RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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North Carolina Supreme Court

Criminal Law and Procedure

Appointment of Counsel Fee in G.S. 7A-455.1 Is Cost of Prosecution Under Art. I, Sec. 23 of North Carolina Constitution and Thus May Not Be Imposed on Defendant in Criminal Case Unless and Until Defendant Is Convicted or Has Pled Guilty or No Contest

State v. Webb, 358 N.C. 92, 591 S.E.2d 505 (6 February 2004). The court ruled that the appointment of counsel fee in G.S. 7A-455.1 is a cost of prosecution under Art. I, Sec. 23 of the North Carolina Constitution and thus may not be imposed on a defendant in a criminal case until the defendant is convicted or has pled guilty or no contest. The court also severed from G.S. 7A-455.1 the provisions (i) requiring payment of the fee at the time of appointment, and (ii) granting a credit against any attorney's fees owed for any defendant who pays the appointment fee in advance. Thus the operative part of this statute after this ruling permits the state to collect the appointment fee from convicted defendants. The court rejected the defendant's argument that the appointment fee for convicted defendants violates the Sixth Amendment of the United States Constitution. The court also ruled that any indigent defendant who paid the appointment fee between April 2, 2003, and February 6, 2004, and who was acquitted or whose case was dismissed, is entitled to a refund by the state. Any defendant who received the pre-payment credit by paying the appointment fee before the final determination of the case and made such payment between April 2, 2003, and February 6, 2004, is entitled to retain the benefit of the credit.

When Defendant's Probation Is Revoked in District Court for Felony Conviction That Occurred There, Defendant's Appeal of Probation Revocation Is to Superior Court, Not Court of Appeals—Ruling of Court of Appeals Reversed

State v. Hooper, 358 N.C. 122, 591 S.E.2d 514 (6 February 2004), *reversing*, 158 N.C. App. 654, 582 S.E.2d 331 (1 July 2003). The court ruled that when a defendant's probation is revoked in district court for a felony conviction that occurred there, the defendant's appeal of the probation revocation is to the superior court, not to the North Carolina Court of Appeals. The court concluded that G.S. 15A-1347, not G.S. 7A-272(d), governed the defendant's appeal of his probation revocation.

(1) Defense Counsel During Jury Argument Conceded Defendant's Guilt of Second-Degree Murder Without Defendant's Consent; *Harbison* Error Requires New Trial
(2) Prosecutor Violated Rule 24 By Failing to Petition for Pretrial Conference in Capital Case
(3) Prosecutor Made Improper Jury Argument

State v. Matthews, 358 N.C. 102, 591 S.E.2d 535 (6 February 2004). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that defense counsel during jury argument conceded the defendant's guilt of second-degree murder without the defendant's consent, and under State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985), that error constituted ineffective assistance of counsel per se under the Sixth Amendment requiring a new trial. (See the court's detailed discussion of the facts in this case.) (2) The court ruled that the prosecutor in this capital case violated Rule 24 of the North

Carolina General Rules of Practice for Superior and District Courts by failing to petition for a pretrial conference. The court stated that before the state retries the defendant, the prosecutor must do so—otherwise the prosecutor risks disciplinary action. (3) The court stated that the prosecutor made an improper jury argument when the prosecutor engaged in name-calling and used scatological language in referring to the defendant's theory of the case. During jury argument the prosecutor characterized the defendant as a "monster," "demon," "devil," "a man without morals," and as having a "monster mind." The court stated that these improper characterizations constituted name-calling and did not serve the state because the prosecutor was not arguing the evidence and conclusions that can be inferred from the evidence. *See also* State v. Maske, 358 N.C. 40, 591 S.E.2d 521 (6 February 2004) (prosecutor referred to defendant as an S.O.B.). In addition, the prosecutor improperly used scatological language by stating "That's bull crap" in concluding an attack on the defendant's theory of the case.

(1) Prosecutor's Jury Argument Was Improper
(2) Diminished Capacity Defense Inapplicable to Acting in Concert Doctrine
(3) Victim Who Is Killed During Kidnapping Is Not Released in Safe Place Under First-Degree Kidnapping

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (7 May 2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. (1) The court ruled that the prosecutor's jury argument was improper when the prosecutor characterized the defendant and his accomplice as wild dogs high on the taste of blood and power over their victims. (2) The court ruled that the trial judge did not err in failing to instruct on diminished capacity concerning the acting in concert doctrine. The court noted that it has never applied diminished capacity to the general intent necessary for acting in concert. (3) The court ruled that a victim who is killed during a kidnapping is not released in a safe place under first-degree kidnapping.

Court Adopts Test to Determine Whether Trial Judge Must Grant Mistrial or New Trial When Juror During Voir Dire Had Failed to Disclose Information

State v. Maske, 358 N.C. 40, 591 S.E.2d 521 (6 February 2004). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the felony being robbery. During jury voir dire, juror A gave a negative response whether she had been a victim of or a witness to a crime. Also, juror A did not respond to a collective question asked of jurors whether the facts of the defendant's case would make it difficult for them to deliberate impartially. During jury deliberations in the guilt-innocence stage, juror A described a break-in that had occurred in her home forty years ago. This information then was reported to the trial judge. All the jurors were brought into the courtroom and questioned by the judge. All jurors, including juror A, said that the disclosure of this evidence would not influence their deliberations. Juror A explained that she had not thought about the break-in when questioned during jury voir dire. The trial judge then denied the defendant's motion for mistrial. The court adopted the following test: a party that moves for a mistrial or new trial based on a misrepresentation by a juror during voir dire must show: (1) the juror concealed material information during voir dire; (2) the moving party exercised due diligence during voir dire to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party. Applying this test, the court upheld the trial judge's denial of the motion for a mistrial. Juror A's inadvertent failure to disclose forty-year-old information that she had forgotten did not amount to concealment, and the juror did not demonstrate bias.

Trial Judge Did Not Err in Requiring Defense Mental Health Expert To Provide State With Raw Test Data from Expert's Psychological Examination of Defendant and in Allowing State to Use It in Cross-Examining Expert

State v. Miller, 357 N.C. 583, 588 S.E.2d 857 (5 December 2003). The defendant was convicted of first-degree murder and sentenced to death. A defense mental health expert testified at the capital sentencing hearing concerning the accomplice's influence over the defendant in carrying out the murder. The court ruled, relying on State v. Cummings, 352 N.C. 600, 536 S.E.2d 36 (2000), and State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995), that the trial judge did not err in requiring the expert to provide the state with raw test data from the expert's psychological examination of the defendant and in allowing the state to use it in cross-examining the expert.

Sufficient Evidence in False Pretenses Case That Victim Was Deceived—Ruling of Court of Appeals Affirmed

State v. Simpson, 357 N.C. 652, 588 S.E.2d 466 (5 December 2003), *affirming*, 159 N.C. App. 435, 583 S.E.2d 714 (5 August 2003). The court affirmed, per curiam and without an opinion, affirmed the Court of Appeals ruling, 159 N.C. App. 435, 583 S.E.2d 714 (5 August 2003), that there was sufficient evidence in a false pretenses case that the victim, a pawnshop owner, was deceived by the defendant's false representation he owned the cameras that he sold to the victim, because at that time the victim did not know that they were stolen, even though the victim may have suspected they were stolen.

Arrest, Search, and Confession Issues

(1) Written Guidelines Are Not Required Under United States or North Carolina Constitutions to Conduct Driver's License Checkpoints
(2) Officer Received Supervisory Approval to Conduct Checkpoint
(3) Driver's License Checkpoint Did Not Violate Fourth Amendment
(4) Officer's Stop of Defendant's Vehicle Was Justified by Reasonable Suspicion of Criminal Activity Irrespective of Constitutionality of Checkpoint

State v. Mitchell, 358 N.C. 63, 592 S.E.2d 543 (6 February 2004), *modifying and affirming*, 154 N.C. App. 186, 571 S.E.2d 640 (19 November 2002). A Belmont Police Department officer decided to conduct a driver's license checkpoint on U.S. 29/74 to check westbound traffic for valid licenses and registrations. The officer spoke with his shift sergeant before conducting the checkpoint to ensure that there was enough personnel to conduct it. The officer had "standing permission" from a department captain to conduct these checkpoints as long as the captain's oral guidelines were followed: at least three officers were present at the checkpoint; officers conducted the checkpoint in a safe area, wore traffic vests, held flashlights to direct vehicles to stop, and stopped every vehicle. These guidelines were not set out in writing. At 4:15 a.m., the defendant's vehicle approached the checkpoint where there were patrol cars with activated blue lights. An officer shined his flashlight on his left hand, directing the defendant to stop. The defendant did not stop; in fact, he speeded up and forced the officer to quickly move out of the path of the defendant's vehicle to avoid being struck. The officer got into his vehicle and pursued the defendant's vehicle, and the defendant eventually stopped 1.5 miles beyond the checkpoint. As a result of this and other evidence, the defendant was charged with DWI. (1) The court ruled that written guidelines are not required under either the United States or North Carolina constitutions to conduct driver's license checkpoints. Adequate oral guidelines were followed in conducting the checkpoint in this case. (2) The court ruled that the officer received supervisory approval to conduct the checkpoint. The court noted the officer's speaking with the staff sergeant about adequate manpower to conduct the checkpoint, and the officer's "standing permission" from the captain to conduct driver's license checkpoints as long as he followed the captain's guidelines. These were sufficient restraints to keep the officer from abusing his

discretion (3) The court ruled that the driver's license checkpoint did not violate the Fourth Amendment—based on the its rulings in (1) and (2) and the stopping of all oncoming traffic at the checkpoint. (4) The court ruled that the officer's stop of defendant's vehicle was justified by reasonable suspicion of criminal activity irrespective of the constitutionality of the checkpoint—assault on a law enforcement officer; attempting to elude a law enforcement officer [G.S. 20-141.5(a)]; and reckless driving.

Capital Case Issues

When Jury Selection in Capital Case Was Conducted With Individual Voir Dire Under G.S. 15A-1214(j), Trial Judge Did Not Err in Requiring That Once State Passed Individual Juror, Defendant Was Required to Pass or Challenge That Same Juror; Court Notes Exception When Individual Voir Dire Is Limited to Specific Issue

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (7 May 2004). The court ruled that when jury selection in a capital case was conducted with individual voir dire under G.S. 15A-1214(j), the trial judge did not err in requiring that once the state had passed an individual juror, the defendant was required to pass or challenge that same juror. Thus all parties are required to accept or reject a juror before the next prospective juror is called. The court examined the provisions in G.S. 15A-1214 and concluded that subsection (j), applicable only in capital cases, contains a distinct procedure, separate from the mandatory procedure outlined in subsections (d) through (f), in which the state must pass twelve jurors before the defendant is required to pass or challenge any juror. The court stated, however, that its ruling should not be interpreted to infringe on the trial judge's inherent authority to permit individual voir dire limited to a specific issue, such as pretrial publicity. If a limited individual voir dire is undertaken, the procedure outlined in subsections (d) through (f), including the requirement to pass a complete panel of twelve, must be followed. [Author's note: Judges should remember that, as noted by the court, G.S. 15A-1214(j) requires a finding of "good cause" to support a judge's order that individual voir dire be conducted.]

Trial Judge Erred in Instructing on Aggravating Circumstance G.S. 15A-2000(e)(6) (Murder Committed for Pecuniary Gain)

State v. Maske, 358 N.C. 40, 591 S.E.2d 521 (6 February 2004). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the felony being robbery. After killing the victim, the defendant took personal property in the apartment where the victim lived. The court ruled that the trial judge erred in instructing on aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain). After quoting from the pattern jury instruction's general description of the aggravating circumstance, the trial judge stated, "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would find this aggravating circumstance . . . ." The court stated that while the general description of the aggravating circumstance was a correct statement of the law, the quoted sentence removed from the jury the requirement that it make a finding whether there was a connection between the killing and the taking of something of value. Because the instruction allowed the jury to find the aggravating circumstance even if the taking had no causal relationship to the killing, it was erroneous.

