (1982).

False Pretenses Offense Was Properly Alleged in Indictment That Stated "Obtain *and* Attempt to Obtain" and "Calculated to Deceive *and* Did Deceive"

State v. Armstead, 149 N.C. App. 652, 562 S.E.2d 450 (2 April 2002). The defendant attempted to cash a stolen check in a store by stating that the check had already been pre-approved by the store manager. The employee handling the check was not actually deceived because she knew that her manager never pre-approved checks. The defendant left the store without cashing the check. The false pretenses indictment stated, in part, "obtain *and* attempt to obtain" and that the false pretense was "calculated to deceive *and* did deceive (emphasis added)." The court ruled, relying on State v. Swaney, 277 N.C. 602, 178 S.E.2d 399 (1970), that the indictment correctly used the conjunctive "and" between "obtain" and "attempt to obtain." In addition, an indictment charging a completed offense is sufficient under G.S. 15-170 to support a conviction of an attempt to commit the charged offense. The court also ruled that the language "and did deceive" was surplusage and did not make the indictment defective.

(1) Sufficient Evidence to Submit Jury Instruction on Doctrine of Possession of Recently-Stolen Property and Rely on Constructive Possession to Support Element of Possession
(2) Indictment Charging Larceny Was Sufficient
(3) No Fatal Variance Between Alleged Date of Larceny and Evidence at Trial

State v. Osborne, 149 N.C. App. 235, 562 S.E.2d 528 (19 March 2002), *affirmed*, 356 N.C. 424, 571 S.E.2d 584 (22 November 2002). The defendant was convicted of felonious larceny. (1) The larceny victim allowed the defendant to move into his apartment, sleep in the living room, and leave his possessions in several garbage bags. Several of the victim's possessions later became missing. They were found in the defendant's garbage bags. The court ruled that there was sufficient evidence to submit a jury

instruction on the doctrine of possession of recently-stolen property. The instruction also properly relied on constructive possession to satisfy the element of possession. (2) The felonious larceny sufficiently charged larceny (in pertinent part—unlawfully, willfully and feloniously did steal, take, and carry away) even though it did not allege that the defendant did not have consent to take the property nor that the defendant had the intent to permanently deprive the victim of the property. The court ruled, relying on State v. Mandina, 91 N.C. App. 686, 373 S.E.2d 155 (1988), that the indictment was sufficient. (3) The larceny indictment alleged that the offense occurred on the date the stolen property was discovered in the defendant's garbage bag—not the date when the theft occurred. The court ruled that there was no fatal variance because the defendant's defense was not alibi and thus he was not prejudiced by the variance.

(1) Indictment Charging Felonious Breaking or Entering Was Not Defective
(2) Indictment Charging Felonious Larceny Was Defective
(3) No Fatal Variance Between Indictment Charging Felonious Breaking or Entering and Evidence at Trial

State v. Norman, 149 N.C. App. 588, 562 S.E.2d 453 (2 April 2002). The defendant was convicted of felonious breaking or entering and felonious larceny. (1) The breaking and entering indictment alleged that the defendant broke and entered a building occupied by Quail Run Homes, Ross Dotson Agent at a specific address in Winston-Salem. The court ruled that this indictment was not defective. An indictment for this offense does not require an allegation of ownership of the building; it only requires identification of the building with reasonable particularity. (2) The felonious larceny indictment described the property as that of "Quail Run Homes Ross Dotson, Agent." The court ruled that this indictment was fatally defective because it failed to properly indicate the legal ownership of the property. (3) The court ruled that there was not a fatal variance between the indictment charging felonious breaking or entering and the evidence at trial, which failed to show that any individual named "Ross Dotson" had any connection to Quail Run Homes. The language concerning "Ross Dotson" was surplusage and immaterial.

Sufficient Evidence to Support Defendant's Convictions of Failing to Notify Sheriff of Change of Address as Required by Registered Sex Offender

State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26 (2 April 2002). The court ruled that there was sufficient evidence to support the defendant's convictions of failing to notify the sheriff of a change of address as required by a registered sex offender. (See the discussion of the evidence in the court's opinion.) The court distinguished State v. Young, 141 N.C. App. 220, 540 S.E.2d 794 (2000), noting that the *Young* ruling involved a defendant who was an adjudicated incompetent.

Evidence of Confinement and Restraint Was Separate and Distinct from Attempted First-Degree Rape to Support Conviction of Second-Degree Kidnapping

State v. Robertson, 149 N.C. App. 563, 562 S.E.2d 551 (2 April 2002). The defendant was convicted of attempted first-degree rape and second-degree kidnapping. Evidence at trial showed that the defendant fraudulently induced the victim to return to his apartment by assuring her that he would help her find the person she was looking for, and then fraudulently induced her to enter his bedroom. Once there, he restrained her, brandished a knife, disrobed, attempted to get on top of her, and threatened to have sex with her or to kill her. The court ruled, relying on State v. Muhammed, 146 N.C. App. 292, 552 S.E.2d 236 (2001), that the evidence of restraint and confinement exceeded that necessary to establish attempted first-degree rape and thus supported the second-degree kidnapping conviction.

Sufficient Evidence to Support Element of "Purpose of Arousing or Gratifying Sexual Desire" in Delinquency Adjudication of Juvenile for Indecent Liberties under G.S. 14-202.2

In re T.C.S., 148 N.C. App. 297, 558 S.E.2d 251 (15 January 2002). The juvenile, eleven years old, was adjudicated delinquent of indecent liberties under G.S. 14-202.2 with a child who was five years old. Distinguishing In re T.S., 133 N.C. App. 272, 515 S.E.2d 230 (1999), the court ruled that the evidence was sufficient to prove the element of "the purpose of arousing or gratifying sexual desire." In discussing the facts supporting this element, the court noted the age disparity between the juvenile and victim, the juvenile's control over the victim, the location and secretive nature of their actions, and the juvenile's maturity.