(1) Trial Judge Did Not Err in Prohibiting Defendant from Introducing Evidence in Capital Sentencing Hearing That Accomplice Received Life Imprisonment for Same Five Murders For Which Defendant Was Convicted
(2) Trial Judge Did Not Err in Failing to Give Peremptory Jury Instruction on Statutory Mitigating Circumstances G.S. 15A-2000(f)(2) (Under Influence of Mental or Emotional Disturbance) and G.S. 15A-2000(f)(6) (Capacity to Appreciate Criminality of Conduct Was Impaired)

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (7 May 2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. He was sentenced to death for two of the murders. (1) The court ruled, relying on State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982), that the trial judge did not err in prohibiting the defendant from introducing evidence in a capital sentencing hearing that the accomplice received life imprisonment for same five murders for which defendant was convicted. The court stated that an accomplice's sentence has no mitigating effect in and of itself. The court rejected, distinguishing State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000), the defendant's argument that evidence of the accomplice's sentences should have admitted under the catchall mitigating circumstance, G.S. 15A-2000(f)(9). The court stated the accomplice's sentence may be considered under (f)(9) when evidence of the sentence is already before the court, such as when the accomplice testified at trial and evidence of a plea bargain was presented for impeachment. (2) The court ruled that the trial judge did not err in failing to give a peremptory jury instruction on statutory mitigating circumstances G.S. 15A-2000(f)(2) (under influence of mental or emotional disturbance) and G.S. 15A-2000(f)(6) (capacity to appreciate criminality of conduct was impaired). The court, relying on State v. Richmond, 347 N.C. 412, 495 S.E.2d 677 (1998), ruled that a peremptory instruction is not required when all the evidence supporting the instruction comes from a mental health professional evaluating the defendant in preparation for trial.

Evidence

(1) Trial Judge Erred in Determining That Alleged Rape Victim Was Unavailable Under Residual Hearsay Exception, Rule 804(b)(5)—Ruling of Court of Appeals Reversed
(2) Trial Judge Erred in Prohibiting Defendant From Introducing Into Evidence Alleged Rape Victim's Voir Dire Testimony Under Rule 804(b)(1) After Judge Had Ruled Victim Was Unavailable to Testify—Ruling of Court of Appeals Reversed

State v. Finney, 358 N.C. 79, 591 S.E.2d 863 (6 February 2004), *reversing*, 157 N.C. App. 267, 581 S.E.2d 764 (15 April 2003). The defendant was convicted of the first-degree rape of his wife. (1) The court ruled that the trial judge erred in determining that the rape victim was unavailable under the residual hearsay exception, Rule 804(b)(5). Thus evidence of the victim's pretrial statement to a detective was inadmissible. The court examined the voir dire testimony of the rape victim and stated that she never definitively refused to testify and certainly did not persist in refusing to testify in the manner contemplated by Rule 804. Rather, she was responsive and cooperative in answering the trial judge's questions. In essence, she told the trial judge that she did not "wish" to testify because of her alleged harassment by the prosecutor. While she may have been a hostile witness for the state, the court concluded that the trial judge failed to determine that she would persist in refusing to testify. (2) The court ruled that the trial judge erred in prohibiting the defendant from introducing into evidence the alleged rape victim's voir dire testimony under Rule 804(b)(1) (admissibility of former testimony) after the judge had ruled that the victim was unavailable to testify.

Murder Victim's Statements Were Admissible Under Rule 803(3) (Then Existing Mental, Emotional, or Physical Condition) to Show Victim's State of Mind

State v. Smith, 357 N.C. 604, 588 S.E.2d 453 (5 December 2003). The defendant was convicted of first-degree murder in which he stabbed the victim to death in her home. The court ruled that the trial judge did not err in allowing the victim's mother to testify that four days before the victim's death the victim told her that she intended to tell the defendant to stop coming by her house and to stop associating with her boyfriend. The victim also told her mother that it was "spooky" to be alone at home during the day, and that sometimes a blue van would come to the end of the road and hesitate before turning around to leave. The mother's testimony about the victim's statements reflected the victim's state of mind, and the testimony concerning the blue van supported the victim's assertion that it was "spooky" to be home alone during the day.

Sentencing

When Defendant's Convictions Were Consolidated for Sentencing Judgment, Trial Judge Did Not Err in Finding Aggravating Factor of Abusing Position of Trust for Most Serious Felony, Even Though Factor Could Not Have Been Found for Less Serious Consolidated Felony—Court of Appeals Ruling Reversed

State v. Tucker, 357 N.C. 633, 588 S.E.2d 853 (5 December 2003), *reversing*, 156 N.C. App. 53, 575 S.E.2d 770 (4 February 2003). The trial judge consolidated for a sentencing judgment convictions of statutory sex offense of a person aged 13, 14, or 15 (Class B1 felony), sexual offense by a person in a parental role (Class E felony), and indecent liberties (Class F felony). The judge found the statutory aggravating factor that the defendant, the stepfather of the victim, abused a position of trust, G.S. 15A-1340.16(d)(15). The court noted that in a consolidated sentencing judgment any aggravating factors found are applied only to the offense in the judgment that provides the basis for the sentencing guidelines; in this case, the most serious offense—statutory sexual offense of person aged 13, 14, or 15 (Class B1 felony). Because the aggravating factor found for this offense is not prohibited by G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove an aggravating factor), even though it would be prohibited for sexual offense by a person in a parental role (Class E felony), the court ruled, relying on State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (1994) and State v. Wright, 319 N.C. 209, 353 S.E.2d 214 (1987), that the judge did not err in finding the aggravating factor in the consolidated sentencing judgment.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Insufficient Evidence to Support Conviction of Maintaining Vehicle for Purpose of Keeping or Selling Controlled Substances
(2) No Violation of Statute Prohibiting Trial in Same Week As Arraignment When Defendant Did Not Request Arraignment As Required by G.S. 15A-941(d)

State v. Lane, 163 N.C. App. 495, 594 S.E.2d 107 (6 April 2004). (1) The state's evidence showed that a white envelope containing eight small Ziploc bags of cocaine (a total of 4.4 grams of cocaine) were found in a vehicle that the defendant had been driving. The court ruled, relying on State v. Dickerson, 152 N.C. App. 714, 568 S.E.2d 281 (2002), that this was insufficient evidence to support the defendant's conviction of maintaining a vehicle for the purpose of keeping or selling controlled substances. The evidence only showed that drugs were found once in the vehicle. The court noted that the evidence in this

case did not indicate possession of cocaine in the vehicle had occurred over a period of time, nor was there evidence that the defendant had used the vehicle on a prior occasion to sell cocaine. (2) The court ruled, relying on State v. Trull, 153 N.C. App. 630, 571 S.E.2d 592 (2002), that there was no violation of the statute [G.S. 15A-943(b)] prohibiting trial in the same week as arraignment when the defendant did not request arraignment as required by G.S. 15A-941(d). Because the record in this case did not show that the defendant requested an arraignment on his habitual felon charge, there was no error in proceeding to the hearing in the same week as the arraignment on the charge.

Jury Instruction on Crime Against Nature Was Not Erroneous Because Offense Includes Penetration By Object Into Genital Opening of Person's Body

State v. Stiller, 162 N.C. App. 138, 590 S.E.2d 305 (6 January 2004). The defendant was convicted of several counts of crime against nature with children. The jury instruction included as acts within crime against nature cunnilingus, fellatio, and the penetration by an object into the genital opening of a person's body. The court stated that while no case in North Carolina has specifically included penetration of a genital opening by an object within crime against nature, such an act is entirely consistent with language in State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978)—see the court's quotation from *Joyner*. The court ruled that the jury instruction was not erroneous. [Author's note: The *Joyner* ruling involved cunnilingus, and its language did not indicate the broadening of the crime to include the use of objects. For a history of crime against nature in North Carolina, see James R. Spence, "The Law of Crime Against Nature," 32 U.N.C. L. Rev. (1954). Note that the legislature specifically included the use of objects when it enacted legislation in 1979 creating first-degree and second-degree sexual offense: see Chapter 682 of the Session Laws of 1979, entitled "An Act To Clarify, Modernize And Consolidate The Law Of Sex Offenses."]

Defendant in First-Degree Murder Trial Who Opposed Submission of Jury Instruction on Second-Degree Murder May Not Raise on Appeal That Trial Judge Erred in Failing to Submit Second-Degree Murder

State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324 (20 January 2004). The court ruled, relying on State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993), the a defendant in a first-degree murder trial who opposed the submission of a jury instruction on second-degree murder may not raise on appeal that the trial judge erred in failing to submit a jury instruction on second-degree murder.

Killing of Motorist During Flight from Armed Robbery Committed Thirty Minutes Earlier Supported Conviction of First-Degree Murder Based on Felony Murder Theory

State v. Doyle, 161 N.C. App. 247, 587 S.E.2d 917 (18 November 2003). The defendant was convicted of felony murder based on an armed robbery. The defendant stole a vehicle by threatening the vehicle occupant with a knife and drove away on Interstate 40 at a normal speed to avoid detection. Once officers activated their lights and sirens, the defendant accelerated, leading the officers on a high speed chase that ended when the defendant crashed into a car on Interstate 40, killing the occupant of that car. Approximately thirty minutes elapsed from the time of the armed robbery and the vehicle crash that killed the occupant. The court ruled, relying on State v. Braxton, 344 N.C. 702, 477 S.E.2d 172 (1996) and other cases, that the killing occurred during the defendant's escape or flight from the armed robbery and thus the defendant was properly convicted of first-degree murder based on the felony murder theory.

Conviction of First-Degree Murder Based on Felony Murder Theory Required Arrest of Judgment of Only One of Underlying Four Robberies

State v. Coleman, 161 N.C. App. 224, 587 S.E.2d 889 (18 November 2003). The defendant was convicted of first-degree murder based solely on the felony murder theory, three counts of armed robbery,

and one count of attempted armed robbery. The trial judge arrested judgment for the attempted armed robbery conviction. The court noted that the trial judge's jury instructions were ambiguous as to which felony served as the underlying felony for the first-degree felony murder verdict. However, the court rejected the defendant's argument that the trial judge was required under these circumstances to arrest judgment for all four robbery convictions. Instead, the court ruled, relying on State v. Freeland, 316 N.C. 13, 340 S.E.2d 35 (1986) and State v. Lotharp, 356 N.C. 420, 571 S.E.2d 583 (2002), that the trial judge did not err in choosing just one of the convictions, the attempted armed robbery, as the felony on which to arrest judgment.

(1) Defendant Was Not Deprived of Fair Trial by Denial of Motion to Sever Trial from Codefendant
(2) Trial Judge's Jury Instruction on Acting in Concert in Armed Robbery Trial Was Not Error When It Required Only That Defendant Acted in Concert to Commit a Robbery

State v. Johnson, 164 N.C. App. 1, 595 S.E.2d 176 (4 May 2004). The defendant was convicted of armed robbery, attempted armed robbery, and conspiracy to commit armed robbery. The state's evidence showed that three men committed the robbery. One of the robbers testified for the state and stated that he got out of the car in which defendant and codefendant were located and demanded the victims' wallets. He said that the plan was to commit a robbery, not an armed robbery. The defendant was driving the car. A victim testified that one of the robbers (the codefendant) was sitting in the backseat and pointed a shotgun at the victims. (1) The court ruled that the defendant was not deprived of a fair trial by the denial of his motion to sever the trial from his codefendant. The defendant's defense—he was driving the vehicle but was unaware that the robbery was to take place—never directly implicated the codefendant. The codefendant's defense—he was not present at the robbery—did not implicate the defendant as a willing participant in the crime. Thus, the defenses of the defendant and codefendant were not so irreconcilable that the jury would unjustifiably infer that a conflict demonstrated that both were guilty. (2) The court ruled, relying on State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), that the trial judge's jury instruction on acting in concert for the armed robbery charge was not error when it required only that defendant acted in concert to commit a robbery. The court stated that the jury need only find that the defendant acted in concert to commit a robbery and that his codefendant used the dangerous weapon pursuant to the common purpose to commit the robbery.

Armed Robbery of Bank's Money from Two Bank Tellers Supported Only One Armed Robbery Conviction

State v. Becton, 163 N.C. App. 592, 594 S.E.2d 143 (6 April 2004). The court ruled, relying on State v. Potter, 285 N.C. 238, 204 S.E.2d 649 (1974), that the armed robbery of a bank's money from two bank tellers supported only one armed robbery conviction.

(1) Sufficient Evidence in Armed Robbery Trial of Defendant's Use of Dangerous Weapon Based on Doctor's Description of Victim's Injuries
(2) Assault on Handicapped Person Offense Requires State to Prove That Defendant Knew or Had Reasonable Grounds to Know That Victim Was Handicapped; Sufficient Evidence Existed to Prove This Element in This Case

State v. Singletary, 163 N.C. App. 449, 594 S.E.2d 64 (6 April 2004). The defendant was convicted of armed robbery and aggravated assault on a handicapped person. The defendant deliberately drove her car into the victim's car to create an accident and commit a robbery. The victim had several conversations with the defendant concerning exchanging information about the accident. At one point, the victim returned to her vehicle but then remembered that she did not receive the defendant's information. The last thing she remembered before waking up in the hospital was getting out of her vehicle to speak with the

defendant. The victim suffered a broken clavicle and a "closed head injury." Although no weapon was produced at trial, the treating doctor testified that the victim received head injuries consistent with the use of a foreign instrument, such as a baseball bat, crowbar, baton, or similar instrument, and her head injuries were not consistent with a fall. The victim was a sixty-five year old woman who weighed 105 pounds and suffered from "profound sensory neural hearing loss" that required her to wear a hearing aid. The hearing aid was an external piece that the victim wore over her ear. (1) The court ruled that there was sufficient evidence of the defendant's use of dangerous weapon based on doctor's description of victim's injuries to support the defendant's armed robbery conviction. (2) The court ruled that in an assault on a handicapped person offense, the state must prove that the defendant knew or had reasonable grounds to know that the victim was handicapped. The court also ruled that there was sufficient evidence that the state proved this element. The court noted that the victim had several conversations with the defendant and repeatedly walked to and from the defendant's car—thus the defendant could see the victim's hearing aid. A reasonable juror could find that the defendant knew or should have known of the victim's handicap.

Sufficient Evidence of Culpable Negligence to Support Convictions of Involuntary Manslaughter and Assault with Deadly Weapon Inflicting Serious Injury in Vehicular Homicide Prosecution in Which Defendant Was Not Impaired

State v. Wade, 161 N.C. App. 686, 589 S.E.2d 379 (16 December 2003). The defendant was driving a vehicle behind the decedent's vehicle. Another vehicle was ahead of the decedent's vehicle. The defendant intermittently would sped up as if to pass the decedent, but the decedent would increase her speed. As the three vehicles approached a sharp curve with a double yellow line, the defendant passed the decedent's vehicle. When the defendant was alongside of the first vehicle, a truck coming in the other direction tried to avoid a crash but eventually struck the decedent's vehicle, killing her, and then flipped over, resulting in serious injuries to the truck driver. The court ruled that there was sufficient evidence of culpable negligence to support convictions of involuntary manslaughter and assault with deadly weapon inflicting serious injury, even though the defendant was not impaired by alcohol or drugs.

(1) Sufficient Evidence of Serious Physical Injury to Support Conviction of Felony Child Abuse Under G.S. 14-318.4(a)
(2) Double Jeopardy Did Not Bar Defendant's Convictions of Both Assault With Deadly Weapon Inflicting Serious Injury and First-Degree Kidnapping

State v. Romero, 164 N.C. App. 169, 595 S.E.2d 208 (4 May 2004). (1) The defendant hit his one-year-old child at least once with a belt, the child cried after being hit, and the child suffered a visible bruise to his head as a result of the assault. The court ruled, relying on State v. Williams, 154 N.C. App. 176, 571 S.E.2d 619 (2003), and other cases, that this was sufficient evidence of serious physical injury to support the defendant's conviction of felony child abuse under G.S. 14-318.4(a). (2) The defendant assaulted an adult female in her home. She escaped outside the home and attempted to call for help. The defendant grabbed her by the hair and dragged her back inside the home. Once inside, the defendant threatened her with a knife and beat her with his belt and gun. The court ruled that double jeopardy did not bar the defendant's convictions of both assault with deadly weapon inflicting serious injury and first-degree kidnapping. The restraint and removal from outside the home back into the home was separate and apart from, and not an inherent incident of, the felonious assault that occurred after he brought her back into the home.

Assault by Pointing Gun Is Not Lesser-Included Offense of Assault with Firearm on Law Enforcement Officer

State v. Dickens, 162 N.C. App. 632, 592 S.E.2d 567 (17 February 2004). The court ruled, relying on the reasoning in State v. Childers, 154 N.C. App. 375, 572 S.E.2d 207 (2002) (state did not need to show

pointing firearm at law enforcement officer to prove assault with firearm on law enforcement officer), that assault by pointing a gun is not a lesser-included offense of assault with a firearm on a law enforcement officer.

Insufficient Evidence to Support Indecent Liberties Conviction Based on Failure to Prove Element, "Purpose of Arousing or Gratifying Sexual Desire," Under G.S. 14-202.1(a)(1)

State v. Brown, 162 N.C. App. 333, 590 S.E.2d 433 (20 January 2004). The defendant was convicted of taking indecent liberties with a child under G.S. 14-202.1(a)(1). The court ruled, distinguishing State v. Every, 157 N.C. App. 200, 578 S.E.2d 642 (2003) (repeated, graphic, and explicit sexual conversations over phone with victim concurrent with an indication that defendant had masturbated was sufficient evidence of indecent liberties), that there was insufficient evidence to support the conviction based on the state's failure to prove the element that the defendant acted for the "purpose of arousing or gratifying sexual desire." The phone conversation between the defendant and the alleged female victim included the defendant's comments on how she looked, indicating that he would like to see her, and his feelings toward her and how he perceived her feelings toward him. The conversations were neither sexually graphic and explicit nor accompanied by other actions tending to show that the defendant's purpose was sexually motivated.

(1) Insufficient Evidence to Support Conviction of Indecent Liberties When Defendant Attempted to Grab Child's Arm in Bathroom Stall
(2) Sufficient Evidence of Kidnapping When Defendant Went Into Bathroom Stall While Child Was Urinating, Closed Stall, and Touched Area Near Child's Penis

State v. Shue, 163 N.C. App. 58, 592 S.E.2d 233 (17 February 2004). Victim A, a eight year old boy, went to a restaurant's bathroom by himself. Unable to lock the bathroom stall, he asked the defendant, a forty-seven year old male, for assistance. The defendant entered the stall with the boy, successfully locked it, turned toward the child, and attempted to grab his arm. The defendant left the stall when the boy jerked his arm away. A short time later victim B, a five year old boy and brother of victim A, went to the bathroom by himself. While the boy was in the bathroom stall, the defendant entered the stall and closed it while the boy was urinating. The defendant touched the area near the child's penis with both hands and then left the stall. (1) The court ruled that there was insufficient evidence to support the defendant's conviction of taking indecent liberties with victim A, including an attempt to take indecent liberties. The court rejected the state's argument that the defendant's conduct with victim B supported the conclusion that he attempted to take indecent liberties with victim A. (2) The court ruled that there was sufficient evidence of second-degree kidnapping of victim B: the defendant confined the victim within the stall for the purpose of facilitating the defendant's taking indecent liberties with the victim.

(1) State Is Not Required to Prove Defendant's Knowledge of Duty to Register in Prosecuting Failure to Comply with Sex Offender Registration Law, G.S. 14-208.11
(2) Sex Offender Registration Law, As Applied to Defendant, Did Not Violate Due Process
(3) Sex Offender Registration Law Does Not Violate Ex Post Facto Clause

State v. White, 162 N.C. App. 183, 590 S.E.2d 448 (20 January 2004). The defendant, subject to the sex offender registration law, was convicted of failing to notify the sheriff of his change of address under G.S. 14-208.11. (1) The court ruled, relying on the rulings in State v. Young, 140 N.C. App. 1, 535 S.E.2d 380 (2000), and State v. Holmes, 149 N.C. App. 572, 562 S.E.2d 26 (2002), that the state is not required to prove the defendant's knowledge of the duty to register in prosecuting a defendant's failure to comply with the sex offender registration law. (2) The court ruled that the sex offender registration law, as applied to the defendant, did not violate due process. The evidence showed that a deputy sheriff had advised the defendant of the sex offender registration requirements, including notifying the sheriff's department of a

change of address, when the defendant initially registered with the department. The defendant offered no evidence that he was incompetent or that the standards for a reasonable and prudent person were otherwise inapplicable to him. (3) The defendant's duty to register was based on a conviction of an offense that occurred before the enactment of the sex offender registration law. The court ruled, relying on the ruling and analysis of Smith v. Doe, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), the sex offender registration law did not violate the Ex Post Facto Clause of the United States Constitution.

(1) State Was Properly Permitted to Amend Sex Offense Indictments
(2) Evidence Was Sufficient to Prove Dates of Statutory Rape Charges and Defendant's Age
(3) Charges Were Sufficiently Differentiated So That Defendant's Right to Unanimous Verdicts Was Not Violated

State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (16 December 2003). The defendant was convicted of five counts of statutory rape and two counts of statutory sexual offense of a child, his daughter, who was between 13 and 15 years old when the offenses occurred. The indictments alleged that each offense occurred between May 1, 1998, and September 30, 1998, and that the defendant was more than four years older than the victim. The indictments were amended during the trial to change the words "defendant being more than 4 years older" to the words "more than 6 years older" so the indictments charged offenses under G.S. 14-27.7A(a) instead of G.S. 14-27.7A(b). (1) The court ruled that the state was properly permitted to amend the indictments. The court stated that the defendant knew his age (he was in his thirties) and was thus aware that G.S. 14-27.7A(b) did not apply to him. In addition, it was biologically impossible for the defendant to be the father of the victim and fall within the age requirements of G.S. 14-27.7A(b). The court concluded that the defendant could not have been misled or surprised about the nature of the charges and their respective punishments. (2) The court ruled that the evidence was sufficient to prove the dates of the statutory rape charges and the defendant's age. The evidence established that the victim was between thirteen and fifteen years old during the time she lived with the defendant at a specified address and that the defendant engaged in almost daily sexual intercourse with her there. Although the state failed to offer evidence of the defendant's age, the court ruled that the evidence was sufficient to prove that the defendant was more than six years older than the victim. The court noted that the victim testified that the defendant was her biological father, and it was biologically impossible for the defendant to be less than six years older than the victim. (3) The court ruled, distinguishing State v. Holden, 160 N.C. App. 503, 586 S.E.2d 513 (7 October 2003), that the charges were sufficiently differentiated so that the defendant's right to unanimous verdicts was not violated. The lack of specificity in the verdict sheets needed for unanimous verdicts was cured by the evidence presented at trial—see the court's discussion of the evidence in its opinion.

(1) After Trial Judge Rejected Plea Agreement, Defendant Could Not Accept It at Later Date Unless State Negotiated Another Plea Agreement With Defendant
(2) Indictment for Statutory Sexual Offense Committed Against Person 13, 14, or 15 Years Old Need Not Allege Specific Sex Act Allegedly Committed by Defendant

State v. Daniels, 164 N.C. App. 558, 596 S.E.2d 256 (1 June 2004). (1) On June 26, 2002, the trial judge rejected the plea agreement between the state and defendant when the defendant said he was "not guilty" when the judge questioned him. On July 15, 2002, the defendant asserted that he wanted to plead guilty pursuant to the plea agreement that was before the judge on June 26, 2002. The court ruled that after the trial judge rejected the plea agreement, the defendant could not accept it at a later date unless the state negotiated another plea agreement with the defendant. The agreement rejected by the judge was null and void. In this case, the state had not negotiated another plea agreement with the defendant after June 26, 2002. (2) The court ruled, referring to G.S. 15-144.2(a), that an indictment for statutory sexual offense committed against person who is 13, 14, or 15 years old need not allege the specific sex act allegedly committed by the defendant.

Statutory Rape Prosecution under G.S. 14-27.7A Is Not Barred by *Lawrence v. Texas*

State v. Clark, 161 N.C. App. 316, 588 S.E.2d 66 (18 November 2003). The defendant was convicted under G.S. 14-27.7A(a) of statutory rape of a victim who was thirteen years old. The court ruled that the United States Supreme Court ruling in Lawrence v. Texas, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (state statute prohibiting two people of same sex to engage in consensual sex act violated privacy interest in Due Process Clause of Fourteenth Amendment when consensual sex act occurred between two adults in private residence), did not bar this prosecution. The court stated that the U.S. Supreme Court noted in *Lawrence* that the case did not involve minors or those "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."

Insufficient Evidence That Defendant Assumed Position of Parent in Home of Minor Victim to Support Conviction Under G.S. 14-27.7(a)

State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738 (2 March 2004). The defendant was convicted of a violation of G.S. 14-27.7(a) based on evidence that he committed sexual acts with a minor with whom he lived together in the same apartment along with the mother of the minor and the mother's boyfriend. The mother allowed the defendant to live in the apartment in return for babysitting her children while she was at work. The court ruled that there was insufficient evidence that the defendant assumed the position of a parent in the home of a minor victim to support the conviction. The court noted that the evidence in this case established only the bare fact that the defendant was a babysitter for the minor.

Weight of Marijuana Is Determined at Time of Seizure of Marijuana, Including Moisture Naturally Contained Within Marijuana—Weight Is Not Determined When Marijuana Is Later Usable or Suitable for Consumption

State v. Gonzales, 164 N.C. App. 512, 596 S.E.2d 297 (1 June 2004)**,** *affirmed per curiam*, 359 N.C. 420, 611 S.E.2d 832 (5 May 2005) This case involved an appeal by the state of a judge's order dismissing trafficking charges. Officers seized 731 potted marijuana plants. Officers cut the plants where they joined the soil and bagged them. The freshly cut plants weighed a total of 25.5 pounds. When submitted to the SBI about two weeks later, they weighed 6.9 pounds. (Author's note: A drug trafficking offense requires a weight of more than 10 pounds of marijuana.) The court ruled, relying on state and federal case law, that the weight of marijuana is determined at the time of seizure of the marijuana, including moisture naturally contained within marijuana. The weight is not determined when the marijuana is usable or suitable for consumption. The court also noted that the defendant has the burden of showing that some of the weight of marijuana is attributable to parts of the plant (such as the mature stalk or sterile seeds) that is not included in the definition of marijuana under G.S. 90-87(16). The court indicated that the defendant also could show that excess water or extraneous debris contributed to the weight of the marijuana.