Trial and Conviction of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury After Appellate Court Had Vacated Defendant's Conviction of Attempted Second-Degree Murder Did Not Violate Defendant's Statutory or Constitutional Rights

State v. Tew, 149 N.C. App. 456, 561 S.E.2d 327 (19 March 2002). The court ruled that the defendant's trial and conviction of assault with a deadly weapon with intent to kill inflicting serious injury after an appellate court had vacated the defendant's conviction of attempted second-degree murder [because the crime does not exist; see State v. Coble, 351 N.C. 448, 527 S.E.2d 45 (2000)] did not violate the defendant's statutory or constitutional rights—joinder under G.S. 15A-926(c)(2), collateral estoppel, or double jeopardy.

Defendant's Payment of Money under G.S. 1-538.2 to Owner of Property Stolen by Defendant Did Not Bar under Double Jeopardy Clause Later Prosecution of Defendant for Larceny of That Property

State v. Beckham, 148 N.C. App. 282, 558 S.E.2d 255 (15 January 2002). The defendant stole property from a business. In response to a demand for payment by the business under G.S. 1-538.2 (civil liability for larceny, shoplifting, etc.), the defendant paid $200.00 to the business. The court ruled, applying the standard set out in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), that the payment of money to the business did not bar under the Double Jeopardy Clause his later prosecution for larceny of the property.

Insufficient Evidence to Support Disorderly Conduct in School, G.S. 14-288.4(a)(6)

In re Brown, 150 N.C. App. 127, 562 S.E.2d 583 (7 May 2002). The court ruled, relying on In re Grubb, 103 N.C. App. 452, 405 S.E.2d 797 (1991) and In re Eller, 331 N.C. 714, 417 S.E.2d 479 (1992), that there was insufficient evidence to support a juvenile adjudication of disorderly conduct in a school, G.S. 14-288.4(a)(6). The evidence showed that a student talked during a test, slammed a door, and begged a teacher in the hallway that he not be sent to the office. The court stated that this evidence did not prove that there was a substantial interference with the school's operation.

Trial Judge Committed Prejudicial Error Requiring New Trial When His Remarks to Deadlocked Jury Referred to Expense of Retrial

State v. Burroughs, 147 N.C. App. 693, 556 S.E.2d 339 (18 December 2001). The court ruled, relying on State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979), that the trial judge committed prejudicial error requiring a new trial when his remarks to a deadlocked jury referred to the expense of a retrial.

Court, Without Deciding Whether Necessity Defense Exists for Offense of Possession of Firearm by Convicted Felon, Rules That Defendant Offered Insufficient Evidence of Defense

State v. Napier, 149 N.C. App. 462, 560 S.E.2d 867 (19 March 2002). The court, without deciding whether the necessity defense exists for the offense of possession of firearm by a convicted felon, ruled that defendant offered insufficient evidence of defense in this case. He did not show that he was under a present or imminent threat of death or serious bodily injury to justify his going to another's property with his firearm.

Defendant May Not Object to Trial By Citation at Superior Court Trial De Novo

State v. Phillips, 149 N.C. App. 310, 560 S.E.2d 852 (19 March 2002). The court ruled, relying on State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982), that a defendant may not object to trial by citation under G.S. 15A-922(a) at a superior court trial de novo. A defendant may object to trial by citation in district court only.

Trial Judge Did Not Err in Denying Defendant's Motion to Withdraw Guilty Pleas Filed Seven Days After Entry of Plea and One Day Before Sentencing Hearing

State v. Davis, 150 N.C. App. 205, 562 S.E.2d 590 (7 May 2002). On December 5, 2000, the defendant pleaded guilty to second-degree murder and other charges concerning a vehicular homicide. A sentencing hearing was scheduled for December 13, 2000. On December 12, 2000, the defendant filed a motion to withdraw his guilty pleas. The court, utilizing the standard from State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990) (presentence motion to withdraw guilty plea should be allowed for any fair and just reason), affirmed the trial judge's denial of the defendant's motion. The court noted that the record did not support the defendant's contention that there was confusion, haste, coercion, and misunderstanding when the guilty plea had been entered. The defendant did not assert his innocence, and the state's evidence strongly support the guilty pleas.

Trial Judge Did Not Err in Summarily Punishing Probationer for Direct Criminal Contempt for Lying During Her Testimony in Probation Revocation Hearing

State v. Terry, 149 N.C. App. 434, 562 S.E.2d 537 (19 March 2002). The court ruled that the trial judge did not err in summarily punishing the probationer for direct criminal contempt for lying during her testimony in a probation revocation hearing. She did not dispute that she had been untruthful in her testimony. The court noted that the probationer was provided ample opportunity to present reasons why she should not be found in contempt.

Probation Violation Report Not Stamped by Clerk's Office Was Not Properly Filed Before End of Probation Period to Give Trial Court Jurisdiction to Conduct Probation Revocation Hearing After End of Probation Period

State v. Moore, 148 N.C. App. 568, 559 S.E.2d 565 (5 February 2002). A probation violation report in the clerk's files was not endorsed with a file stamp. The probation revocation hearing was conducted after the end of the probation period. The court ruled that the trial court did not have jurisdiction to conduct the probation revocation hearing because the probation violation report was not properly filed under G.S. 15A-1344(f)(1).

Judge Did Not Err in Denying, Without Evidentiary Hearing, Defendant's Motion for Appropriate Relief Alleging Ineffective Assistance of Counsel When Motion Failed to Supply Affidavits or Other Evidence Beyond Bare Assertions in Motion

State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72 (21 May 2002). The court ruled, relying on State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985), that the judge did not err in denying, without an evidentiary hearing, the defendant's motion for appropriate relief alleging ineffective assistance of counsel when the motion failed to supply affidavits or other evidence beyond the bare assertions in the motion; see G.S. 15A-1420(c)(6). The court also noted, citing State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985), the motion failed to comply with the requirements of G.S. 15A-1420(b)(1).

Several Years Delay in Processing Defendant's Appeal of Conviction to Court of Appeals Did Not Violate Defendant's Due Process Rights

State v. China, 150 N.C. App. 469, 564 S.E.2d 64 (4 June 2002).The defendant was convicted in superior court in April 1994, but his appointed counsel did not perfect the appeal. New counsel was appointed in December 2000 to seek appellate review. The court ruled, analyzing several factors (length of delay, reason for delay; defendant's assertion of right to speedy appeal; prejudice to defendant) that the delay in processing the appeal did not violate the defendant's due process rights.