(1) Trial Judge Erred in Allowing State to Amend Drug Paraphernalia Indictment
(2) Insufficient Evidence to Support Jury Instruction on Constructive Possession in Drug Trial

State v. Moore, 162 N.C. App. 268, 592 S.E.2d 562 (20 January 2004). (1) The indictment charging possession of drug paraphernalia alleged that the paraphernalia was "a can designed as a smoking device." The court ruled that the trial judge erred in allowing the state to amend the indictment to change the description of the paraphernalia to a "brown paper container" because the amendment constituted a substantial alteration of the offense set out in the indictment. (2) The defendant was convicted of possession with intent to sell and deliver cocaine. The court ruled that there was insufficient evidence to support a jury instruction on constructive possession of the cocaine, which was found by officers in a

mobile home when five people were in or near the home. (See the court's opinion for the facts of this case.)

Trial Judge in Drug Prosecution Erred in Admitting State Witness's Testimony That Defendant Was in Place Known as "Open Air Market for Drugs"

State v. Williams, 164 N.C. App. 638, 596 S.E.2d 313 (1 June 2004). The defendant was convicted of drug offenses. The court ruled, relying on State v. Weldon, 314 N.C. 401, 333 S.E.2d 701 (1985), and other cases, that the trial judge erred in admitting a state witness's testimony that the defendant was in a place known as an "open air market for drugs." The court stated that this evidence is inadmissible hearsay.

(1) Trial Judge Did Not Err in Not Submitting Assault on Government Officer [G.S. 14-33(c)(4)] As Lesser Offense of Malicious Conduct by Prisoner (G.S. 14-258.4)
(2) Trial Judge Did Not Err in Not Removing Defense Counsel Based on Alleged Conflict of Interest

State v. Smith, 163 N.C. App. 771, 594 S.E.2d 430 (20 April 2004). (1) The defendant was convicted of malicious conduct by prisoner (G.S. 14-258.4). The state's evidence showed that the defendant was a prisoner in a state correctional unit and spat on a state correctional officer while the officer was performing her duties. The defendant did not present any evidence to negate the state's evidence. The court ruled that the trial judge did not err in not submitting assault on a government officer [G.S. 14-33(c)(4)] as a lesser offense of malicious conduct by prisoner. (2) The defense counsel had represented a state's witness in a civil matter unrelated to the defendant's case. The witness testified in corroboration of another witness at the defendant's trial. The court noted that the defendant did not show that defense counsel was less than diligent during the cross-examination of the formerly represented state's witness and thus was not deprived of his right to a fair trial. The court ruled that the trial judge did not err in not removing defense counsel based on the alleged conflict of interest.

Trial Judge Erred in Not Submitting Misdemeanor Breaking or Entering as Lesser Offense of Felonious Breaking or Entering, But Did Not Err in Not Submitting Misdemeanor Larceny as Lesser Offense of Felony Larceny Committed Pursuant to a Breaking or Entering

State v. Friend, 164 N.C. App. 430, 596 S.E.2d 275 (1 June 2004). The defendant was convicted of felonious breaking or entering a residence and felony larceny committed pursuant to the felonious breaking or entering. The defendant's evidence showed that he broke into the residence to sleep there. The court ruled that the trial judge erred in not submitting misdemeanor breaking or entering as a lesser offense of felonious breaking or entering. However, the court ruled that the trial judge did not err in not submitting misdemeanor larceny as lesser offense of felony larceny committed pursuant to the breaking or entering, because the evidence was uncontradicted that if a larceny occurred, it occurred pursuant to a breaking or entering. Larceny is a felony whether it is committed pursuant to a felony or misdemeanor breaking or entering—see G.S. 14-72(b)(2) and G.S. 14-54.

No Fatal Variance in Assault Indictments When Charging Language Was Surplusage

State v. Pelham, 164 N.C. App. 70, 595 S.E.2d 197 (4 May 2004). The defendant was charged in three indictments, involving three different officers, with assault with a firearm on a law enforcement officer (G.S. 14-34.5). The language relevant to the issue in this case alleged an assault against the named officer with a firearm, "by shooting at him." The evidence at trial showed that the defendant shot at a fourth officer, but not these three officers. The court ruled, relying on State v. Muskelly, 6 N.C. App. 174, 169

S.E.2d 530 (1969), that the language, "by shooting at him," was surplusage and thus there was no fatal variance.

Trial Judge Erred in Not Submitting Defense of Entrapment to DWI Charge

State v. Redmon, 164 N.C. App. 658, 596 S.E.2d 854 (1 June 2004). The court ruled that the trial judge erred in not submitting the defense of entrapment to a DWI charge. The court stated that the defendant's evidence, if believed, would tend to show that the officer induced the defendant to drive his truck and that the defendant was not predisposed to drive while impaired (see the detailed facts on inducement and predisposition set out in the court's opinion.)

(1) Two DWI Convictions Consolidated for Judgment Count as Two Convictions in Prosecution of Habitual DWI
(2) Evidence Was Sufficient to Support Impaired Driving in Habitual DWI Prosecution

State v. Allen, 164 N.C. App. 665, 596 S.E.2d 261 (1 June 2004). (1) The court ruled, distinguishing habitual felon law, that two DWI convictions consolidated for judgment count as two convictions in the prosecution of habitual DWI. (2) The court ruled that the following evidence was sufficient to support impaired driving in an habitual DWI prosecution: An officer, informed by a dispatcher that an impaired driver was driving an older model white Toyota pickup truck, saw a truck matching that description cross the centerline of a road. The officer stopped the vehicle. The officer noticed a very strong odor of alcohol emanating from the truck while he spoke with the defendant-driver. The defendant had difficulty getting out of the truck, was unsteady on his feet, and had to hold onto the side of the truck to walk. While the defendant was cooperative, he seemed sleepy, his speech was slurred, and he was difficult to understand. The officer did not ask the defendant to perform psychophysical tests because he believed the defendant was incapable of performing the tests without risk of physical harm from a potential fall. The officer opined that the defendant was impaired. Also, the defendant refused to take the Intoxilyzer test, which the court noted as a significant fact.

State Was Properly Permitted to Amend Habitual Felon Indictment

State v. Lewis, 162 N.C. App. 277, 590 S.E.2d 318 (20 January 2004). The court ruled that the state was properly permitted to amend a habitual felon indictment. The state corrected the second conviction alleged in the indictment, which had mistakenly noted the date and county of the defendant's probation revocation instead of the date and county of the defendant's prior conviction of felonious breaking and entering.

Trial Judge Erred in Allowing State to Amend Fatally Defective Larceny Indictment

State v. Cathey, 162 N.C. App. 350, 590 S.E.2d 408 (20 January 2004). A larceny indictment alleged that the defendant stole property from "Faith Temple Church of God." The evidence showed that the church's legal name was "Faith Temple Church—High Point, Incorporated." Relying on State v. Roberts, 14 N.C. App. 648, 188 S.E.2d 610 (1972), the court ruled that the trial judge erred in allowing the state to amend this fatally defective larceny indictment.

Larceny Indictment Alleging "Personal Property of Parker's Marine" Was Fatally Defective

State v. Phillips, 162 N.C. App. 719, 592 S.E.2d 272 (17 February 2004). The court ruled that a larceny indictment was fatally defective when it alleged "the personal property of Parker's Marine," because it failed to allege that Parker's Marine was a legal entity capable of ownership of property. That is, Parker's

Marine was not an individual and the name did not show that it was a legal entity capable of owning property.

Fatal Variance Existed Between Felonious Assault Indictment's Description of Deadly Weapon and Evidence of Deadly Weapon Presented at Trial

State v. Skinner, 162 N.C. App. 434, 590 S.E.2d 876 (3 February 2004). The defendant was charged in an indictment with assault with a deadly weapon with intent to kill inflicting serious injury. The court ruled that there was fatal variance between the indictment's description of the deadly weapon (using hands to strike the victim) and the evidence presented a trial, which tended to show that the deadly weapon was a hammer or iron pipe.

Fatal Variance Existed Between Date Alleged in Sex Offense Indictments and Date Proved at Trial When Defendant's Alibi Defense Was Prejudiced by Variance

State v. Custis, 162 N.C. App. 715, 591 S.E.2d 895 (17 February 2004). The defendant was indicted for several sex offenses that alleged they occurred on or about June 15, 2001. The state's evidence showed sexual encounters between the victim and the defendant over a period of years that ended sometime before the date alleged in the indictment. The defendant's offered an alibi defense for the date alleged in the indictment. The court ruled, relying on State v. Stewart, 353 N.C. 516, 546 S.E.2d 568 (2001), that the variance between the allegation in the indictment and the evidence at trial involved almost the same "unique facts and circumstances" as in *Stewart* and sufficiently prejudiced the defendant's alibi defense to require a new trial.

Plain Error Existed Based on Disputed Facts in This Case When Trial Judge Instructed Jury on Theories of Kidnapping Not Alleged in Indictment

State v. Smith, 162 N.C. App. 46, 589 S.E.2d 739 (6 January 2004). The defendant was convicted of second-degree kidnapping and other offenses. The court ruled, relying on State v. Lucas, 353 N.C. 568, 548 S.E.2d 712 (2001) and other cases, that it was plain error (the defendant had not objected to the jury instruction at trial) based on the disputed facts in this case when the trial judge instructed on "confining, restraining, and removing" the victim when the indictment only had alleged "removing." The court reversed the conviction and remanded for a new trial.

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion to Sever Trial from Codefendant
(2) Sufficient Evidence to Support Convictions of Kidnapping That Occurred During Armed Robberies

State v. Escoto, 162 N.C. App. 419, 590 S.E.2d 898 (3 February 2004). The defendant was convicted of first-degree burglary, five counts of first-degree kidnapping, and two counts of armed robbery. The state's evidence showed that five people, including the defendant and codefendant, entered a home and forced five victims onto the floor with guns and restrained them using tape, shoelaces, and telephone cord. They also placed tape over the mouths of the victims and took items of property. The defendant and codefendant testified that they were coerced by the others involved in the crimes to commit the offenses. However, a state's witness, who was confined with the codefendant in jail before trial, testified in effect that the codefendant had admitted that he was not coerced into committing the crimes. (1) The court ruled that the trial judge did not abuse his discretion in denying the defendant's motion to sever the defendant's trial from the codefendant. The court noted that G.S. 15A-927(c)(1), patterned after the ruling in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), did not apply in this case because the codefendant testified in the defendant's trial and thus was available for cross-examination. The court

also stated that G.S. 15A-927(c)(2) (requiring severance when necessary to promote fair determination of guilt or innocence) did not require severance. There is a strong policy favoring consolidated trials of defendants, and the defendant and codefendant did not present conflicting defenses in this case. (2) The court ruled that there was sufficient evidence to support convictions of kidnapping that occurred during armed robberies. There was sufficient restraint of the victims (see the facts set out above) beyond that inherent in the commission of the armed robberies.

Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion to Sever Armed Robbery Trial from Codefendant

State v. Distance, 163 N.C. App. 711, 594 S.E.2d 221 (20 April 2004). The defendant and codefendant were tried together and convicted of armed robbery and conspiracy to commit armed robbery of an employee at a video rental store. At a voir dire hearing on the defendant's motion to sever his trial from the codefendant, the codefendant's wife testified that the defendant told her that if he had to make a statement or talk with the police about what happened, he would say that the codefendant did not participate in the robbery. The court ruled, relying on State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986), and distinguishing State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976), that the trial judge did not abuse his discretion in denying the defendant's motion to sever his trial from his codefendant. The defendant failed to provide any evidence to corroborate the testimony of the codefendant's wife, an interested witness providing hearsay testimony. In addition, the defendant made no attempt during the voir dire hearing or trial to corroborate his assertion that the codefendant would have testified on the defendant's behalf if the trial had been severed. This evidence was insufficient to show that the defendant was deprived of an opportunity to present his defense.