Arrest, Search, and Confession Issues

Thirteen-Year-Old Juvenile's Confession Was Admissible Because His Aunt Was His "Guardian" under Juvenile Rights Provisions in G.S. 7A-595(b) [Now, G.S. 7B-2101(b)]

State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644 (18 December 2001). The defendant, a thirteen-year-old juvenile who was subjected to custodial interrogation in his aunt's presence, was tried as an adult and convicted of several felonies. The court ruled that the custodial interrogation complied with G.S. 7A-595(b) [now, G.S. 7B-2101(b)] because his aunt was a "guardian" under the juvenile rights provisions. The court noted that the term "guardian" is not defined in the juvenile code and rejected the defendant's argument that a guardian means only someone who is court appointed. The court ruled that a guardian under G.S. 7A-595(b) means a person upon whom government has conferred any authority over the juvenile. Because both the department of social services and the local school system had given authority over the defendant to the aunt, the court ruled that she was a "guardian" under G.S. 7A-595(b). [Author's note: This ruling would clearly also apply to G.S. 7B-2101(b).]

(1) Defendant's Motion to Suppress Incriminating Statements Based on Alleged Violation of Vienna Convention Was Properly Denied
(2) SBI Agent Was Competent to Testify About His Conversations in Spanish with Defendant

State v. Aquino, 149 N.C. App. 172, 560 S.E.2d 552 (5 March 2002). The defendant, a Mexican national, made incriminating statements when interviewed in Spanish by an SBI agent who was fluent in Spanish. (1) The court upheld the trial judge's denial of the defendant's motion to suppress the statements based on an alleged violation of the Vienna Convention on Consular Relations, which requires law enforcement authorities to inform a detained or arrested foreign national that they may have their consulates notified of their status. The court noted that courts reviewing this issue—see, e.g., United States v. Jimenez-Nava, 243 F.3d 192 (5th Cir. 2001)—have refused to rule that suppression of evidence is a remedy for a violation of this treaty. In any event, the defendant was not detained for purposes of the treaty. He was voluntarily with the SBI agent during the interviews. [Author's note: For information about this treaty, see http://www.state.gov/www/global/legal_affairs/ca_notification/introduction.html and M. Wesley Clark, "Providing Consular Rights Warnings to Foreign Nationals," in FBI Law Enforcement Bulletin, 22-32 (March 2002).] (2) The SBI agent testified that he understood the defendant and what he was saying, and believed that the defendant understood him. The court ruled that the agent was competent to testify at trial about his interviews in Spanish with the defendant.

Miranda Ruling Does Not Apply to Statement to Law Enforcement Officer Offered into Evidence in Civil Abuse and Neglect Proceeding

In re Pittman, 149 N.C. App. 951, 561 S.E.2d 560 (16 April 2002). The court ruled, citing State v. Adams, 345 N.C. 745, 483 S.E.2d 156 (1997) and a legal treatise, that the *Miranda* ruling does not apply to a statement made to a law enforcement officer offered into evidence in a civil abuse and neglect proceeding. The *Miranda* ruling only applies to a statement offered into evidence in a criminal proceeding.

Confession Was Voluntary; It Was Not Improperly Induced by Promises to Defendant

State v. Thompson, 149 N.C. App. 276, 560 S.E.2d 568 (19 March 2002). The defendant voluntarily came to the police station and spoke with a detective about a robbery. The court ruled that the detective's repeated assertions that the defendant would not be arrested that day regardless of what he said was not an improper inducement that led the defendant to confess. The court noted that the defendant was familiar with the criminal justice system (he had seven prior convictions) and had doubtless been questioned often by law enforcement officers before the questioning that occurred in this case.

Anonymous Tip and Officer's Corroboration Provided Reasonable Suspicion to Make Investigative Stop and Frisk for Robbery Suspect's Weapon

State v. Allison, 148 N.C. App. 702, 559 S.E.2d 828 (19 February 2002). An unidentified woman approached officer A at a convenience store and told him that about five minutes earlier she had been in a nearby restaurant where she had observed four African-American males sitting in the bar area. She said that she had overheard them talking about robbing the restaurant, and she had seen the four men passing a black handgun among themselves. At the officer's request, the woman repeated her observations to officer B. Officer B then obtained the woman's telephone number, which he wrote on the back of his hand. Officer B and other officers entered the restaurant and saw four African-American males sitting in the bar area. Officer B identified the defendant as having been involved in prior gun-related incidents. He then approached the men and asked them to step into the restaurant's foyer. The defendant was "holding his pants up as though he had something dragging his pants down." The officer began conducting a pat-down frisk of the defendant and asked him whether he was carrying any weapons. After the defendant responded "no," the officer continued frisking him and seized a nine milliliter handgun from his waistband. The defendant was arrested for carrying a concealed weapon. Later, officer B called the telephone number that he had written on the back of his hand, but there was no answer. The court ruled, distinguishing Florida v. J. L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) and State v. Hughes, 353 N.C. 200, 539 S.E.2d 625 (2000), that reasonable suspicion supported officer B's investigatory stop of the defendant. Unlike *Florida v. J. L.* and *Hughes*, the tip was supplied by a face-to-face encounter rather than by an anonymous phone call. Officer B had an opportunity to observe the demeanor of the tipster to assess the tip's reliability. By engaging officer B directly, the tipster significantly increased the likelihood that she would be held accountable if her tip proved to be false. Also, unlike the informants in *Florida v. J. L.* and *Hughes*, the tipster offered a reasonable explanation how she was aware that criminal activity was possibly going to take place. In addition, the officer's knowledge that the defendant had been involved in gun-related incidents buttressed the tip. The court also ruled that the officer's frisk was proper. The court rejected the defendant's argument that once officer B had begun to frisk him and found nothing, the defendant should have been permitted to leave once he informed the officer that he was not carrying a handgun.