Sufficient Evidence to Support Conviction of Misdemeanor Cruelty to Animals

State v. Coble, 163 N.C. App. 335, 593 S.E.2d 109 (16 March 2004). The defendant was convicted of misdemeanor cruelty to animals, G.S. 14-360(a), involving her treatment of two dogs kept at her home. The court ruled that the following evidence supported the conviction based on the defendant's knowingly depriving the dogs of necessary sustenance. The evidence showed that the defendant knew that the dogs were being kept, with her consent, at her home and in her backyard. The dogs were tied up with no shelter, food, or water. Both dogs were allowed to become emaciated; one had died and had been left, still tied up, to the point of decay. When an animal control department employee arrived at the defendant's home and spoke with the defendant about the dogs, she did not act surprised to see the dead dog and admitted that she did not have time to feed the dogs. The defendant also admitted to having given the dogs too much worming medicine. (See other facts set out in the court's opinion.)

State Offered Sufficient Evidence in Worthless Check Prosecution That Defendant Knew There Were Insufficient Funds When He Issued Worthless Checks

State v. Mucci, 163 N.C. App. 615, 594 S.E.2d 411 (20 April 2004). The defendant was convicted of four counts of felony issuing of worthless checks. The court ruled that the state offered sufficient evidence that the defendant knew there were insufficient funds when he issued the checks. The court quoted from Semones v. Southern Bell Telephone & Telegraph Co., 106 N.C. App. 334, 416 S.E.2d 909 (1992), that knowledge may be inferred from evidence that the defendant issued other worthless checks within the same time period as the check at issue. The court noted that in this case, not only was there evidence that the checks had been issued with insufficient funds, there was also evidence that other checks within the same time period had been returned for insufficient funds and the defendant requested the victim to hold the checks and not deposit them immediately.

Fatal Variance Existed When Juvenile Petition Alleged Forcible Sexual Offense and Evidence Did Not Show That Force Was Used; Although Evidence Showed Commission of Statutory Sexual Offense, It Was Not Properly Alleged

In re Griffin, 162 N.C. App. 487, 592 S.E.2d 12 (3 February 2004). The court ruled that a fatal variance existed when a juvenile petition alleged a forcible sexual offense and the evidence at the adjudicatory hearing did not show that force was used. Although the evidence showed that a statutory sex offense was committed, the juvenile petition did not allege the victim's age and the difference in ages between the victim and the juvenile—the court relied on State v. Jones, 135 N.C. App. 400, 520 S.E.2d 787 (1999), as requiring this information to be alleged. Thus, the trial judge erred in adjudicating the juvenile to be delinquent of first-degree statutory sexual offense.

(1) Court Discusses Legal Issues Involving Dismissal of Charges Under G.S. 15A-711(c)
(2) Defendant Failed to Prove Constitutional Right to Speedy Trial Was Violated Although There Was About Two Year Delay From Date of Offenses to Trial and Defendant Asserted Right to Speedy Trial Several Times
(3) Trial Judge Did Not Err in Instructing Jury That Box Cutter Was Deadly Weapon as a Matter of Law Based on Evidence That Defendant Lunged and Swiped at Three Victims

State v. Doisey, 162 N.C. App. 447, 590 S.E.2d 886 (3 February 2004). The defendant was convicted of three counts of assault with a deadly weapon on a government officer. (1) Because of deficiencies in the record concerning the facts involving the defendant's motion to dismiss the charges under G.S. 15A-711(c) (prisoner's request that prosecutor request penal institution to produce prisoner for trial), the court reversed the trial judge's denial of the defendant's dismissal motion and remanded for a new hearing. The court reviewed the case law concerning the issues involved in a dismissal and stated: (i) the dismissal of charges is based on whether a prosecutor failed within six months of the defendant's request to be produced for trial to request the defendant's release from a penal institution for trial; (ii) the dismissal of charges is not based on the state's failure to try the defendant within any particular time period; (iii) the prisoner's request is not subject to a trial judge's approval or denial; and (iv) if the Attorney General's Office assumes the prosecution of a case from the district attorney, the office takes it subject to a previously filed G.S. 15A-711 request by a defendant. (2) The court ruled that the defendant failed to prove his constitutional right to a speedy trial was violated although there was about a two year delay from the date of the offenses to trial and the defendant asserted his right to speedy trial several times. The court stated that the defendant alleged prejudice only by his suffering anxiety and concern, but he did not assert that the delay in any way hampered his ability to present a defense. The court also noted that the defendant was serving a 30 to 40 year sentence while awaiting trial. The court rejected the defendant's argument that the state failed to offer any reasons for the delay, noting that the defendant has the burden of showing that the reason for the delay was the state's neglect or willfulness. (3) The court ruled that the trial judge did not err in instructing the jury that a box cutter was a deadly weapon as a matter of law based on the evidence that the defendant lunged and swiped at the three victims with the box cutter in his hand.

(1) Insufficient Evidence to Support Conviction of Breaking or Entering Motor Vehicle When State Failed to Prove Element That Vehicle Contained Goods or Anything of Value
(2) Court States That Trial Judge Who Orders Defendant to Be Shackled Must Make Adequate Findings to Support Shackling

State v. Jackson, 162 N.C. App. 695, 592 S.E.2d 575 (17 February 2004). (1) The court ruled, relying on State v. McLaughlin, 321 N.C. 267, 362 S.E.2d 280 (1987), that there was insufficient evidence to support the defendant's conviction of breaking or entering a motor vehicle when the state failed to prove the element that vehicle contained goods or anything of value. The court rejected the state's argument that

the vehicle's keys, seats, carpeting, visors, handles, knobs, cigarette lighter, and radio satisfied this element. There must be proof of objects within the vehicle separate and distinct from the functioning vehicle. (2) The court stated that a trial judge who orders a defendant to be shackled must make adequate findings to support the shackling.

Whether Sawed-Off Shotgun Fits Exception for Antique in G.S. 14-288.8(c) Is Affirmative Defense

State v. Blackwell, 163 N.C. App. 12, 592 S.E.2d 701 (17 February 2004). The court ruled that whether a sawed-off shotgun fits the exception for an antique in G.S. 14-288.8(c) (adopting federal law, which defines antique as weapon manufactured in or before 1898) is an affirmative defense. Thus a defendant must present evidence showing that the weapon qualifies as an antique. [Author's note: The court used the term "initial" burden of proof, which probably means that a defendant has the initial burden of production, and if the defendant satisfies that burden, then the state has the burden of proving that the weapon was not an antique.]

Trial Judge Erred in Not Submitting Defense-Requested Jury Instruction That Defendant Had No Duty to Retreat When Attacked in Her Home

State v. Everett, 163 N.C. App. 95, 592 S.E.2d 582 (2 March 2004). The defendant was convicted of second-degree murder. The court ruled, relying on State v. Brown, 117 N.C. App. 239, 450 S.E.2d 538 (1994), and other cases, that the trial judge erred in not submitting a defense-requested jury instruction that the defendant had no duty to retreat when she was attacked in her home.

Evaluation of Defendant During Trial for Capacity to Proceed Did Not Violate Statutes or Constitution

State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902 (18 November 2003). The court ruled that a one hour and forty minute competency evaluation of the defendant at Dorothea Dix Hospital by a forensic psychiatrist during the second day of his trial did not violate G.S. 15A-1001 et seq. or constitutional due process. The evaluation was ordered after the trial judge had been informed that an evaluation of the defendant's capacity to proceed had been previously ordered by another judge but had never been conducted.

Judge Did Not Err in Determining at Retrospective Competency Hearing That Defendant Had Been Competent to Stand Trial at Trial Conducted Three Years Earlier by Same Judge

State v. McRae, 163 N.C. App. 359, 594 S.E.2d 71 (6 April 2004). The defendant was indicted for first-degree murder in March 1996. After six conflicting competency evaluations, he was found competent to stand trial and was tried in April 1998—but the jury could not agree on a verdict and a mistrial was declared. The defendant was given a seventh competency evaluation five days before the second trial in May 1998 and found competent; at the second trial he was found guilty of first-degree murder. On appeal, the North Carolina Court of Appeals ruled that the defendant's due process rights were violated because the defendant should have been evaluated on the day the second trial began—considering the seven prior and conflicting evaluations. The court on remand to superior court ordered a judge to determine if a retrospective competency hearing could be held effectively, and if so, to determine the defendant's competency at the time of trial in May 1998. The judge who had presided at the second trial conducted a retrospective competency hearing in the summer of 2001, and ruled that the defendant was competent at the time of the second trial. The court affirmed the judge's ruling. (See the court's discussion of the various issues involved with this ruling, including that the judge did not abuse his discretion in determining that a meaningful retrospective competency hearing could be held.)

Evidence Was Insufficient to Support Jury Instruction on Defendant's Flight After Leaving Crime Scene

State v. Holland, 161 N.C. App. 326, 588 S.E.2d 32 (18 November 2003). The court ruled, relying on State v. Thompson, 328 N.C. 477, 402 S.E.2d 386 (1991), that the following evidence was insufficient to support a jury instruction on the defendant's flight. The defendant left the crime scene with his accomplices and drove to the home of one of the accomplices. The defendant was then driven to a girlfriend's residence. The court stated that there was no evidence that the defendant went there to avoid apprehension. Visiting a friend at a residence is not an act that, by itself, raises a reasonable inference that the defendant was attempting to avoid apprehension.

Prosecutor's Jury Argument Was Improper

State v. Sims, 161 N.C. App. 183, 588 S.E.2d 55 (18 November 2003). The defendant was convicted of first-degree murder and related offenses in which there were two accomplices. During the state's jury argument, the prosecutor stated, "He who hunts with the pack is responsible for the kill." The court noted that this isolated comment has been held not to be reversible error, citing State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970). The court noted that although the prosecutor later in his argument did not specifically call the defendant and two accomplices "wild dogs or hyenas" hunting on the "African plain," the association was sufficiently close to lead to such an inference. This was especially true because the defendant is an African-American and in light of multiple references to hunting on the "African plan," even after the trial judge warned the prosecutor to be careful with his references. The prosecutor's references to an accomplice as the "alpha male" and his references to the defendant and the other accomplice as followers in the pack, continued this close association with the animal kingdom, moving beyond a simple analogy to help explain the theory of acting in concert. The court found this argument to be improper.

Trial Judge Erred in Resentencing Defendant Inconsistently With Plea Agreement When Judge Did Not Allow Defendant Opportunity to Withdraw Guilty Plea

State v. Rhodes, 163 N.C. App. 191, 592 S.E.2d 731 (2 March 2004). The trial judge accepted the defendant's guilty plea based on a plea agreement with the state that he would be punished in the intermediate range. The judge then sentenced the defendant as provided in the agreement. After learning of additional information about the defendant, the judge on his own motion vacated the judgment and resentenced the defendant to an active sentence without allowing the defendant an opportunity to withdraw his guilty plea. The court ruled, relying on State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976), that the judge erred under G.S. 15A-1024 in doing so.

Trial Judge Erred in Replacing Excused Juror with Alternate Juror After Jury Deliberations Had Begun

State v. Hardin, 161 N.C. App. 530, 588 S.E.2d 569 (2 December 2003). The court ruled, relying on State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997), that the trial judge erred in replacing an excused juror with an alternate juror after jury deliberations had begun. The defendant is entitled to a new trial even though he did not object to the substitution of the excused juror with the alternate juror.

(1) Judge in Plenary Hearing for Criminal Contempt Erred When Failing to Find That Facts on Which Finding of Criminal Contempt Rested Were Established Beyond a Reasonable Doubt
(2) Alco-Sensor Test Result That Showed Criminal Defendant Was Impaired While in Courtroom Was Inadmissible at Criminal Contempt Hearing

State v. Ford, 164 N.C. App. 566, 596 S.E.2d 846 (1 June 2004). The defendant was in district court awaiting trial for DWI. Evidence showed that the defendant had the odor of alcohol about her. At the request of the district court judge, an officer administered an Alco-Sensor test, and the reading was 0.08. This and other evidence resulted in the district court judge finding the defendant in direct criminal contempt. The defendant appealed to superior court, where a judge conducted a hearing and found the defendant had been in direct criminal contempt in district court, using the result of the Alco-Sensor test. The judge did not find that the facts supporting the finding of criminal contempt were established beyond a reasonable doubt. (1) The court ruled that a judge in a plenary hearing for criminal contempt errs when failing to find that the facts on which a finding of criminal contempt rested were established beyond a reasonable doubt. (2) The court ruled that the Alco-Sensor test result that showed that the criminal defendant was impaired while in the courtroom was inadmissible at a criminal contempt hearing under the provisions of G.S. 20-16.3(d), which specifies when a test result is admissible.

News Media Organizations Were Not Entitled Under Public Records Laws to Disclosure of Records of SBI Criminal Investigation of Fatal Fire at Mitchell County Jail, Even When No Criminal Prosecution Will Be Undertaken and Investigation Had Been Completed

Gannett Pacific Corp. v. State Bureau of Investigation, 164 N.C. App. 154, 595 S.E.2d 162 (4 May 2004). The court ruled that plaintiffs, news media organizations, were not entitled under public records laws to the disclosure of the records of an SBI criminal investigation of a fatal fire at the Mitchell County Jail, even when no criminal prosecution will be undertaken and the investigation had been completed. However, the court ruled that the plaintiffs were entitled to any records within the SBI report that are public records under G.S. 132-1.4(c) and (k) or any other law.

Arrest, Search, and Confession Issues

(1) Anticipatory Search Warrant Properly Authorized Search of House When Package Was Taken into House and Then Placed in Car and Driven Away
(2) Sufficient Evidence That Defendant Knowingly Possessed Cocaine in Package
(3) Sufficient Evidence of Defendant's Constructive Possession of Marijuana in House to Support Conviction of Possession with Intent to Sell or Deliver
(4) Sufficient Evidence of Conspiracy to Traffic in Cocaine
(5) Sufficient Evidence of Maintaining Dwelling for Purpose of Keeping or Selling Controlled Substance

State v. Baldwin, 161 N.C. App. 382, 588 S.E.2d 497 (2 December 2003). The defendant was convicted of trafficking in cocaine by possession, trafficking in cocaine by transportation, conspiracy to traffic in cocaine, possession with intent to sell or deliver marijuana, and maintaining a dwelling for the purpose of keeping or selling controlled substances. A U.S. Postal Inspector intercepted a package and found a trafficking amount of cocaine in it; the package was addressed to "Sean Smith." Officers obtained an anticipatory search warrant for the house at the address on the package, and the execution of the search warrant was conditioned on the delivery of the package there. The inspector in an undercover capacity delivered the package at the address. The defendant (Eddie Baldwin) indicated that he was Sean Smith and took the package inside the house. Within a few minutes, the defendant took the package out of the house and placed it in a Pontiac. About an hour later, the defendant came out of the house, removed the package from the Pontiac and placed it in a Toyota. Another person (the defendant's housemate) drove

away in the Toyota. Officers then executed the search warrant for the house, where they found guns, 414.5 grams of marijuana, surveillance equipment, and plastic bags containing traces of cocaine. (1) The court ruled that because the search warrant met the requirements for a anticipatory search warrant set out in State v. Smith, 124 N.C. App. 565, 478 S.E.2d 237 (1996), once the package arrived at the residence, the nexus between the package and the residence was established. Even though the package was no longer on the premises, delivery of the package linked the house to the criminal activity inside, establishing probable cause to search the house. In addition, because the warrant specifically allowed the officers to search the premises at this address to find and seize cocaine generally and to identify the participants of the crime, the officers' thorough search of the premises was within the scope of the warrant. (2) The court ruled that there was sufficient evidence that the defendant knowingly possessed the cocaine in the package. Although the package was addressed to someone else, the defendant identified himself as the addressee and signed for the package using the addressee's name. An inference that the defendant knew of the presence of the cocaine in the package could be drawn from his capability and intent to control the package by taking it inside and placing it in the two cars. In addition, incriminating evidence was found in the residence. (3) The court ruled that there was sufficient evidence of the defendant's constructive possession of marijuana with the intent to sell or deliver. The marijuana, along with surveillance equipment and other drug paraphernalia, was found in a common area of a house whose address was listed on the defendant's driver's license and car registration. He also received mail at the address. Although he apparently shared the house with at least one other person, a reasonable inference based on the totality of circumstances established his constructive possession of the marijuana. The court also ruled, distinguishing State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265 (1977), that the amount of marijuana (414.5 grams) and the other evidence found at the house was sufficient to support the conviction of possessing it with the intent to sell or deliver. (4) The court ruled that there was sufficient evidence to support the defendant's conspiracy conviction, noting—among other evidence—that the package of cocaine was driven away by the defendant's housemate. (5) The court ruled that there was sufficient evidence to support the defendant's conviction of maintaining a dwelling for the purpose of keeping or selling a controlled substance. The defendant received mail at the address for approximately one year, his driver's license showed the address as his home address, and his car was registered with this address. This evidence showed more than temporary occupancy and pointed instead to the defendant's maintaining the house.

Anticipatory Search Warrant Was Valid Under Fourth Amendment When Contingency Language for Executing Search Warrant Was Set Out in Affidavit and Warrant Incorporated Affidavit by Reference

State v. Carrillo, 164 N.C. App. 204, 595 S.E.2d 219 (4 May 2004). The court ruled, relying on Groh v. Ramirez, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) and State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971), that an anticipatory search warrant was valid under the Fourth Amendment when the contingency language for executing the search warrant was set out in affidavit and the warrant incorporated the affidavit by reference.

Officer Violated Fourth Amendment By Walking Drug Dog Around Vehicle Whose Driver Was Lawfully Detained for Investigation of Driver's License, Because Use of Drug Dog Required Reasonable Suspicion of Criminal Activity Beyond Reason of Investigating Driver's License

State v. Branch, 162 N.C. App. 707, 591 S.E.2d 923 (17 February 2004). The defendant's vehicle was stopped at a driver's license and vehicle registration checkpoint. The defendant produced a duplicate driver's license and registration. Officers were suspicious of the duplicate license because they believed that her driver's license had been revoked, and in their experience when a person's driver's license has been revoked, the person may drive with an invalid duplicate made before the revocation. While the defendant was detained during the time these matters were checked, another officer walked a drug dog

around the perimeter of the defendant's vehicle. The dog alerted to the presence of drugs. The court noted that the officers had reasonable suspicion to detain the defendant to investigate the validity of the duplicate driver's license, based on their information concerning the possible revocation of her driver's license and their experience with the use of duplicate driver's licenses in the context of revocations. However, the court ruled that walking the dog around the vehicle violated the Fourth Amendment because it required reasonable suspicion of criminal activity beyond the reason for which the driver was being detained—that is, the drug dog could not be used simply because the defendant was detained for the license investigation even if, as here, the use of the dog did not extend the length of the detention. The court cited State v. Falana, 129 N.C. App. 813, 501 S.E.2d 358 (1998), Florida v. Royer, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1980), and State v. McClendon, 130 N.C. App. 368, 502 S.E.2d 902 (1998). [Author's note: The analysis and ruling in this case are directly affected by the subsequent United States Supreme Court ruling in Illinois v. Caballes, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (walking drug dog around vehicle while driver was lawfully detained for officer's issuance of warning ticket for speeding did not violate Fourth Amendment).]

(1) Officer Had Reasonable Suspicion to Stop Vehicle for DWI for Weaving Within Lane Late at Night and There Were Bars in Area
(2) Length of Detention During Investigatory Stop Was Reasonable
(3) Officer May Ask Consent to Search Without Having Reasonable Suspicion of Crime

State v. Jacobs, 162 N.C. App. 251, 590 S.E.2d 437 (20 January 2004). The defendant was convicted of several drug offenses. An officer stopped the defendant's vehicle, detained him for about three to five minutes, received consent to search the vehicle, and discovered evidence in the car and on the defendant's person. (1) About 1:43 a.m. on November 8, 2001, a Burlington police officer saw a car continuously weaving back and forth in its lane over a distance of three-quarters of a mile. There were several bars in the area. The court ruled, relying on State v. Watson, 122 N.C. App. 596, 472 S.E.2d 28 (1996), that the officer had reasonable suspicion to stop the vehicle for DWI. [Author's note: Although the officer also had information that a suspect in a Johnson City, Tennessee murder was in Burlington, the car's Tennessee license plate was registered to a Johnson City resident, and a substantial amount of drug trafficking occurred between Burlington and Johnson City, these facts had not also been used as the basis for the trial judge's ruling that the officer had reasonable suspicion to stop the vehicle.] (2) The court ruled that the length of the defendant's detention (about three to five minutes) during the investigatory stop was reasonable under the Fourth Amendment. The officer during this time asked the defendant questions about his impairment, the murder suspect, and drug trafficking. The defendant's responses did not fully resolve the officer's suspicions, and the defendant was acting very nervous—the court noted State v. McClendon, 350 N.C. 630, 517 S.E.2d 132 (1999), on the issue of nervousness as a factor in determining reasonable suspicion. (3) The court rejected the defendant's argument that the state failed to establish that the officer had reasonable suspicion to request the defendant's consent to search the vehicle. The state only needs to show that a consent to search is voluntary; neither reasonable suspicion nor probable cause is a prerequisite for an officer's asking for consent to search.

Officer Did Not Have Reasonable Suspicion to Stop Defendant's Vehicle for DWI Based on Vehicle Remaining Stationary for Eight to Ten Seconds After Red Light Turned Green Before Proceeding Through Intersection

State v. Roberson, 163 N.C. App. 129, 592 S.E.2d 733 (2 March 2004). At approximately 4:30 a.m., an officer was traveling southbound on High Point Road in Greensboro when he stopped for a red light at an intersection. The defendant's vehicle was also stopped at the red light on the opposite side of the intersection—northbound on High Point Road. There were no other vehicles in the area. When the light turned green, the officer proceeded through the intersection. As he passed the defendant's vehicle, he saw the defendant and could see that she was looking straight ahead. He later was unable to recall whether he

saw her hands. After the officer had traveled one city block, the defendant's vehicle still had not moved. The officer made a U-turn and began to approach the defendant's vehicle from the rear. The officer estimated from eight to ten seconds as the time that the defendant's vehicle had delayed before proceeding through the intersection. Shortly thereafter the officer effected a stop of the vehicle. The officer testified that many bars and restaurants were located in the immediate area and he believed that they were required to stop serving alcohol at 2:00 a.m. The court ruled, relying on cases from other jurisdictions, that the officer did not have reasonable suspicion to stop the defendant's vehicle for DWI. The court noted that a driver waiting at a traffic light can have her attention diverted for any number of reasons. Moreover, because there was not another vehicle behind the defendant to redirect her attention to the green light by honking a horn, a time lapse of eight to ten seconds did not appear so unusual to establish reasonable suspicion for a vehicle stop. The court rejected in the consideration of reasonable suspicion in this case the state's advocacy of general statistics concerning time, location, and special events (the furniture market's presence in town) from which a law enforcement officer could draw inferences based on training and experience. The court also stated that it would not address the state's argument based on a reference to a National Highway Traffic Safety Administration (NHTSA) publication on statistics concerning slow responses to traffic signals because neither the publication nor testimony about it were introduced at the suppression hearing. [Author's note: Concerning NHTSA publications and establishing reasonable suspicion, see State v. Bonds, 139 N.C. App. 627, 533 S.E.2d 855 (2000).]

(1) Reasonable Suspicion Existed to Stop Defendant in His Vehicle to Investigate Recently-Committed Sexual Assault
(2) Officer Had Authority Under Michigan v. Long, 463 U.S. 1032 (1983), to Make Protective Search of Defendant's Vehicle for Weapons

State v. Edwards, 164 N.C. App. 130, 595 S.E.2d 213 (4 May 2004). Suspecting that the defendant had committed sexual assaults on females on December 23, 2000, and December 26, 2000, based on information gathered from the victims, officers placed him under surveillance. On January 9, 2001, evidence from surveillance at about 2:50 a.m. indicated that the defendant's car had left his residence toward a nearby town. At about 4:00 a.m., officers heard an alert tone from that town's police that a female had been sexually assaulted with a handgun by a person whose general description met the defendant's. Officers saw no other vehicles on the road that night other than patrol cars (it was snowing). The defendant's vehicle then passed an officer's vehicle; it was coming from the other town and heading to the defendant's residence. The officers stopped the defendant's vehicle. The defendant immediately put both of his hands underneath his seat and jumped out of the vehicle. Officers had to draw their weapons on the defendant because he failed to comply with their orders. After handcuffing the defendant, one of the officers searched under the front seat of the defendant's vehicle for a weapon and found a handgun. (1) The court ruled that the officers had reasonable suspicion to stop the defendant to investigate the recently-committed sexual assault. The court noted that the officers also had authority to stop the vehicle because it had an expired Illinois registration plate. (2) The court ruled that the officer had the authority to make a protective search of the defendant's vehicle for a weapon under Michigan v. Long, 463 U.S. 1032 (1983).

Officer's Detection of Marijuana Odor About Defendant's Person Provided Probable Cause to Search Him and Exigent Circumstances Existed to Conduct Warrantless Search of Defendant

State v. Yates, 162 N.C. App. 118, 589 S.E.2d 902 (6 January 2004). An officer conducted a warrantless search of the defendant when he detected the odor of marijuana about his person. The officer was qualified to recognize the odor of marijuana. Relying on cases from other states, the court ruled that the officer's detection of the odor of marijuana about the defendant's person provided probable cause to search him and exigent circumstances existed to support the warrantless search of the defendant.

[Author's note: A warrantless search may often be justified by an additional theory that does not rely on a finding of exigent circumstances. Because an officer has probable cause to arrest a defendant for possession of marijuana based on the detection of the odor, a warrantless search may be conducted before an arrest as a search incident to arrest as long as the search is contemporaneous with the arrest. See Rawlings v. Kentucky, 448 U.S. 98 (1973); State v. Mills, 104 N.C. App. 724, 411 S.E.2d 193 (1991); Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 88, 90 (3d. ed. 2003).

Probable Cause Supported Search Warrant to Search Defendant's Home

State v. Rodgers, 161 N.C. App. 345, 588 S.E.2d 481 (18 November 2003). The defendant was convicted of trafficking in cocaine. The court ruled that probable cause supported a search warrant to search the defendant's home for cocaine. The affidavit recited information from a confidential informant, supported by facts setting out the informant's reliability, that the defendant would be transporting a large quantity of cocaine from his home. The informant described the defendant, gave the defendant's home address, and described his car (the car description was substantially but not completely corroborated later by the officer). On the same day when the officer received that information, the officer conducted surveillance at the defendant's home and eventually stopped the defendant's car and discovered marijuana and $1,500.00 in U.S. currency in the possession of another vehicle occupant. The court noted that the officer could reasonably believe that finding marijuana and a large sum of money indicated that the defendant was involved in drug activities. Not finding cocaine in the vehicle, as reported by the informant, provided probable cause to believe that cocaine was still in the defendant's home.

Consent to Search Vehicle Included Search of Jacket in Vehicle

State v. Jones, 161 N.C. App. 615, 589 S.E.2d 374 (16 December 2003). Officers saw the defendant get into a vehicle and take off his leather jacket and place it on the back seat. He later got out of the vehicle. A drug dog walking outside of the vehicle alerted "very strongly" on the passenger side of the vehicle where the defendant had been located. Another person told the officers that the vehicle belonged to his wife and he was in charge of the car; he then gave consent to search the vehicle and gave the car keys to them. The officers removed the jacket and found illegal drugs in it. The court ruled, relying on Florida v. Jimeno, 500 U.S. 248, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991), United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995), and other cases, that the consent to search the vehicle included the jacked and was valid.

(1) Officer Who Gave *Miranda* Warnings Only in Writing Did Not Violate Defendant's *Miranda* Rights
(2) Defendant Did Not Unequivocally Assert Her Right to Counsel During Custodial Interrogation When She Mentioned That She Had an Attorney for a Related Charge
(3) Officer Did Not Violate Defendant's Sixth Amendment Right to Counsel When He Arrested and Interrogated Defendant for Armed Robbery Charge After She Already Had Been Charged and Had Attorney for Related Charge of Conspiracy to Commit Armed Robbery

State v. Strobel, 164 N.C. App. 310, 596 S.E.2d 249 (18 May 2004). Three people were involved in an armed robbery. The defendant was arrested for conspiracy to commit the armed robbery, appeared in district court, and requested and was appointed an attorney in December 2001. Based on additional information implicating her as a participant in the robbery, in January 2002 an officer arrested her for armed robbery. The officer did not orally advise the defendant of her *Miranda* rights. Instead, he gave her a written form and asked her to read it. She signed each page of the statement that acknowledged that she had read it. During her interrogation, the defendant mentioned that she had a court-appointed attorney representing her on the conspiracy charge. The officer told the defendant that she could use the telephone and telephone book located in the room to call her attorney. He also told her that he would stop

interrogation until she had the opportunity to talk to her lawyer. (1) The court ruled, relying on federal appellate cases, that giving the defendant her *Miranda* warnings only in writing did not violate the defendant's *Miranda* rights. The court noted, however, that it is better practice to give a defendant an oral recitation of *Miranda* warnings. (2) The court ruled, relying on Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), that the defendant did not unequivocally assert her right to counsel during custodial interrogation when she mentioned that she had an attorney for a related charge. (3) The court ruled, relying on Texas v. Cobb, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001), and State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998), that the officer did not violate the defendant's Sixth Amendment right to counsel when he arrested and interrogated her for the armed robbery charge after she already had been charged and had an attorney for the related charge of conspiracy to commit armed robbery. The two charges are separate under the standard set out in the *Cobb* ruling. [Author's note: For a discussion of the Fifth Amendment right to counsel under *Miranda* and the Sixth Amendment right to counsel, see pp. 200-210 in Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d. ed. 2003).]

Defendant Was Not in Custody to Require *Miranda* Warnings

State v. Clark, 161 N.C. App. 316, 588 S.E.2d 66 (18 November 2003). The court ruled that the defendant was not in custody to require *Miranda* warnings when an officer questioned the defendant in his home, the defendant was told he was not under arrest or in custody, and the defendant was not restrained in any way.

Officer's Statements to Defendant Were Not Interrogation to Require *Miranda* Warnings

State v. Gantt, 161 N.C. App. 265, 588 S.E.2d 893 (18 November 2003). The defendant was convicted of second-degree sexual offense. Officers arrested the defendant for sexual offense but did not give him *Miranda* warnings. On the drive to the magistrate's office, the defendant—in the midst of making suicidal threats and self-destructive behavior—said, "I didn't do nothing." An officer responded, "She says differently." Shortly thereafter, the defendant again talked about killing himself, which was followed by the officer's statement, "You broke into the lady's apartment. You were hiding in her closet." The defendant then stated: "I got four fingers in her pussy." The court ruled, relying on State v. Young, 317 N.C. 396, 346 S.E.2d 626 (1986), that the officer's statements were not interrogation, and thus the defendant's statements were not taken in violation of the *Miranda* ruling. The officer's statements did not call for a response from the defendant and thus were not the functional equivalent of interrogation.

Defendant Was Not Coerced into Giving Confession

State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738 (2 March 2004). The court ruled that the defendant was not coerced into giving a confession. The court noted that although the defendant's statements were taken over a six-hour time span, during which the defendant was secured to a chair by a single handcuff, the evidence also showed that law enforcement officers provided the defendant with food and drink, asked about his comfort at regular intervals, and allowed him several bathroom breaks.

Defendant's Waiver of Right to Counsel at Polygraph Examination Included Waiver of Right to Counsel During Polygraph Examiner's Post-Test Interview of Defendant

State v. Shepherd, 163 N.C. App. 646, 594 S.E.2d 439 (20 April 2004). The defendant was arrested and charged with several sex offenses. He requested, through his attorney, to take a polygraph test concerning the offenses. Before the polygraph test, the defendant and his attorney signed documents waiving the attorney's presence at the polygraph examination. During the polygraph examiner's post-test interview, the defendant made incriminating statements that were introduced at trial. The court noted the examiner's

testimony that the examination consists of a pre-test examination, the instrumentation phase, and the post-test interview. The court ruled, relying on State v. Soles, 119 N.C. App. 375, 459 S.E.2d 4 (1995), that the defendant's waiver of counsel applied to all phases of the examination and thus permitted the introduction of the defendant's incriminating statements made without his counsel's presence.

Evidence

Admission in Defendant's Trial of Confession of Accomplice Made to Law Enforcement Officers During Interrogation Violated Confrontation Clause Under *Crawford v. Washington* Ruling When Accomplice Did Not Testify At Trial and Defendant Did Not Have Prior Opportunity to Cross-Examine Accomplice

State v. Pullen, 163 N.C. App. 696, 594 S.E.2d 248 (20 April 2004). The court ruled that the admission in the defendant's trial of a confession of an accomplice made to law enforcement officers during interrogation violated the Confrontation Clause under the ruling in Crawford v. Washington, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (8 March 2004), when the accomplice did not testify at trial and defendant did not have a prior opportunity to cross-examine the accomplice.

(1) Crime Scene Witnesses' Statements Made to Law Enforcement Officer Twenty Minutes After Crimes Were Committed Were Admissible as Excited Utterances Under Hearsay Exception, Rule 803(2) (Excited Utterance)
(2) Hearsay Statement Made by Unavailable Witness Identifying Defendant's Accomplice in Photographic Lineup as Participant in Crimes Was Admissible Under Residual Hearsay Exception, Rule 804(b)(5), and Admission of Statement Did Not Violate Confrontation Clause

State v. Allen, 162 N.C. App. 587, 592 S.E.2d 31 (17 February 2004). The defendant was convicted of first-degree murder in which the defendant and accomplices entered a home containing several Spanish-speaking people and committed a murder and robbery. (1) The court ruled that two witnesses' statements made to a Spanish-speaking law enforcement officer twenty minutes after the crimes were committed were admissible as excited utterances under hearsay exception, Rule 803(2) (excited utterance). The officer's arrival at the scene offered the Spanish-speaking witnesses their first opportunity to convey what had happened. One witness had been crying before the officer had arrived and the other witness stopped crying when speaking with the officer. (2) The court ruled that a hearsay statement made by an unavailable witness identifying the defendant's accomplice in a photographic lineup as a participant in the crimes was admissible under the residual hearsay exception, Rule 804(b)(5), and the admission of the statement did not violate the Confrontation Clause**.** (See the court's detailed analysis in its opinion.)

Trial Judge Erred in Allowing State's Medical Expert to Offer Opinion That Her Diagnosis of Victim Was Probable Sexual Abuse When There Was Insufficient Physical Evidence to Support Opinion

State v. Couser, 163 N.C. App. 727, 594 S.E.2d 420 (20 April 2004). The defendant was convicted of various sex offenses with a thirteen-year-old female. The state's medical expert testified that she performed an examination of the victim and her only abnormal finding was the presence of two abrasions on either side of the introitus. Based on her examination and the history of the victim provided to her, the expert testified that her diagnosis was probable sexual abuse. On cross-examination, the expert testified that the abrasions could be caused by something other than a sexual assault and were not, in themselves, diagnostic or specific to sexual abuse. The court ruled, relying on State v. Dixon, 150 N.C. App. 46, 563 S.E.2d 594, affirmed, 356 N.C. 428, 571 S.E.2d 584 (2002), that the trial judge erred in allowing the expert to offer an opinion that her diagnosis of victim was probable sexual abuse because there was insufficient physical evidence to support the expert's opinion. Because the defendant had not objected to

the testimony at trial, the court then determined whether the error amounted to plain error. The court examined the facts in this case and ruled that the trial judge committed plain error requiring a new trial.

State Made Good-Faith Effort to Obtain Hearsay Declarant's Presence at Trial to Show That Declarant Was Unavailable Under Residual Hearsay Exception, Rule 804(b)(5)

State v. Bailey, 163 N.C. App. 84, 592 S.E.2d 738 (2 March 2004). The court ruled that that state made a good-faith effort to obtain the hearsay declarant's presence at trial to show that the declarant was unavailable under the residual hearsay exception, Rule 804(b)(5). The court noted that the evidence showed that law enforcement officers tried to subpoena the hearsay declarant at the address they were given and called several phone numbers provided by the victim.

Defendant's Motion to Introduce Statement Under Residual Hearsay Rule, Rule 803(24), Was Properly Denied

State v. Carrigan, 161 N.C. App. 256, 589 S.E.2d 134 (18 November 2003). The court ruled that the trial judge did not err in denying the defendant's motion to introduce an out-of-court statement under the residual hearsay rule, Rule 803(24) because (1) the defendant did not give proper notice to the state of his intention to introduce the statement, and (2) even if the defendant gave proper notice, the statement lacked sufficient guarantees of trustworthiness.

In Prosecution of First-Degree Statutory Sexual Offense with Child Involving Anal Intercourse, Evidence of Defendant's Engaging in Consensual Anal Intercourse with Wife Was Inadmissible Under Rule 404(b)

State v. Dunston, 161 N.C. App. 468, 588 S.E.2d 540 (2 December 2003). The defendant was convicted of first-degree statutory sexual offense with his foster child, which involved anal intercourse with the child. The defendant's wife testified for the defendant, and the state was permitted on cross-examination to elicit testimony from her that the defendant's sexual activity with the wife included consensual vaginal and anal intercourse. The court ruled that this testimony was inadmissible under Rule 404(b) because it was not relevant for any purpose other than to prove the defendant's propensity to engage in anal intercourse. The fact that the defendant engaged in and liked consensual anal intercourse with his wife was not by itself sufficiently similar under Rule 404(b) to engaging in anal intercourse with an underage person—other than they both involved anal sex.

Expert's Opinion Testimony in Child Sexual Abuse Trial Was Admissible Even Though Expert Had Not Examined Child Victim

State v. McCall, 162 N.C. App. 64, 589 S.E.2d 896 (6 January 2004). The defendant was convicted of indecent liberties and attempted first-degree rape of a seven-year-old child. The court ruled, relying on Rule 703, State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979), and other cases, that the trial judge did not err in allowing the state's expert mental health witness to testify—in response to hypothetical questions and based on information related to her by third parties—that the victim's behavior and characteristics were consistent with those of a child who had been sexually abused, even though the expert had not examined the child.

Trial Judge Did Not Err in Admitting Statements Made by Murder Victim to Various Witnesses Under Hearsay Rule 803(3) (Statement of Declarant's Then Existing State of Mind, Emotion, Sensation, or Physical Condition)

State v. Dawkins, 162 N.C. App. 231, 590 S.E.2d 324 (20 January 2004). The defendant was convicted of the first-degree murder of his wife. The court ruled that the trial judge did not err in admitting the following statements made by the murder victim to various witnesses under hearsay Rule 803(3) (statement of declarant's then existing state of mind, emotion, sensation, or physical condition): (1) the victim gave to a witness photographs of her with a black eye and told her to keep them and give them to the police if anything should happen to her (statement reflects her fear of an uncertain future and her then-existing intent to plan for that future should something happen to her); (2) the victim told a witness that the defendant had told her he had killed and buried a girl, and when the victim later mentioned the killing to the defendant, the defendant tried to throw her out of a moving vehicle and said if she ever mentioned the killing again, he would kill her [statement reflects the victim's existing state of mind and emotional condition—State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990)]; and (3) a witness saw injuries on the victim, and the victim told the witness that the defendant had inflicted the injuries [statement relates to the victim's existing state of mind and emotional condition—State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992); State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993)].

Witness May Not Be Impeached Under Rule 609 With Conviction That Had Been Reversed on Appeal

State v. Jordan, 162 N.C. App. 308, 590 S.E.2d 424 (20 January 2004). The court ruled that a witness may not be impeached under Rule 609 with a conviction that had been reversed on appeal. A witness had been convicted of voluntary manslaughter after a jury trial. The North Carolina Court of Appeals reversed the conviction and granted a new trial. The defendant then pled guilty to voluntary manslaughter based on a plea agreement with the state, but he received a lesser sentence than from the original conviction that had been reversed. Defense counsel was prohibited by the trial judge from questioning the witness about the sentence he had received from the original conviction. The court upheld the trial judge's ruling.

Trial Judge Did Not Err in Prohibiting Defendant from Offering Evidence of Murder Victim's Violence Toward Others When Defense Was Accident

State v. Crawford, 163 N.C. App. 122, 592 S.E.2d 719 (2 March 2004). The defendant was convicted of second-degree murder involving the killing of his wife. The court ruled, relying on State v. Goodson, 341 N.C. 619, 461 S.E.2d 740 (1995), that the trial judge did not err in prohibiting the defendant from offering evidence of the murder victim's violence toward others (in this case, her former husband) when the defendant's defense was accident.

(1) Acquittal of Assault on Government Officer in District Court Did Not Bar Under Rule 404(b) or Collateral Estoppel Admission of Evidence of Assault in Superior Court Trial de Novo of Obstructing Public Officer
(2) Trial Judge in Superior Court Trial de Novo of Obstructing Public Officer Did Not Err in Prohibiting Defense Evidence of Acquittal of Assault on Government Officer in District Court

State v. Bell, 164 N.C. App. 83, 594 S.E.2d 824 (4 May 2004). The defendant was charged with assaulting a government officer under G.S. 14-33(c)(4) and delaying and obstructing a public officer under G.S. 14-223. The state's evidence showed that she interfered with a law enforcement officer's detention of a student outside a middle school. In district court, the defendant was found not guilty of the assault but was convicted of violating G.S. 14-223. She appealed the conviction for trial de novo in superior court and was convicted. (1) The court ruled, relying on State v. Agee, 326 N.C. 542, 391 S.E.2d

171 (1990) (acquittal of criminal charge does not bar evidence of events involving charge under Rule 404(b) when part of the chain of circumstances involving another offense), State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984), and Dowling v. United States, 493 U.S. 342 (1990), that the acquittal of assault on a government officer in district court did not bar under Rule 404(b) or collateral estoppel admission of evidence of the assault in superior court trial de novo of obstructing a public officer. When there is more than one possible explanation for an acquittal and the defendant can only speculate about the basis of the acquittal, the defendant has failed to meet the burden of establishing collateral estoppel. (2) The trial judge did not err in prohibiting defense evidence of the acquittal of assault on a government officer in district court in the superior court trial de novo of obstructing a public officer. The defendant's acquittal was not relevant to the question whether the defendant was guilty of obstructing a public officer.

(1) Court Affirms Trial Judge's Order Requiring Destruction of Defendant's Firearms Under G.S. 15-11.1(b1), Based on Finding That Defendant Was Unlawful User of Marijuana and Thus Prohibited by Federal Law From Possessing Firearms
(2) Court Vacates Trial Judge's Order That Defendant Was Prohibited, Without Any Time Limitation, from Possessing Firearms or Ammunition on His Own Premises, Even for Personal Protection

State v. Oaks, 163 N.C. App. 719, 594 S.E.2d 788 (20 April 2004). Officers executed a search warrant for marijuana at the defendant's residence. They seized marijuana, digital scales, rolling papers, a fully-automatic MAK 90 rifle, thirty other firearms, and ammunition. The defendant admitted to an officer that he smoked marijuana about every other day. As a result of plea negotiations, the defendant pleaded guilty to misdemeanor possession of marijuana and possession of drug paraphernalia, and the state dismissed the charge of possession of a weapon of mass destruction (the MAK 90 rifle). At the plea hearing, the state notified the defendant that it would file a motion to have all the firearms and ammunition destroyed. A hearing was held at a later date based on the state's motion for an order of disposition of the firearms under G.S. 15-11.1(b1) and 18 U.S.C. §§ 922(d)(3) and (g)(3). (1) The defendant conceded that the MAK 90 rifle should be forfeited, but contested the motion concerning the remaining non-automatic firearms. The court ruled that the trial judge's order requiring the destruction of the defendant's firearms and ammunition under G.S. 15-11.1(b1)(3) was proper based on the finding that the defendant was an unlawful user of marijuana. The court noted that G.S. 15-11.1(b1)(2) did not authorize the return of the firearms to the defendant if the defendant was ineligible to possess them. Under 18 U.S.C. § 922(d)(3), it is unlawful to dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that the person is an unlawful user of a controlled substance. Under 18 U.S.C. § 922(g)(3), it is unlawful for any person who is an unlawful user of a controlled substance to receive or possess any firearm or ammunition that has been shipped or transported in interstate commerce (Author's note: There was evidence presented that the firearms had been shipped or transported in interstate commerce). (2) The court vacated the trial judge's order that the defendant was prohibited, without any time limitation, from possessing firearms or ammunition on his own premises, even for personal protection. The court stated that it cannot affirm an order that apparently presumes that the defendant will always be an unlawful user of a controlled substance and thus may never possess firearms.

(1) Surety's Constructive Notice of Two of More Prior Failures to Appear by Defendant Is Sufficient to Trigger No-Set-Aside-of-Forfeiture Provision in G.S. 15A-544.5(f)
(2) Failure to Appear in Court as Directed by Citation Constitutes Failure to Appear under G.S. 15A-544.5(f)

State v. Poteat, 163 N.C. App. 741, 594 S.E.2d 253 (20 April 2004). The defendant twice failed to appear for his trial of driving while license revoked. The first failure to appear occurred after an officer had issued a citation for the offense. A surety posted a secured bond for the defendant after the defendant had been arrested after the two failures to appear. The defendant failed to appear again and the bond was

forfeited. A judge dismissed the surety's later motion to set aside the forfeiture. The court ruled: (1) a surety's constructive notice of two of more prior failures to appear by defendant is sufficient to trigger the no-set-aside-of-forfeiture provision in G.S. 15A-544.5(f)—actual notice is not required (the court examined the facts in this case and found that the surety had constructive notice); and (2) a defendant's failure to appear in court as directed by citation constitutes a failure to appear under G.S. 15A-544.5(f).

Sentencing

Trial Judge Committed Plain Error By Sentencing Defendant in Presumptive Range Without Allowing Defendant Opportunity to Present Evidence of Mitigating Factors

State v. Knott, 164 N.C. App. 212, 595 S.E.2d 172 (4 May 2004). The court ruled, relying on State v. Kemp, 153 N.C. App. 231, 569 S.E.2d 717 (2002), the trial judge committed plain error by sentencing the defendant in the presumptive range without allowing the defendant an opportunity to present evidence of mitigating factors.

When Multiple Offenses Are Consolidated for Judgment and Each Offense Is Equally the Highest Classified Offense, Consolidated Judgment May Be Aggravated by Any Factor That Is Element of One, But Not All, Offenses

State v. Harrison, 164 N.C. App. 693, 596 S.E.2d 834 (1 June 2004). The defendant pled guilty to multiple felonies, all of which were punished as Class C felonies because the defendant was an habitual felon. All the offenses were consolidated for judgment, and the sentencing judge found two aggravating factors and sentenced him in the aggravated range. The defendant argued that these factors constituted elements of the offenses to which the defendant pled guilty, which is prohibited by G.S. 15A-1340.16(d). The court ruled, distinguishing State v. Tucker, 357 N.C. 633, 588 S.E.2d 853 (2003), that when multiple offenses are consolidated for judgment and each offense is equally the highest classified offense, a consolidated judgment may be aggravated by any factor that is element of one, but not all, offenses.

State Failed to Prove New Jersey Convictions Were Substantially Similar to North Carolina Offenses

State v. Morgan, 164 N.C. App. 298, 595 S.E.2d 804 (18 May 2004). The court ruled that the state at the defendant's sentencing hearing failed to prove that a New Jersey conviction of homicide in the third degree was substantially similar to voluntary manslaughter in North Carolina. Although the state presented a copy of the 2002 New Jersey homicide statute [which the court noted is admissible under G.S. 8-3(a)], it failed to show that the 2002 statute was unchanged from the 1987 version under which the defendant was convicted. The state also presented no evidence to prove that New Jersey misdemeanor convictions were substantially similar to offenses classified as Class A1 or 1 misdemeanors in North Carolina.

Trial Judge Did Not Err in Finding Aggravating Factor of Violating Position of Trust and Confidence for Convictions of Statutory Rape and Statutory Sexual Offense

State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (16 December 2003). The defendant was convicted of several counts of statutory rape and statutory sexual offense of a person 13, 14, or 15 by a defendant who was more than six years older than the victim. The defendant was the victim's father. The court ruled that the trial judge did not err in finding the aggravating factor that the defendant violated a position of trust and confidence. The court rejected the defendant's argument that because he could have been charged with incest, the ruling in State v. McGuire, 78 N.C. App. 285, 337 S.E.2d 620 (1985), barred the finding of this aggravating factor because it was evidence of a joinable offense with which the defendant

had not been charged. The court noted that this ruling had been questioned in a later case, and also that the statutory language underlying *McGuire* had been repealed when the Structured Sentencing Act (SSA) had been enacted, and in any event that language applied only to an aggravating factor relating to prior convictions. The sentencing in this case was under SSA, not the Fair Sentencing Act.

Aggravating Factors for Convictions of G.S. 14-258.4 for Spitting on Correctional Officers Were Properly Found

State v. Robertson, 161 N.C. App. 288, 587 S.E.2d 902 (18 November 2003). The defendant was convicted of two counts of malicious conduct by a prisoner under G.S. 14 258.4 for spitting in the faces of two prison guards while he was an inmate in the Department of Correction. He was also convicted of assault on a government employee arising out of another incident. He was also punished for criminal contempt of court for overturning a table and shouting epithets at trial. The court ruled that the trial judge, in sentencing the defendant for the two counts of malicious conduct by a prisoner, did not err in finding as aggravating factors that the offenses were committed to hinder the lawful exercise of a governmental function and the defendant had breached his assurance of good behavior by faking a heart problem and falling on the floor on the third day of trial. The finding of hindering a lawful exercise of a governmental function did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element may not be used to prove an aggravating factor) because the offense is a general intent crime while the aggravating factor requires a finding of specific intent and thus additional evidence to prove it. The finding of breaching assurance of good behavior did not violate double jeopardy because the contempt finding was not based on the same conduct supporting this aggravating factor. The finding also did not violate G.S. 15A-1340.16(d).

Trial Judge Did Not Err in Finding Aggravating Factor That Defendant Involved Person Under 16 in Committing Offense [G.S. 15A-1340.16(d)(13)] Although Defendant Was Acquitted of Other Offenses Involving Young People

State v. Boyd, 162 N.C. App. 159, 595 S.E.2d 697 (6 January 2004). The defendant was convicted of conspiracy to sell cocaine in which two juveniles were also involved. The defendant was acquitted of contributing to the delinquency of a minor and using a minor to commit a drug offense. The court ruled, distinguishing State v. Marley, 321 N.C. 415, 364 S.E.2d 133 (1987), that the trial judge did not err in finding as an aggravating factor that the defendant involved a person under 16 in committing an offense [G.S. 15A-1340.16(d)(13)], although the defendant was acquitted of other offenses involving young people.