Anonymous Tip and Officer's Corroboration Provided Reasonable Suspicion to Make Investigative Stop for Armed Robberies

State v. Young, 148 N.C. App. 462, 559 S.E.2d 814 (5 February 2002). A Western Union office was robbed twice in a two week period. Each robbery was committed by a person who was described similarly. A week after the second robbery, a female caller to 911, who would not identify herself because she feared for herself and her child, said that she knew who had committed both robberies. She said he was currently in the vicinity of a Wendy's restaurant near the Western Union and was driving a white 1998 Buick Century. Her description matched the prior descriptions. She also described his clothing and said that he was very dangerous and armed with a pistol. An officer then went to Wendy's and saw a vehicle and its driver that matched the anonymous caller's identifications. The officer followed the defendant when he drove away from Wendy's. He drove the wrong way down a one-way street. Eventually he pulled in a parking lot and was stopped after getting out of his car. The court ruled that the officer had probable cause that the defendant violated G.S. 20-165.1 (willfully driving wrong way on one-way street) that justified the officer's stop of the defendant. The court also ruled, relying on State v. Bone, 354 N.C. 1, 550 S.E.2d 842 (2001), that the anonymous information and corroboration by the officer established reasonable suspicion to stop the defendant for the armed robberies.

Probable Cause Did Not Exist to Support Search Warrant for Residence When It Was Based on Anonymous Citizen Complaints Asserting Suspicions of Drug Activity Based on Heavy Vehicular Traffic There and Officer's Conclusion That There Was Illegal Drug Activity

State v. Hunt, 150 N.C. App. 101, 562 S.E.2d 597 (7 May 2002). The court ruled, relying on State v. Crisp, 19 N.C. App. 456, 199 S.E.2d 155 (1973) and State v. Ford, 71 N.C. App. 748, 323 S.E.2d 358 (1985) and distinguishing State v. Barnhardt, 92 N.C. App. 94, 373 S.E.2d 461 (1988), that probable cause did not exist to support a search warrant for a residence when it was based on anonymous citizen complaints asserting suspicions of drug activity based on heavy vehicular traffic with short visits there, and an officer's conclusion that there was illegal drug activity based on his observation of heavy vehicular traffic. The court noted that one ever saw drugs on the premises.

Informant's Information and Officer's Corroboration Supported Probable Cause to Arrest and Search Defendant

State v. Chadwick, 149 N.C. App. 200, 560 S.E.2d 207 (5 March 2002). A reliable informant gave an officer information that the defendant would be delivering a large amount of cocaine to a specific location in about fifty minutes. The informant described the driver and make of the vehicle in which the defendant would be a passenger, the direction of the vehicle's travel to the location, where the vehicle would park, and that the defendant would act like he was there to use the telephone and then conduct a drug transaction there. The officer had previously set up a drug deal with the defendant. The officer conducted surveillance at the place and corroborated all the informant's information. The court ruled that the officer had probable cause to arrest and search the defendant, citing several cases, including State v. Wooten, 34 N.C. App. 85, 237 S.E.2d 301 (1977), and State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991).

(1) Law Enforcement Officers Properly Interacted with Probation Officer Who Sought to Enforce Warrantless Search Condition of Drug Defendant's Probation
(2) Officer Was Lawfully on Property When Officer Smelled Marijuana Odor
(3) Independent Source Doctrine Supported Seizure of Evidence With Search Warrant Even If Officers Had Previously Made Illegal Warrantless Entry of House
(4) Probable Cause Supported Search Warrant

State v. Robinson, 148 N.C. App. 422, 560 S.E.2d 154 (5 February 2002). A law enforcement officer received anonymous information that the defendant was growing marijuana in his house. About 15 months earlier, an officer had previously searched the defendant's residence and found marijuana. An officer then spoke with the defendant's probation officer, who said that the defendant was on probation from the earlier drug offense that included a condition consenting to warrantless searches of his person and residence. The probation officer went to the defendant's house, where he attempted to enforce the warrantless search condition. The defendant refused to allow the search, and the probation officer arrested him. The law enforcement officers were informed of his arrest and went to the house. No one answered, although the officers had learned from the probation officer that the defendant's girlfriend was there. From the driveway, one of the officers (while the other officers were knocking on the door) smelled a strong odor or marijuana emanating from the house and saw movement in the house. The officers left. They then telephoned the defendant's girlfriend, who refused to consent to a search of the house. They returned to the house, knocked on the door and received no answer, and then broke into the house. They conducted a security sweep and restrained the girlfriend. One officer obtained a search warrant and they then searched the house, finding marijuana. The court ruled: (1) the law enforcement officers properly interacted with probation officer who later sought to enforce warrantless search condition of drug defendant's probation—the court cited State v. Church, 110 N.C. App. 569, 430 S.E.2d 462 (1993) and United States v. Knights, 122 S. Ct. 587, 151 L. Ed. 2d 497 (10 December 2001); (2) the officers were lawfully on the defendant's driveway, on the way to the front door, when they smelled the odor of marijuana—see State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979); (3) the independent source doctrine [Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); State v. Wallace, 111 N.C. App. 581, 433 S.E.2d 238 (1993)] supported the seizure of the marijuana with a search warrant even if it is assumed that the officers had previously made an illegal warrantless entry of house—no evidence from the assumed illegal entry was used in the search warrant; and (4) all the information described above supplied probable cause to support the search warrant.

Exigent Circumstances Did Not Support Officers' Seizure of Defendant's Horses on Her Property Without Search Warrant

State v. Nance, 149 N.C. App. 734, 562 S.E.2d 557 (16 April 2002). The defendant leased barns and paddocks for her horses. Animal control officers received a telephone call on December 18, 1998, that the horses were being treated cruelly. That same day they viewed the horses from a road. The horses were located in open, accessible areas on the defendant's leased property. They were emaciated and appeared to be starving. On December 21, 1998, the officers entered the property and seized the horses without a search warrant. The court noted that although the officers did not violate the Fourth Amendment when they initially viewed the horses on December 18, 1998, they deprived her of her Fourth Amendment possessory interest in the horses when they removed them three days later. The court then ruled that exigent circumstances did not support the officers' seizure of the horses on the defendant's property without a search warrant. The court stated the officers had ample time during the three days to secure a search warrant.

[Author's note: The court's ruling is questionable. First, the court's view that the second entry onto the defendant's property without a search warrant or consent violated the Fourth Amendment because it was "private property" is in direct conflict with Oliver v. United States, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984) (person has no reasonable expectation of privacy in land beyond curtilage of his or

her home, and therefore officer's presence there is not a search under the Fourth Amendment). Because the defendant in this case had no reasonable expectation of privacy in the land on which the horses were located, officers could walk on that land without a search warrant or consent as often as they wanted without violating the defendant's Fourth Amendment rights. Second, the plain view doctrine does not require that the officers' seizure of the horses be supported by exigent circumstances. The plain-view doctrine is the basis for upholding a warrantless seizure of property when (1) there is a prior valid intrusion, and (2) an officer has probable cause to believe that the object to be seized is evidence of a crime. Horton v. California, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990). The officers were lawfully on the land on December 21, 1998, when they approached the horses because the land was not a place where the defendant had a reasonable expectation of privacy. Thus there was a valid intrusion. The officers also had probable cause to believe the property they seized—the horses—were evidence of the crime of cruelty to animals. For a case that has correctly ruled on a warrantless seizure of property on land in which there was no reasonable expectation of privacy, see United States v. Dougherty, 774 F. Supp. 1181 (W.D. Wis. 1989) (warrantless seizure of marijuana plants in open field did not violate Fourth Amendment because officers had probable cause to believe that plants were marijuana; neither search warrant nor exigent circumstances were required).]

Officer's Warrantless Entry Into Apartment Did Not Violate Fourth Amendment Because He Reasonably Believed That Someone Inside Needed Immediate Assistance

State v. China, 150 N.C. App. 469, 564 S.E.2d 64 (4 June 2002). An officer and two victims of a burglary that had occurred within an hour approached an apartment where they believed that the burglary suspect was located. As they approached, they heard a violent argument emanating from inside the apartment. The officer knocked on the door, which opened, and they walked inside. One person was sitting in the living room with a knife in her hand, and the defendant walked out of the kitchen bleeding profusely from his forearm. The court ruled, citing State v. Woods, 136 N.C. App. 386, 524 S.E.2d 363 (2000), and Mincey v. Arizona, 437 U.S. 385 (1978), that the officer's warrantless entry into the apartment did not violate the Fourth Amendment because he reasonably believed that someone inside needed immediate assistance.

(1) Drawing Weapons and Using Handcuffs Did Not Exceed Scope of Investigatory Drug Stop
(2) Defendant Who Was Temporarily Residing in Another's House Did Not Prove That He Had Reasonable Expectation of Privacy in Place in House Where Officers Conducted Search

State v. Sanchez, 147 N.C. App. 619, 556 S.E.2d 602 (18 December 2001). The defendant was convicted of cocaine trafficking offenses. (1) Based on information from an informant that supplied reasonable suspicion and also revealed that the defendant might be heavily armed, officers conducted an investigatory stop of a vehicle in which they drew their guns and handcuffed the defendant and other passengers. The handcuffing occurred for no more than five minutes. The court ruled, citing United States v. Hensley, 469 U.S. 491, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), that the use of weapons and handcuffs were permissible during the stop. (2) The defendant was temporarily residing in a living area of another's house. The living area was located in the basement which was connected to the garage and laundry room. The laundry room was separate by a door to the basement and garage area. The cocaine was found under the stairwell located in the laundry room. The court ruled, distinguishing Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), that the defendant did not prove that he had a reasonable expectation of privacy concerning the cocaine under the stairwell, which was a common area of the house.

(1) Stop of Vehicle and Frisk of Passenger Did Not Violate Fourth Amendment
(2) Vehicle Passenger Did Not Have Reasonable Expectation of Privacy in Vehicle to Challenge Search
(3) Search Incident to Arrest of Vehicle Occupant Included Search of Center Console

State v. VanCamp, 150 N.C. App. 347, 562 S.E.2d 921 (21 May 2002). The defendant was a passenger in a vehicle that failed to stop at a driver's license checkpoint, but it eventually stopped sixty feet beyond the checkpoint in response to an officer's command to stop. The officer looked inside the vehicle with his flashlight and saw the corner of a plastic bag sticking out from the passenger seat occupied by the defendant. The officer knew that a plastic bag such as this one was often used to transport illegal drugs. When the defendant rolled down the window, the officer smelled the odor of alcohol coming from the vehicle. The officer asked the defendant to get out of the vehicle, frisked him for weapons, felt what he recognized to be a pair of brass knuckles in the defendant's front pants pocket, and arrested him for carrying a concealed weapon. The officer then searched the vehicle and found crack cocaine in the center console. (1) The court ruled that the stop of the vehicle and the officer's frisk of the defendant did not violate the Fourth Amendment. (2) The court ruled that the defendant did not assert an ownership or possessory interest in the vehicle and therefore did not have a reasonable expectation of privacy to challenge the search of the center console. (3) Even if the defendant had a reasonable expectation of privacy in the vehicle, the search of the center console was lawful under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), as a search incident to the arrest of a vehicle occupant.

Visitor to Motel Room Did Not Have Reasonable Expectation of Privacy to Challenge Search There

State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138 (18 December 2001). The court ruled, relying on United States v. Grandstaff, 813 F.2d 1353 (9th Cir. 1987) and United States v. Maddox, 944 F.2d 1223 (6th Cir. 1991), that a visitor to a motel room did not have a reasonable expectation of privacy to challenge a search there. The evidence showed that the room was rented to another person, the defendant did not have any luggage there, and the defendant had not spent the night there or had planned to do so.

Warrantless Search of Defendant's Vehicle Was Proper Incident to Arrest of Occupant under *New York v. Belton*

State v. Logner, 148 N.C. App. 135, 557 S.E.2d 191 (28 December 2001). The defendant was convicted of possession of cocaine found in a search of her vehicle. Parker was in a vehicle, which was not the defendant's, when an officer developed probable cause to arrest her. Parker managed to leave that vehicle and get into another vehicle in which the defendant was the driver. The officer arrested Parker while she was an occupant of defendant's vehicle and conducted a warrantless search of the defendant's vehicle incident to Parker's arrest. The court ruled that the warrantless search was permitted under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

(1) Nonverbal Conduct Intended as Assertion Is a "Statement" Giving Consent to Search Under G.S. 15A-221(b)
(2) Officer Had Probable Cause to Seize and Unfold Twenty Dollar Bill to Look for Illegal Drugs

State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286 (5 March 2002). Officers responded to a tip of reported drug activity at an apartment. They entered with consent and stated their intentions to search for drugs and pat down the occupants for weapons. They noticed that the defendant continuously reached into his pants pocket. The defendant responded "no" to an officer's question about whether he had anything in his pocket. When the officer asked the defendant if she could check his pants pocket, he stood up and raised his hands away from his body accompanied by a gesture that the officer understood to mean consent. Shortly thereafter, the defendant allowed the officer to search his pocket. The officer found a

folded twenty dollar bill with a lump in it. Based on her training and experience, it was consistent with the way drugs are packaged or concealed. She unfolded the bill and found crack cocaine. (1) The court ruled that proper consent was obtained because nonverbal conduct intended as an assertion is a "statement" giving consent to search under G.S. 15A-221(b). (2) The court ruled, citing State v. Briggs, 140 N.C. App. 484, 536 S.E.2d 858 (2000), that the officer had probable cause to seize the bill and unfold it to look for illegal drugs.

(1) State Was Properly Permitted Before Second Judge to Raise Different Ground for Admissibility of Seized Evidence, Based on First Judge's Limited Grounds for Suppression of Evidence
(2) Inevitable Discovery Doctrine Supported Seizure of Heroin from Apartment

State v. Woolridge, 147 N.C. App. 685, 557 S.E.2d 158 (18 December 2001). Officers received information from a confidential informant that the defendant was selling heroin from his apartment. An officer set up surveillance of the apartment and saw the defendant walk out of his apartment, sit briefly on a chair on the porch, and then go back inside. He then saw the defendant leave with Miller in a vehicle. Officers conducted a vehicle stop because they believed that the defendant was wanted for a parole violation. They took both the defendant and Miller to the police station where they determined that the defendant was in fact wanted for a parole violation. Miller told the officers that he lived in the defendant's apartment and sold heroin for the defendant. Based on this information, officers began the process of obtaining a search warrant for the defendant's apartment. Meanwhile, other officers continued to conduct surveillance of the apartment. Based on watching a person act suspiciously with chairs on the porch, an officer conducted a warrantless search of the chairs and seized heroin from the bottom of one of the chairs. Later, officers arrived with a search warrant and searched the apartment, and the officer who had seized the heroin from the chair on the porch gave it to the executing officers. Before trial, a judge granted the defendant's motion to suppress the heroin because the warrantless search of the chair violated the Fourth Amendment, but the judge specifically stated that his ruling did not affect any later search based on the search warrant. The state later during pretrial motions with another judge moved to admit the heroin into evidence based on the inevitable discovery doctrine, and that judge ruled for the state on this ground. (1) The court ruled that the second ruling was procedurally proper because that the first judge had specifically not addressed the inevitable discovery doctrine. (2) The court ruled, relying on State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992), that the heroin was properly admitted under the inevitable discovery doctrine. An officer testified that he would have definitely have searched the chairs when executing the search warrant based on the interest shown in the chairs during the original surveillance. The court noted, based on the *Garner* ruling, any bad faith by the officer who conducted the warrantless search was irrelevant in determining application of the inevitable discovery doctrine.

Officer's Violation of Knock-and-Announce Requirement (G.S. 15A-249) in Executing Search Warrant Was Not Substantial Violation to Require Suppression of Evidence Under G.S. 15A-974(2)

State v. Sumpter, 150 N.C. App. 431, 563 S.E.2d 60 (21 May 2002). An officer executed a search warrant for illegal drugs at a residence. As the officer pushed open an unlocked exterior door, he announced his identity and purpose ("police officer, search warrant"). The court noted that the officer violated G.S. 15A-249 by not announcing his identity and purpose before opening the door and entering the residence. However, the court ruled that this violation was not substantial to require the exclusion of evidence [G.S. 15A-974(2)] found in the search. An immediate entry could prevent the destruction of illegal drugs, the door was unlocked, no one objected to the officer's entry into the residence, several people had been seen entering the residence without knocking or receiving an invitation to enter, and people who use crack cocaine usually carry weapons.

State Agency Did Not Have Reasonable Cause Under Fourth Amendment to Request Drug Test of Two Employees

Best v. Dept. of Health and Human Services, 149 N.C. App. 882, 563 S.E.2d 573 (7 May 2002), *affirmed*, 356 N.C. 430, 571 S.E.2d 586 (22 November 2002). The court ruled that the Department of Health and Human Services did not have reasonable cause under the Fourth Amendment to request a drug test of two employees. (See the facts discussed in the court's opinion.)

Evidence

(1) Trial Judge Did Not Err in Accepting Law Enforcement Officer as Expert in Accident Investigation and Reconstruction
(2) Trial Judge Did Not Err in Allowing Law Enforcement Officer, Accepted as Expert in Accident Investigation and Reconstruction, to Give Opinion How Vehicle Crash Occurred

State v. Holland, 150 N.C. App. 457, 566 S.E.2d 90 (4 June 2002) The defendant was convicted of involuntary manslaughter based on an vehicle crash in which the defendant, who was impaired, was a driver of one of the vehicles. A State Highway Patrol officer inspected the crash scene. The trial judge accepted the officer as an expert in accident investigation and reconstruction and allowed the officer to testify about the accident scene, including the extent and location of damage to the vehicles, the presence of scrape, gouge, and scuff marks in the pavement, and the location of debris. Based on the officer's analysis, he gave an opinion about the sequence of events. He said that a tractor and the defendant's vehicle, a jeep, were traveling north on a highway. The jeep collided with the rear of the tractor. Then the jeep crossed the center line of the highway and collided with a pickup truck that was traveling south, and both vehicles came to rest on the left side of the road. (1) The court reviewed the officer's training and experience and ruled that the trial judge did not err in accepting the officer as an expert in accident investigation and reconstruction. (2) The court ruled, relying on Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233 (2002), Griffith v. McCall, 114 N.C. App. 190, 441 S.E.2d 570 (1994), and State v. Purdie, 93 N.C. App. 269, 377 S.E.2d 789 (1989), that the trial judge did not err in allowing the officer to give an opinion how the vehicle crash occurred. The testimony meet the requirements of Daubert v. Merrell Dow, 509 U.S. 579 (1993), and State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), which were discussed in the *Taylor* ruling, cited above.

Court Disapproves of Judicial Official's Offering Opinion Testimony of Defendant's Impaired Condition When Defendant Had Appeared Before Official

State v. Lewis, 147 N.C. App. 274, 555 S.E.2d 348 (20 November 2001). The defendant was convicted of DWI. The magistrate before whom the defendant had appeared after his arrest testified at the trial that the defendant was impaired. The court stated that it disapproves of a judicial official offering opinion testimony of a defendant's impaired condition when the defendant had appeared before that official.

Trial Judge Erred in Allowing State's Mental Health Expert to Give Opinion in Child Sexual Assault Trial That Child Victim Had Been Sexually Abused When There Was No Physical Evidence of Abuse

State v. Dixon, 150 N.C. App. 46, 563 S.E.2d 594 (7 May 2002), *affirmed*, 356 N.C. 428, 571 S.E.2d 584 (22 November 2002). The court ruled, citing State v. Stancil, 355 N.C. 266, 559 S.E.2d 788 (2002), that the trial judge erred in allowing the state's mental health expert to give his opinion in a child sexual assault trial that the child victim had been sexually abused when there was no physical evidence of abuse.

Trial Judge in Child Abuse Case Did Not Err in Admitting Expert Testimony That Delayed and Incomplete Disclosures By Children Are Not Unusual and Children Sometimes Continue to Associate with Alleged Abuser

State v. Carpenter, 147 N.C. App. 386, 556 S.E.2d 316 (4 December 2001). The defendant was convicted of several sex offenses with a child. The state's expert witness was a licensed clinical social worker and properly qualified in child sex abuse evaluations and interviews based on her extensive experience, training, and education. The court ruled, relying on State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988), State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993), and State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987), that the trial judge did not err in admitting the expert's testimony that delayed and incomplete disclosures by children are not unusual and children sometimes continue to associate with the alleged abuser. The court noted that the expert did not offer an opinion about the victim's credibility.

(1) Child Sexual Abuse Victim's Statements to Licensed Professional Counselor Were Properly Admitted under Residual Hearsay Exception, Rule 804(b)(5)
(2) Child Sexual Abuse Victim's Statements to Pediatric Nurse and Examining Physician Were Properly Admitted under Rule 803(4) (Medical Diagnosis or Treatment); Evidence Satisfied *State v. Hinnant* Test

State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568 (28 December 2001). The defendant was convicted of several sexual offenses with a child. The child refused to testify at trial. (1) The court ruled that the child's statements to a licensed professional counselor were properly admitted under the residual hearsay exception, Rule 804(b)(5). (See the court's discussion of the facts supporting its ruling.) (2) The court ruled that the child's statements to a pediatric nurse and a physician who conducted a physical examination of the child were properly admitted under Rule 803(4) (medical diagnosis or treatment). The evidence satisfied the test for admissibility under State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). (See the court's discussion of the facts supporting its ruling.)

Evidence of Prior Sexually-Related Acts with Young Girls That Occurred Ten and Fifteen Years Before Similar Acts Being Tried Was Properly Admitted Under Rule 404(b)

State v. Patterson, 149 N.C. App. 354, 561 S.E.2d 321 (19 March 2002). The defendant was convicted of taking indecent liberties and other related offenses with four girls whose ages were thirteen and fourteen. Some of the acts included the girls removing their clothing and posing for pictures in their underwear. The court ruled that evidence of prior sexually-related acts with young girls that occurred ten and fifteen years ago in Delaware was properly admitted under Rule 404(b) to show the defendant's common scheme and plan. The evidence was not too remote in time.

(1) Statement of Unavailable Witness Was Properly Admitted under Residual Hearsay Exception, Rule 804(b)(5)
(2) Evidence of Defendant's 1971 Murder Conviction Was Properly Admitted under Rule 404(b) to Show Defendant's Intent to Kill and His Identity as Perpetrator

State v. Castor, 150 N.C. App. 17, 562 S.E.2d 574 (7 May 2002). The defendant was convicted of first-degree murder in which he used a shotgun to kill the victim. The murder was committed in 1998. (1) The court ruled that a statement of an unavailable witness was properly admitted under the residual hearsay exception, Rule 804(b)(5). The state's unsuccessful efforts to serve a subpoena sufficiently showed that the witness was unavailable. Other evidence showed why the statement was trustworthy. (See the court's discussion of these issues in its opinion.) (2) The court ruled that evidence of the defendant's 1971 murder conviction was properly admitted under Rule 404(b) to show the defendant's intent to kill and his identity

as the perpetrator. The court noted that the trial judge had found ten similarities between the murder on trial and the 1971 murder. Also, during the twenty-seven year period between the killings, the defendant had been imprisoned for about eighteen years, which are excluded in determining the "remoteness" issue—see State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145 (2001).

State Was Properly Permitted to Impeach Its Witness With Investigator's Testimony

State v. Martinez, 149 N.C. App. 553, 561 S.E.2d 528 (2 April 2002). The defendant was convicted of conspiracy to traffic in marijuana. The state's witness, who was a co-conspirator, testified that he did not know what was in the package (marijuana) that was delivered to him. The court ruled, distinguishing State v. Hunt, 324 N.C. 343, 378 S.E.2d 754 (1989), that the trial judge did not err in permitting the state's investigator to testify in effect that the state's witness had said that marijuana was in the package. The court noted that before the investigator testified the trial judge had instructed the jury that his testimony was admitted only to show a prior inconsistent statement by the state's witness. The court also noted that there was no evidence that the state's *primary* purpose in eliciting testimony from the investigator was to evade the hearsay rule and admit the prior inconsistent statement as substantive evidence.

State Was Properly Permitted Under Rule 405(a) to Impeach Defendant's Character Witnesses with Defendant's Prior Conviction

State v. Rhue, 150 N.C. App. 280, 563 S.E.2d 72 (21 May 2002). The defendant was convicted of second-degree murder. The court ruled, citing State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000), that the state was properly permitted under Rule 405(a) and Rule 403 to impeach the defendant's character witnesses, who testified about the defendant's peacefulness, with the defendant's 1980 conviction of assault with a deadly weapon. The court noted that the character witnesses testified that they knew the defendant in 1980, and thus their testimony made that conviction relevant.

Trial Judge Erred in Not Allowing Handwriting Expert to Offer Opinion on Genuineness of Person's Signature

Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233 (19 March 2002). The court ruled that the trial judge erred in not allowing a handwriting expert to offer an opinion on the genuineness of a person's signature. The court noted that there is no requirement that a party offering expert testimony must produce evidence that the testimony is based in science or has been proven through scientific study. Expert testimony may be based not only on scientific knowledge, but also on technical or other specialized knowledge not necessarily based in science. The court also noted that appellate cases have consistently upheld expert testimony concerning handwriting analysis.

Compact Disk Presentation on Mechanism of Baby-Shaking Syndrome Was Properly Admitted During Testimony of Forensic Pathology Expert

State v. Carrilo, 149 N.C. App. 543, 562 S.E.2d 47 (2 April 2002). The court ruled that a compact disk presentation on the mechanism of baby-shaking syndrome was properly admitted during the testimony of a forensic pathology expert in a child abuse homicide trial. The disk included (1) a stop-action video demonstration of the shaking of a doll, representing an infant, and (2) animated diagrams of an infant's brain. The presentation was used to illustrate the expert's testimony concerning the manner in which an infant is shaken to cause the severity of injuries sustained in the typical shaken baby syndrome case.

(1) Trial Judge Erred in Permitting State to Cross-Examine Defendant About Over Ten-Year-Old Aggravated Battery Conviction Under Rule 609(b)
(2) Evidence of Defendant's Beating of Victim Three Months Before Murder Was Properly Admitted Under Rule 404(b)

State v. Harris, 149 N.C. App. 398, 562 S.E.2d 547 (19 March 2002). The defendant was convicted of first-degree murder in the 1998 beating death of the victim with a hammer. (1) The court ruled that that the trial judge erred in permitting the state to cross-examine the defendant about a 1984 Florida aggravated battery conviction under Rule 609(b)—the conviction involved an assault with a bullwhip against his then wife. The court noted that the conviction did not shed any light on the defendant's veracity and the substantial likelihood of prejudice outweighed its minimal impeachment value. (2) The court ruled that the trial judge did not err in admitting under Rule 404(b) evidence of the defendant's beating of the victim with a baseball bat three months before the murder to show malice, premeditation and deliberation, intent, and ill will.

Sentencing

PJC in District Court Is Prior Conviction for Felony Sentencing Under Structured Sentencing Act

State v. Graham, 149 N.C. App. 215, 562 S.E.2d 286 (5 March 2002). Relying on State v. Hatcher, 136 N.C. App. 524, 524 S.E.2d 815 (2000), the court ruled that a PJC entered in district court was properly counted as a prior conviction for felony sentencing under the Structured Sentencing Act [author's note: although not stated in the court's opinion, presumably the PJC was for a Class A or A1 misdemeanor—see G.S. 15A-1340.14(5)].

When Revoking Defendant's Probation, Judge Erred in Recommending That as Condition of Work Release That Defendant Pay Fine Owed in Probationary Judgment

State v. Wingate, 149 N.C. App. 879, 561 S.E.2d 911 (16 April 2002). In January 2000, the defendant was placed on probation. Among the probation conditions was an order to pay $231 in costs, a $1,500 fine, a $100 community service fee, and $400 in attorney fees. In October 2000, a judge revoked the defendant's probationary sentence and activated his sentence. The judge recommended that as a condition of work release that the defendant pay monies owed in the probationary sentence. The court noted that a judge may recommend restitution or reparation be imposed as a condition of attaining work release. The court ruled that the money owed for costs and attorney's fees was properly included in the recommendation. The court also ruled that if the community service fee had been incurred by the state and constituted damages as a result of the defendant's commission of the crime for which he was placed on probation, then it was properly included in the recommendation. The court rejected the defendant's argument that the community service fee is a normal operating expense of government and cannot be considered restitution. The court ruled that the judge erred in recommending payment of the fine as a condition of work release because a fine is not restitution or reparation; the court cited State v. Alexander, 47 N.C. App. 502, 267 S.E.2d 396 (1980).

Trial Judge Properly Found as Aggravating Factor Defendant's Use of Weapon of Mass Destruction in Sentencing for Armed Robbery Conviction

State v. McMillian, 147 N.C. App. 707, 557 S.E.2d 138 (18 December 2001). The defendant was convicted of armed robbery in which he used a sawed off shotgun. The court ruled that the trial judge properly found as an aggravating factor in sentencing that the defendant used a weapon of mass destruction. The finding of this aggravating factor did not violate the provision in G.S. 15A-1340.16(d) that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor.

Department of Correction Has No Authority to Modify Illegal Sentence, But Department Must Notify Trial Court and Parties That Sentence and Judgment Are Not in Accordance With State Law and Must Be Vacated

Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856 (20 November 2001). This case involved a lawsuit by several prisoners against the Department of Correction concerning the department's modifications of their sentences that disadvantaged them. The department determined that a prisoner, who was sentenced to CYO (Committed Youthful Offender) status under the Fair Sentencing Act, did not qualify for that status and refused to consider her for immediate parole. The department determined that two prisoners who received concurrent sentences were ineligible for concurrent sentences and informed them that their sentences would run consecutively. The court, distinguishing State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998), upheld the trial court's ruling that the Department of Correction has no authority to modify an illegal sentence, but the department must notify the trial court and parties that the sentence and judgment are not in accordance with state law and must be vacated.

Fourth Circuit Court of Appeals

North Carolina Supreme Court Ruling That Short-Form First-Degree Murder Indictment Did Not Violate Defendant's Sixth or Fourteenth Amendment Rights Was Neither Contrary To, Nor an Unreasonable Application of, Clearly Established United States Supreme Court Precedent

Hartman v. Lee, 283 F.3d 190 (4th Cir. 2002). The court ruled that a North Carolina Supreme Court ruling [State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996)] that a short-form first-degree murder indictment did not violate a defendant's Sixth or Fourteenth Amendment rights was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent.