Recent Cases Affecting Criminal Law and Procedure
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North Carolina Supreme Court

Criminal Law and Procedure

Defendant's Convictions of First-Degree Statutory Rape and Indecent Liberties Did Not Violate Constitutional Right to Unanimous Jury Verdict—Ruling of Court of Appeals Is Reversed

State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), *reversing in part*, 170 N.C. App. 200, 612 S.E.2d 678 (2005). The defendant was convicted of six counts of first-degree statutory sexual offense, five counts of first-degree statutory rape, and three counts of taking indecent liberties (The first-degree statutory sexual offense convictions were not before the North Carolina Supreme Court for its review.) The court ruled, reversing the ruling of the court of appeals, that the defendant's convictions of first-degree statutory rape and indecent liberties did not violate the defendant's constitutional right to a unanimous jury verdict. (1) The defendant was charged in three identically-worded indecent liberties indictments that lacked specific details distinguishing one offense from another. The offense dates for each indictment were also identical (May 1, 1999, through December 6, 2000). The victim testified about three specific incidents of indecent liberties on three different occasions in the summer of 1999. Relying on State v. Hartness, 326 N.C. 561, 391 S.E.2d 177 (1990), and State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated, even though a friend of the victim testified about a fourth act of indecent liberties by the defendant with the victim. The court stated that this fourth incident had no effect on jury unanimity because according to *Lyons*, *Hartness* ruled that while one juror might have found some incidents of misconduct constituting indecent liberties and another juror might have found different incidents of misconduct constituting indecent liberties, the jury as a whole found that improper sexual conduct occurred. (2) The defendant was charged in five identically-worded indictments with first-degree statutory rape that lacked specific details distinguishing one offense from another. The offense dates for each indictment alleged the same time frame. The victim testified that she had sexual intercourse with the defendant thirty-two times during the years 1999 and 2000. During her testimony, she recounted five specific instances in which the defendant penetrated her vagina with his penis. Relying on the reasoning in State v. Wiggins, 161 N.C. App. 583, 589 S.E.2d 402 (2003), the court ruled that the defendant's constitutional right to a unanimous jury verdict was not violated.

Defendant's Convictions of Second-Degree Sexual Offense Did Not Violate Constitutional Right to Unanimous Jury Verdict—Ruling of Court of Appeals Is Reversed

State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), *reversing in part*, 165 N.C. App. 548, 599 S.E.2d 87 (2004). The North Carolina Court of Appeals in this case had reversed seven of the defendant's convictions of second-degree sexual offense because the defendant's constitutional right to a unanimous jury verdict had been violated. The North Carolina Supreme Court, per curiam and without an opinion, stated that for the reasons set out in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), the ruling of the North Carolina Court of Appeals is reversed.

(1) Court Rules That Felonious Breaking or Entering Indictment Need Not Allege Specific Felony Intended to Be Committed; Court Overrules Contrary Court of Appeals Ruling
(2) If Felonious Breaking or Entering Indictment Alleges Specific Felony Intended to Be Committed, State May Not Amend Indictment to Allege Another Felony

State v. Silas, 360 N.C. 377, 627 S.E.2d 604 (7 April 2006), *modifying and affirming*, 168 N.C. App. 627, 609 S.E.2d 400 (2005). The defendant's indictment for felonious breaking and entering alleged that the defendant broke and entered with the intent with the intent commit the felony of murder. During the charge conference, the trial judge allowed the state to amend the indictment to change the intended felony as assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. (1) The court ruled, relying on State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (1994) (burglary indictment need not allege specific felony defendant intended to commit), that a felonious breaking or entering indictment need not allege the specific felony intended to be committed. The court overruled a contrary ruling in State v. Vick, 70 N.C. App. 338, 319 S.E.2d 327 (1984). The court stated that it is sufficient if the indictment alleges that the defendant intended to commit a felony or larceny. (2) The court ruled that if a felonious breaking or entering indictment alleges a specific felony intended to be committed, the state may not amend the indictment to allege another felony. Such an amendment is a substantial alteration of the indictment and prohibited by G.S. 15A-923(e). The court rejected the state's argument that the language concerning the intent to commit murder was harmless surplusage.

(1) Trial Judge Did Not Err in Exercising Discretion to Not Excuse Prospective Juror Because of Her Age
(2) No *Brady v. Maryland* Violation Because Exculpatory Evidence Was Provided in Time for Defendant to Make Effective Use of It at Trial
(3) Trial Judge Did Not Err in Denying Defendant's Motion for Appropriate Relief Alleging Juror Misconduct
(4) Trial Judge Did Not Err in Denying Defendant's Request for Evidentiary Hearing on Motion for Appropriate Relief

State v. Elliott, 360 N.C. 400, 628 S.E.2d 735 (5 May 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The court ruled that the trial judge did not err in exercising his discretion to not excuse a prospective juror because of her age (she was over 65, the age in G.S. 9-6.1 at the time of this trial; the age is now over 72). She did not have a compelling personal hardship other than her age. The court reminded trial judges that excusing prospective jurors present in the courtroom who are over the statutory age in G.S. 9-6.1 must reflect a genuine exercise of discretion. (2) The state's witness testified that she identified the defendant from a photo lineup. The prosecutor did not ask the witness if she could make an in-court identification. During the argument on the defendant's motion to dismiss charges, the trial judge asked the prosecutor why the witness was not asked to make an in-court identification. The prosecutor explained that the witness had advised the prosecutor just before she was about to testify that she would not be able to make an in-court identification. The defendant then moved to strike her testimony under Brady v. Maryland, 373 U.S. 83 (1963) (state has constitutional duty to disclose materially favorable evidence to defendant). Instead of granting the defendant's motion, the judge allowed the state to re-open its case. The state recalled the witness, who testified on cross-examination that she was unable to make an in-court identification. The court noted that to establish a *Brady* violation, the defendant must show the evidence was materially favorable and would have affected the outcome of the trial. The court ruled that the while the state should have disclosed the information to the defendant as soon as it became available, the belated disclosure was not reversible error because there is no *Brady* error if the defendant had sufficient time to use the information to his benefit. The defendant during jury argument made good use of this information and the prosecutor's failure to provide it to the defendant. Also, the witness's testimony was most relevant to the charges on which the jury returned

verdicts of not guilty. (3) The court ruled that the trial judge did not err in denying the defendant's motion for appropriate relief (MAR), which alleged that the defendant's constitutional and statutory rights had been violated when two jurors met and prayed outside the jury room during a recess from jury deliberations on the death sentence recommendation. The evidence (a newspaper article) revealed that two jurors had prayed together in the lobby during an afternoon recess. The court noted that there was nothing in the record to indicate a discussion or deliberation of any kind occurred in the lobby. The court concluded that because the defendant failed to submit sufficient evidence supporting the allegations in his MAR, he failed to show the existence of the asserted ground for relief. (4) The court also ruled that the trial judge did not err in denying the defendant's request for an evidentiary hearing on his MAR. During argument for an evidentiary hearing, the defendant stated that he intended to call three jurors and then call newspaper reporters on rebuttal if necessary. The court stated that under G.S. 15A-1240(c) and Rule 606(b), the jurors could only have testified whether extraneous information came to their attention or whether someone bribed or intimidated (or attempted to bribe or intimidate) them. Nothing in defendant's MAR indicated that the jurors considered extraneous information, which is information about the defendant or the case being tried that was not introduced into evidence. Therefore, even if the trial judge had granted the defendant's request for an evidentiary hearing, none of the defendant's proposed juror witnesses would have been allowed to testify concerning the issues raised in the MAR that attempted to impeach the death sentence recommendation.

Trial Judge Erred in Allowing State to Amend Habitual DWI Indictment—Ruling of Court of Appeals Is Reversed

State v. Winslow, 360 N.C. 161, 623 S.E.2d 11 (16 December 2005)**.** The court, per curiam and without an opinion, reversed the decision of the North Carolina Court of Appeals, 169 N.C. App. 137, 609 S.E.2d 463 (15 March 2005), for the reasons stated in the dissenting opinion. The defendant was arrested and charged with habitual impaired driving (DWI) on April 9, 2000. He later was indicted, with the oldest prior conviction mistakenly alleged as April 1, 1993, which is not within seven years of the current offense. At the close of the state's evidence, the defendant moved to dismiss the indictment for not alleging habitual DWI. The trial judge allowed the state to amend the indictment to allege the correct conviction date of the oldest conviction as August 11, 1993. The dissenting opinion stated that the amendment was a substantial alteration of the charge and not allowed under G.S. 15A-923(e), because the amendment elevated the offense from a misdemeanor to a felony. The dissenting opinion stated that the case should be remanded for resentencing on misdemeanor DWI.

Trial Judge Erred in Rape Trial in Jury Instruction on Force and Lack of Consent— Ruling of Court of Appeals Is Affirmed

State v. Smith, 360 N.C. 341, 626 S.E.2d 258 (3 March 2006). The court, affirming the ruling of the North Carolina Court of Appeals, 170 N.C. App. 461, 613 S.E.2d 304 (2005), ruled that there was a reasonable likelihood that the trial judge's instruction to the jury in a rape trial impermissibly lessened the state's burden to prove the elements of force and lack of consent beyond a reasonable doubt. The defendant's defense was consent. The judge instructed the jury, based on State v. Moorman, 320 N.C. 387, 358 S.E.2d 502 (1987), that "[f]orce and lack of consent are implied in law if at the time of the vaginal intercourse the victim is sleeping or similarly incapacitated." The court noted that the instruction was a correct statement of the law, but it also stated that force and lack of consent can only be implied in law if the state proves beyond a reasonable doubt that the victim was sleeping at the time of the vaginal intercourse. In this case the victim's being asleep was the determinative fact in issue and the crux of the state's prosecution. Accordingly, it was imperative that the jury be instructed that they must find the solitary fact (victim was asleep) that satisfied multiple elements of rape (force and lack of consent) beyond a reasonable doubt. The court concluded that there was a reasonable likelihood that the jury

misapplied the instruction because it was not informed it had to find the basic fact of sleeping beyond a reasonable doubt.

Insufficient Evidence of Possession of Diazepam With Intent to Sell and Deliver—Ruling of Court of Appeals Is Affirmed

State v. Sanders, 360 N.C. 170, 622 S.E.2d 492 (16 December 2005)**.** The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals, 171 N.C. App. 46, 613 S.E.2d 708 (21 June 2005), that the defendant's possession of thirty diazepam pills with no other evidence connected with the sale of diazepam was insufficient to support his conviction of possession with the intent to sell and deliver diazepam. The court of appeals relied on State v. King, 42 N.C. App. 210, 256 S.E.2d 247 (1979). The court of appeals had ordered the case remanded the for entry of judgment on the lesser included offense of misdemeanor possession of diazepam.

Insufficient Evidence of Kidnapping During Armed Robbery— Ruling of Court of Appeals Is Affirmed

State v. Ripley, 360 N.C. 333, 626 S.E.2d 289 (3 March 2006). The court, affirming the ruling of the North Carolina Court of Appeals, 172 N.C. App. 453, 617 S.E.2d 106 (16 August 2005), ruled that the movement of robbery victims from an Entranceway into a motel lobby during the commission of an armed robbery was not an independent act legally sufficient to support the defendant's separate convictions of second-degree kidnapping.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling Upholding Jury Instruction in First-Degree Kidnapping Trial Concerning Defendant's Not Releasing Kidnapping Victim in Safe Place

State v. Corbett, 360 N.C. 287, 624 S.E.2d 625 (27 January 2006), *affirming per curiam*, 168 N.C. App. 117, 607 S.E.2d 281 (18 January 2005). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals upholding a jury instruction in a first-degree kidnapping trial concerning the defendant's not releasing the kidnapping victim in a safe place. The defendant took a store employee as a hostage. The defendant released the victim only when a law enforcement officer pointed his weapon at the defendant and the victim. The court of appeals ruled, relying on State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992), that the jury instruction was proper when it effectively stated that the defendant's release of the victim into the focal point of a law enforcement officer's weapon was not a release in a safe place.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Double Jeopardy Did Not Attach to Defendant's Acknowledgement of Guilt in Deferred Prosecution Agreement

State v. Ross, 360 N.C. 355, 625 S.E.2d 779 (3 March 2006). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals, 173 N.C. App. 569, 620 S.E.2d 33 (4 October 2005), that double jeopardy did not attach to the defendant's acknowledgement of guilt in a deferred prosecution agreement when the agreement did not comprehend a plea of guilty and a judge did not determine that there was a factual basis for a guilty plea. Thus, when the defendant entered into a deferred prosecution agreement for several misdemeanor tax offenses, failed to comply with the agreement, and the state dismissed the charges and later prosecuted the defendant for embezzlement, there was no double jeopardy violation.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Trial Judge Did Not Err in Giving Instruction on Flight

State v. Etheridge, 360 N.C. 359, 625 S.E.2d 777 (3 March 2006). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals, 168 N.C. App. 359, 607 S.E.2d 325 (1 February 2005), that there was sufficient evidence to support the trial judge's jury instruction on flight by the defendant. The defendant left the break-in scene shortly after a neighbor arrived. Although law enforcement found the defendant's vehicle, they were unable to locate the defendant for several weeks.

Capital Case Issues

(1) Court Clarifies How It Will Review Trial Judge's Decision Not To Submit Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant History of Prior Criminal Activity) and Upholds Judge's Decision Not to Submit Circumstance
(2) Court Rules That Trial Judge Did Not Err in Not Submitting Mitigating Circumstances G.S. 15A-2000(f)(7) (Defendant's Age When Murder Committed)

State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (27 January 2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The trial judge declined to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). The defendant had asked the trial judge not to submit the circumstance, but then argued on appeal that the judge erred in not submitting it. The court reaffirmed prior rulings that the judge has a duty to submit mitigating circumstance (f)(1) when evidence supports its submission, regardless of the defendant's position on whether or not to submit it. The court discussed some of its prior case law on (f)(1). The court noted that some of its cases had resulted in a distortion of capital sentencing as trial judges have focused too closely on the existence, nature, and extent of a defendant's record and have correspondingly failed to consider the aspect of the court's rulings that allows the court to determine whether a reasonable jury would find the defendant's criminal activity to be significant. The court stated when a judge decides not to submit the circumstance, that determination is entitled to deference. Whenever a defendant contends the trial judge erred in not submitting (f)(1), the court will review the whole record in evaluating whether the judge acted correctly, considering the court's admonition that any reasonable doubt concerning the submission of a statutory or requested mitigating circumstance should be resolved in the defendant's favor. Although the doctrine of invited error is inapplicable, "a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given." The court then examined the evidence in this case and upheld the trial judge's decision not to submit (f)(1): A few months before the murder, the defendant broke and entered a residence in West Virginia and stole a firearm. In 1998, the defendant had been convicted of several breaking and entering offenses in North Carolina. He abused marijuana, crack cocaine, and Oxycontin. He had a pending DUI in West Virginia. The court overruled State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994), to the extent it implied that if evidence concerning a defendant's criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction. (2) The court ruled that the trial judge did not err in not submitting mitigating circumstances G.S. 15A- 2000(f)(7) (defendant's age when murder committed). The defendant had argued that he was 23 years old at the time of the murder and emotionally immature. The court concluded that the evidence demonstrated that the defendant's maturity was consistent with his chronological age.

(1) Trial Judge Did Not Err in Not Giving Peremptory Instructions on Statutory Mitigating Circumstances G.S. 15A-2000(f)(2) and -2000(f)(6)
(2) No Double Jeopardy Violation in Submitting Aggravating Circumstance in Capital Resentencing Hearing That Had Not Been Submitted in First Capital Sentencing Hearing in Which Defendant Had Received Death Sentence
(3) Court Comments on Jury Instructions and Form on Issue Three in Capital Sentencing Hearing

State v. Duke, 360 N.C. 110, 623 S.E.2d 11 (16 December 2005). The defendant was convicted of two counts of first-degree murder and sentenced to death. (1) The court ruled that the defendant was not entitled to a peremptory instruction on mitigating circumstances G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance) and -2000(f)(6) (defendant's impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law). Concerning (f)(2), the defense mental health expert admitted on cross-examination that two clinicians could reach different conclusions about the defendant's mental condition. In addition, the expert testified that other mental health professionals had previously given inconsistent diagnoses of the defendant's condition. Concerning (f)(6), the state offered evidence that the jury could reasonably have found that the defendant knew and appreciated the criminality of his actions. (2) The court ruled, relying on State v. Sanderson, 346 N.C. 669, 488 S.E.2d 133 (1997), and distinguishing Ring v. Arizona, 536 U.S. 584 (2002), that there is no double jeopardy violation in submitting an aggravating circumstance in a capital resentencing hearing that had not been submitted in the first capital sentencing hearing in which the defendant had received a death sentence. (3) The court commented that North Carolina's death penalty structure differs from the statute the Kansas Supreme Court recently struck down and is pending for a decision in the United States Supreme Court. State v. Marsh, 278 Kan. 520 (2004), *cert. granted*, 125 S. Ct. 2517 (2005). The court stated that in North Carolina, should the jury answer Issue Three in the affirmative, the jury is required to make one last decision of guided discretion: whether the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty. Unlike the Kansas statute, a North Carolina jury's decision does not rest completely on the weighing of the mitigating circumstances against the aggravating circumstances. Assuming arguendo a constitutional violation occurs under the Kansas statute, North Carolina's statutory scheme offers an additional layer of protection against the arbitrary imposition of the death penalty.

Prosecutor Did Not Abuse Discretion in Seeking Death Penalty

State v. Allen, 360 N.C. 297, 626 S.E.2d 271 (3 March 2006). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the state did not abuse its discretion in seeking the death penalty in this case. The court noted that to prevail on the assertion of abuse of discretion, the defendant must show a discriminatory purpose and a discriminatory effect, and there was no evidence of either.

Evidence

(1) Admission of SBI Lab Reports Prepared by Non-Testifying SBI Serologist Did Not Violate *Crawford v. Washington*
(2) SBI Lab Report Was Admissible Under Rule 803(6) (Business Records) and Was Not Inadmissible Because of Rule 803(8) (Public Records)

State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (5 May 2006). The defendant was convicted of three counts of first-degree murder and sentenced to death. (1) A forensic pathologist performed an autopsy on one of the murder victims and provided vaginal swabs and smears to a law enforcement officer, who submitted the evidence to the SBI laboratory. As a serologist in the lab, Agent Spittle would receive samples of

blood and bodily fluids, examine the samples and identify the fluids, and then refer them to others in the lab for further analysis. His records reflected both the results of his investigation and his disposition of the evidence. After receiving the serological evidence for this murder, Agent Spittle sent the evidence relating to the sperm from vaginal swabs and smears to SBI Agent Budzynski, who testified at trial that the DNA in the samples matched DNA recovered in one of the other murders. The same procedure was followed for one of the other murders: rectal and vaginal swabs were collected by a forensic pathologist, were received and examined by Agent Spittle, and then were sent to Agent Budzynski. Agent Spittle did not testify at trial, but his reports involving both murders were introduced into evidence. These reports contained Agent Spittle's results of his analyses and chain of custody information. The court ruled that the admission of Agent Spittle's reports did not violate Crawford v. Washington, 124 S. Ct. 1354 (2004), because the reports were not testimonial. The court stated that the reports did not bear witness against the defendant. Instead, they were neutral, having the power to exonerate as well as to convict. The court acknowledged that while the reports were prepared with the understanding that eventual use in court was possible or even probable, they were not prepared exclusively for trial and Agent Spittle had no interest in the outcome of any trial in which the records might be used. The court noted dicta in *Crawford* that business records are not testimonial. The court stated that among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse. (2) The court ruled that Agent Spittle's reports were admissible as business records under Rule 803(6). The court noted that Agent Nelson was Agent Spittle's supervisor and was responsible for creating and implementing laboratory record-keeping policies. Agent Nelson testified that Agent Spittle created the reports contemporaneously with his work as part of the regular practice of the agency and within the ordinary course of agency business. The court noted the comment to Rule 803(8) (public records hearsay exception) states that reports that are not admissible under the rule are not admissible as business records under Rule 803(6). The defendant argued that the provision in Rule 803(6) that findings from an investigation made under authority are admissible against the state means that laboratory reports are inadmissible when offered by the state against the defendant. The court, relying on State v. Smith, 675 P.2d 510 (Ore. App. 1984), and noting that it had cited this case in State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984) (upholding Breathalyzer affidavit in district court under business and public records hearsay exceptions), stated that if Agent Spittle's reports were purely ministerial observations, they were not inadmissible under either Rule 803(8) or Rule 803(6). The court concluded that the reports concerned routine, nonadversarial matters, and were prepared for a number of purposes, including statistical analysis and construction of databases, even though one purpose was potential use in court. Agent Spittle's analysis of the evidence also facilitated further examination of the evidence within the SBI lab. The court ruled that the reports were records of purely ministerial observations that do not offend the public records exception and were properly admitted as business records.

Proposed Defense Cross-Examination of Rape Victim Was Not Permitted Under Rule 412, Rape Evidence Shield Rule—Ruling of Court of Appeals Is Reversed

State v. Harris, 360 N.C. 145, 623 S.E.2d 615 (16 December 2005), *reversing*, 166 N.C. App. 386, 602 S.E.2d 697 (5 October 2004). The defendant was convicted of second-degree rape and common law robbery. The state's evidence showed that the defendant physically attacked the victim, raped her, and stole property from her. A nurse who examined the victim testified that her examination of the victim showed multiple lacerations, bruising, and tears in her anus and vagina, and her cervix was very bruised and swollen red. The defendant's defense was consent. The trial judge did not allow the defendant to cross-examine the victim about her sexual activity with her boyfriend earlier on the day of rape and robbery. At a hearing under Rule 412 (rape evidence shield rule), the victim testified that her boyfriend had attempted to have consensual sex with her, but no penetration had occurred. The court ruled, distinguishing State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986), that the proposed cross-examination of the victim was not permitted under Rule 412, specifically subdivision (b)(2) (evidence of specific

instances of sexual behavior to show act was not committed by the defendant). The encounter with her boyfriend was consensual and was unlikely to have produced the type and number of injuries, based on the nurse's testimony. The court upheld the trial judge's ruling and reversed the ruling of the North Carolina Court of Appeals, 166 N.C. App. 386, 602 S.E.2d 697 (2004). The court also concluded that even assuming that the excluded evidence was probative, it was substantially outweighed by the danger of unfair prejudice to the state and prosecuting witness under Rule 403.

Arrest, Search, and Confession Issues

Defendant Did Not Unambiguously Assert Right to Silence and Thus Officer's Asking for Amplification of Defendant's "No" Response Did Not Violate His Constitutional Rights

State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (5 May 2006). Officers were investigating the defendant's alleged involvement in three murders. They asked the defendant at work whether he would accompany them to the police station for an interview. He was told that he was not under arrest and he could return to work later. He was not given *Miranda* warnings. He went with the officers to the police station, where he admitted involvement with the three murders and then went with the officers to the locations where the murders were committed. The officers returned to the police station where he was given *Miranda* warnings and asked if he wanted to answer any more questions at that time. When the defendant answered, "no," the officer asked what he meant. The defendant responded that he was tired and would answer more questions after he had a chance to sleep. When the defendant awoke after several hours sleep, he said that he felt like talking some more. The officers re-advised the defendant of his *Miranda* rights, and the defendant affirmed his willingness to continue answering questions. The court ruled, citing State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that under these circumstances, the defendant's "no" response was ambiguous (that is, not a clear assertion of the right to remain silent), and the officer did not violate the defendant's constitutional rights by asking for amplification. The defendant had been cooperative from the beginning of his encounter with the police and had been forthcoming with his answers to the officers' questions. When the defendant unexpectedly answered "no" on being asked if he wished to answer any more questions, the officer did no more than ask him what he meant.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Notes in File of Department of Social Services (DSS) But Not in Prosecutor's File Were Not Discoverable Under G.S. 15A-903(a)(1) Because DSS Is Not a Prosecutorial Agency; Nor Did It Act As a Prosecutorial Agency In This Case
(2) Evidence Supported Jury Instruction on Defendant's Flight

State v. Pendleton, 175 N.C. App. 230, 622 S.E.2d 708 (20 December 2005). The defendant was convicted of multiple sex offenses involving a twelve-year-old. (1) The trial judge denied the defendant's motion to continue made after the state on the morning of trial produced notes originating from the Department of Social Services (DSS) that may have contained names of possible witnesses. The court ruled that notes in a DSS file but not in the prosecutor's file were not discoverable under G.S. 15A-903(a)(1), because DSS is not a prosecutorial agency. Nor did DSS act as a prosecutorial agency in this case. DSS referred the matter to law enforcement who developed their own evidence by interviewing the victim. Although a DSS employee sat in on a law enforcement interview of the victim, the court stated that this activity did not transform DSS into a prosecutorial agency. The court also ruled that the defendant had waived appellate review of any constitutional issues involving the defendant's motion to continue based on the state's failure to produce the notes until the morning of trial. (2) The court ruled

that the evidence supported the jury instruction on flight. The defendant failed to keep two appointments with a detective, left the area, and then presented false identification when he was stopped for a traffic violation in South Carolina.

(1) Trial Judge Did Not Err in Allowing State's Witness to Testify Whose Name Did Not Appear on Witness List Disclosed by State Before Trial, Based on State's Good Faith Showing Under Case Law and G.S. 15A-903(a)(3)
(2) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury

State v. Brown, ___ N.C. App. ___, 628 S.E.2d 787 (18 April 2006). The two defendants were convicted of common law robbery and assault inflicting serious bodily injury. (1) The court ruled that the trial judge did not err in allowing a state's witness to testify whose name did not appear on a witness list disclosed by the state before trial. The state informed the trial judge that before being approached by the witness the morning of trial, the state was unaware of the witness or that he had observed the victim's injuries. The judge conducted a voir dire of the witness, who testified that he had not previously spoken with the state about the case. The court ruled that a good faith showing had been made under State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977), and G.S. 15A-903(a)(3) to allow the witness to testify. (2) The victim testified that his facial injuries were "very" painful, he suffered pain in his mouth for about a month, and his right eye felt like it fell out of his head. The victim's father testified that the victim complained about pain for about ten months. A doctor testified that the victim suffered multiple facial fractures and lacerations, and characterized his injuries as causing "severe" and "extreme" pain. The court ruled that this evidence was sufficient to prove "serious bodily injury" under that part of the statutory definition that includes a protracted condition that causes extreme pain.

(1) Defendant's Right to Unanimous Jury Verdict Was Not Violated When Defendant Was Convicted of Five Counts of First-Degree Sexual Offense
(2) Defendant's Right to Unanimous Jury Verdict Was Violated for Eight of Ten Convictions of Sexual Activity by Substitute Parent, G.S. 14-27.7(a)
(3) Defendant's Right to Unanimous Jury Verdict Was Violated for Four Convictions of Indecent Liberties

State v. Massey, 174 N.C. App. 216, 621 S.E.2d 633 (1 November 2005). **(Author's note: There was a dissenting opinion on the rulings reversing the defendant's convictions in (2) and (3) below, so the North Carolina Supreme Court may review the rulings.)** The defendant was convicted of multiple sex acts with a minor victim. (1) The court ruled that the defendant's right to a unanimous jury verdict was not violated when the defendant was convicted of five counts of first-degree sexual offense. The court noted that an examination of the record revealed that the jury instructions and verdicts contained specific references to the date, act, and location of the alleged acts. From these references, it was possible to determine which of the defendant's five convictions corresponded to the possible acts testified to at trial. (2) The court ruled that the defendant's right to a unanimous jury verdict was violated for eight of ten convictions of sexual activity by a substitute parent, G.S. 14-27.7(a). There was generic testimony about alleged incidents in the bedroom and living room consisting of anal intercourse and cunnilingus. This testimony was sufficient to support one conviction each in the bedroom and living room under State v. Lawrence, 165 N.C. App. 548, 599 S.E.2d 87 (2004), *disc. rev. allowed*, 359 N.C. 413, 612 S.E.2d 634 (2005), and other cases. But as to the remaining eight convictions in which the jury found the defendant guilty based on identical instances of anal intercourse, it was impossible to relate the charges in the verdict sheets to the specific instances, because the verdict sheets did not associate an offense with a given incident. Because it cannot be determined whether the jury unanimously convicted the defendant based on specific acts, the court ordered a new trial for these eight convictions. (3) The court ruled that the defendant's right to a unanimous jury verdict was violated for four convictions of indecent liberties.

The court was unable to determine which particular evidence was the basis for the jury's guilty verdicts because, although the defendant was only charged with four counts of indecent liberties, the state presented evidence of more than four incidents of indecent liberties. Although the trial judge instructed the jury to consider each count of indecent liberties a separate and distinct act, the instructions did not distinguish among the counts. It was therefore impossible to determine whether each juror had in mind the same incidents when voting to convict the defendant. **[Author's note: This ruling may be affected by the later rulings in State v. Markeith Lawrence, 360 N.C. 368, 627 S.E.2d 609 (7 April 2006), and State v. Gary Lawrence, 360 N.C. 393, 627 S.E.2d 615 (7 April 2006), discussed above.]**

(1) Juvenile's Giving False Name to Officer During Investigative Stop Constituted Sufficient Evidence of G.S. 14-223 (Resist, Delay, or Obstruct Public Officer)
(2) Sufficient Evidence of Burning Public Building, G.S. 14-59
(3) Trial Judge Erred Under G.S. 7B-2605 in Failing to Find Compelling Reasons When Denying Release of Juvenile Pending Appeal to Court of Appeals

In re J.L.B.M., 176 N.C. App. 613, 627 S.E.2d 239 (21 March 2006). (1) The court ruled that the juvenile's giving a false name to the officer during an investigative stop constituted sufficient evidence of G.S. 14-223. In giving a false name to the officer, the juvenile delayed the officer's investigation, including any attempt to contact the juvenile's parent or guardian. The court rejected the juvenile's argument that because the officer's stop was unlawful, the juvenile could not be convicted of a violation of G.S. 14-223. The court stated that the unlawful stop did not give the juvenile a license to lie about his identity. The court distinguished cases in which the underlying arrest was unlawful, because in those cases a lawful arrest was a necessary element of a violation of G.S. 14-223. (2) The juvenile set off fireworks in a room at the police station, resulting in a two to three-foot flame that deposited back soot on the floor and wall. The juvenile laughed when an officer attempted to put out the fireworks. The court ruled that this evidence was sufficient to prove that the juvenile acted wantonly and willfully and "set fire" to the building. The court, relying on State v. Hall, 93 N.C. 571 (1885), noted that the state was not required to prove a "burning" under G.S. 14-59; setting fire to a building does not requiring proof of charring. (3) The court ruled that the trial judge erred under G.S. 7B-2605 in failing to find compelling reasons when denying the release of the juvenile pending the juvenile's appeal to the North Carolina Court of Appeals. Compare with In re K.T.L., ___ N.C. App. ___, 629 S.E.2d 152 (2 May 2006) (trial judge found compelling reasons in writing to deny release pending appeal).

(1) Trial Judge Did Not Err in Ordering Juvenile Adjudicatory Hearing to Be Open to Public
(2) Trial Judge After Entry of Dispositional Order Did Not Err in Placing Juvenile in Custody of DSS With Review Within 90 Days Under G.S. 7B-2506(1)(c) and G.S. 7B-906(a)
(3) Trial Judge Did Not Err Under 7B-2605 in Finding in Writing Compelling Reasons To Deny Release of Juvenile Pending Appeal to Court of Appeals

In re K.T.L., ___ N.C. App. ___, 629 S.E.2d 152 (2 May 2006). The juvenile was adjudicated delinquent of involuntary manslaughter. The court ruled: (1) in a case in which both the state and the juvenile moved that the adjudicatory hearing be closed to the public, the trial judge did not abuse his discretion in denying the motions of the state and juvenile and ordering that the hearing be open to the public after holding a hearing on the issue and considering the factors set out in G.S. 7B-2402; (2) the trial judge after the entry of the dispositional order did not err in ordering the juvenile to be placed in the custody of the department of social services (with a review hearing within 90 days) under the provisions of G.S. 7B-2506(1)(c) and G.S. 7B-906(a); and (3) the trial judge did not err when he provided in writing compelling reasons under G.S. 7B-2605 to support his order that, pending the juvenile's appeal of the disposition order, the department of social services is granted custody of the juvenile and placement in a residential treatment facility.

Sufficient Evidence Supported Juvenile Adjudication of Ethnic Intimidation (G.S. 14-401.14) Based on Content of E-Mail Sent by Student to Assistant Principal

In re B.C.D., ___ N.C. App. ___, 629 S.E.2d 617 (16 May 2006). The court ruled that sufficient evidence supported the juvenile's adjudication of ethnic intimidation, G.S. 14-401.4. An African-American assistant principal at a high school received an e-mail that was determined to have been sent by the juvenile, a student, who had previously been disciplined by the assistant principal for using racial epithets on a school bus. In the e-mail, the juvenile used a racial epithet [starting with the letter "n" and consisting of six letters] in describing her and stated that if she ever suspended somebody for using that racial epithet, the KKK will show up on her door step. It further stated that this was a promise, not a threat. The court concluded that the e-mail communicated a threat to assault the assistant principal for a racially-motivated reason.

Insufficient Evidence to Support Defendant's Conviction of Embezzlement Because She Neither Took Lawful Possession of Her Employer's Property Nor Was She Entrusted With Property In a Fiduciary Capacity

State v. Palmer, 175 N.C. App. 208, 622 S.E.2d 676676 (20 December 2005). The court ruled, relying on State v. Weaver, 359 N.C. 246, 607 S.E.2d 599 (2005), and State v. Keyes, 64 N.C. App. 529, 307 S.E.2d 890 (1983), that there was insufficient evidence to support the defendant's conviction of embezzlement because she neither took lawful possession of her employer's property nor was she entrusted with property in a fiduciary capacity. Even though the defendant generally had access to incoming checks, she did not lawfully possess them nor was she entrusted with them as a fiduciary because she obtained them through misrepresentation. The court noted that the appropriate charge against the defendant was larceny.

Sufficient Evidence to Support Defendant's First-Degree Felony Murder Conviction Based on Felony Murder Theory of Acting in Concert With Another Person Who Committed Drug Trafficking Offense With Deadly Weapon and Shot and Killed Victim-Seller

State v. Herring, 176 N.C. App. 395, 626 S.E.2d 742 (7 March 2006). The defendant knew A, who was a drug dealer, and the defendant had often found buyers for A. The defendant agreed to get B, his cousin, to purchase drugs from A. The defendant later arrived at A's apartment with B, the defendant having previously discussed with B purchasing cocaine from A and robbing A of his drugs and money. B left the apartment and obtained a gun, and then B fought with A over the cocaine. B shot and killed A. The amount of cocaine was a trafficking amount. The defendant was convicted of first-degree felony murder, with trafficking by possessing or attempting to possess cocaine as the underlying felony and committing it with a deadly weapon. The jury rejected the state's alternate theory that A's death was the result of an armed robbery or attempted armed robbery. The court ruled that there was sufficient evidence of the defendant's conviction based on acting in concert with B, who had constructive possession of the cocaine during his struggle with A. Relying on State v. Barnes, 345 N.C. 184, 481 S.E.2d 44 (1997), the court stated that as long as the defendant joined with B in committing *a* (emphasis in opinion) crime (in this case, drug trafficking by possessing or attempting to possess cocaine), he was responsible for all other crimes committed in a single transaction in furtherance of the common purpose or plan: to facilitate B's possession of A's cocaine. It was irrelevant that the defendant may not have intended to join B in shooting and killing A. Also, the state was not required to prove the defendant knew that B possessed a gun.

Sufficient Evidence of Intent to Kill to Support Conviction of Attempted First-Degree Murder of Infant Abandoned in Thirty Degree Weather in Remote Dilapidated Shed Where She Would Not Likely Be Found

State v. Pittman, 174 N.C. App. 745, 622 S.E.2d 135 (6 December 2005). The court ruled, relying on State v. Edwards, 174 N.C. App. 490, 621 S.E.2d 333 (15 November 2005), that there was sufficient evidence of intent to kill to support the defendant's conviction of attempted first-degree murder of an six-week-old infant who the defendant abandoned in thirty degree weather in a remote dilapidated shed where she would not likely be found. There was also evidence that the defendant acted to avoid paying child support for the infant, a goal that could only be ensured by the infant's death.

(1) Indictment Charging Felony Eluding Arrest (G.S. 20-141.5) Was Not Fatally Defective When It Alleged Aggravating Factors But It Did Not Set Forth Facts Supporting Them
(2) Trial Judge Did Not Commit Plain Error in Jury Instructions on Felony Eluding Arrest (G.S. 20-141.5) in Failing to Define "Gross Impairment" Aggravating Factor
(3) Sufficient Evidence Supported "Gross Impairment" Aggravating Factor
(4) When Indictment Charging Felony Eluding Arrest (G.S. 20-141.5) Alleged Three Aggravating Factors, State Was Only Required to Prove Two Aggravating Factors

State v. Stokes, 174 N.C. App. 447, 621 S.E.2d 311 (15 November 2005). The defendant was convicted of felony eluding arrest under G.S. 20-141.5. (1) The court ruled that the indictment charging felony eluding arrest was not fatally defective when it alleged the aggravating factors but did not set forth facts supporting them. For example, it alleged the gross impairment of a person's faculties while driving due to the consumption of an impairing substance [G.S. 20-141.5(b)(2)a.], but it did not allege the facts supporting this aggravating factor. (2) The court ruled the trial judge did not commit plain error in failing to define the "gross impairment" aggravating factor in the jury instructions. (3) The court ruled that sufficient evidence support the "gross impairment" aggravating factor. The defendant had a strong odor of alcohol about him; his eyes were very red, glazed, and glassy; his speech was mush mouthed and very hard to understand; he drove his vehicle one-half mile with a law enforcement officer hanging out of the window; he had to be forcibly removed from the vehicle; and he admitted to consuming six to seven beers. (4) The court ruled, relying on State v. Funchess, 141 N.C. App. 302, 540 S.E.2d 435 (2000), that when the indictment charging felony eluding arrest alleged three aggravating factors, the state was only required to prove two aggravating factors.

Sufficient Evidence to Support Conviction of Sale of Methamphetamine When Defendant Provided Drug as Payment for Work Previously Done for Defendant By Recipient of Drug

State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594 (3 January 2006). The court ruled, relying on State v. Carr, 145 N.C. App. 335, 549 S.E.2d 897 (2001) ("sale" of controlled substance includes exchange for money or any other form of consideration), that there was sufficient evidence to support the defendant's conviction of sale of methamphetamine when the defendant provided the drug as payment for work previously done for the defendant by the recipient of drug.

Trial Judge Erred in Failing to Instruct Jury That to Convict Defendant It Must Find Defendant Knew What He Possessed Was Heroin, When Defendant Had Testified That He Was Unaware Heroin Was in Refrigerator

State v. Lopez, 176 N.C. App. 538, 626 S.E.2d 736 (7 March 2006). The defendant was convicted of trafficking by possessing heroin and conspiracy to traffic by possessing heroin. The court ruled, relying on State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984), the trial judge erred in failing to instruct the jury that to convict the defendant it must find the defendant knew what he possessed was heroin, when the

defendant had testified that he was unaware that heroin was in a refrigerator. [Author's note: The relevant jury instruction is in footnote 2 of N.C.P.I.—Crim. 260.17.]

Drug Indictments Were Fatally Defective When They Did Not Allege Correct Name of Controlled Substance

State v. Ahmadi-Turshizi, 175 N.C. App. 783, 625 S.E.2d 604 (7 February 2006). The court ruled, relying on State v. Ledwell, 171 N.C. App. 328, 614 S.E.2d 412 (2005), that drug indictments were fatally defective when they did not allege the correct name of a controlled substance. They alleged "methylenedioxymethamphetamine," when the correct name is "3, 4 – methylenedioxymethamphetamine."

G.S. 90-95(e)(9) (Possessing Controlled Substance on Premises of Local Confinement Facility) Includes Secured Area in Local Confinement Facility Where Officers Detain and Search Arrestees Who Are to Be Taken Before Magistrate

State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274 (15 November 2005). The court ruled that G.S. 90-95(e)(9) (possessing a controlled substance on the premises of a local confinement facility) includes the secured area in a local confinement facility (in this case, Forsyth County Law Enforcement and Detention Center) where officers detain and search arrestees who are to be taken before a magistrate. The court stated that the offense extends beyond the bounds of the lockup area to include those secured areas in which arrestees are temporarily detained for search, booking, and other purposes.

Insufficient Evidence to Support Defendant's Conviction of Trafficking in Cocaine by Transportation

State v. Williams, ___ N.C. App. ___, 630 S.E.2d 216 (6 June 2006). The defendant was convicted of trafficking in cocaine by possession and by transportation. The court ruled that there was insufficient evidence to support the conviction by transportation. The state failed to present evidence that the defendant moved the cocaine from one place to another. When law enforcement officers arrived at a YMCA where their informant had set up a drug deal with the defendant, the defendant's vehicle containing the cocaine was already parked there and remained stationary during the course of the transaction. There was no evidence to show whether the defendant moved the cocaine before the informant arrived. Also, there was insufficient evidence to show when or how the cocaine was placed in the defendant's vehicle.

Sufficient Evidence of Corpus Delecti to Support Defendant's Conviction of Conspiracy to Traffic by Possessing Cocaine

State v. Sims, 174 N.C. App. 829, 622 S.E.2d 132 (6 December 2005). The defendant was convicted of conspiracy to traffic by possessing more than 400 grams of cocaine. The court ruled, relying on State v. Parker, 315 N.C. 222, 337 S.E.2d 487 (1985), that there was sufficient evidence independent of the defendant's confession to support the amount of cocaine necessary to prove this offense. The defendant admitted that he had purchased a half kilogram of cocaine from another person on three occasions. Two items of evidence established the trustworthiness of this statement. First, a search of the defendant's residence resulted in the officers' finding a substantial amount of cocaine, 181 grams, in the defendant's possession. Second, a controlled buy had been made before the search of the defendant's residence in which an informant had purchased 26 grams of cocaine from the defendant.

(1) Sufficient Evidence of Defendant's Constructive Possession of Illegal Drugs
(2) Sufficient Circumstantial Evidence That Defendant Knew or Had Reasonable Grounds to Know Goods Were Stolen to Support Conviction of Possession of Stolen Goods

State v. Weakley, 176 N.C. App. 642, 627 S.E.2d 315 (21 March 2006). (1) The defendant was convicted of drug offenses based on various illegal drugs being found in his home pursuant to a search warrant. Relying on State v. Thorpe, 326 N.C. 451, 390 S.E.2d 311 (1990), and other cases, the court ruled that there was sufficient evidence of the defendant's constructive possession of the illegal drugs. There was undisputed evidence that the defendant leased and resided in the house (although when the search warrant was executed, another man also lived in the residence and his girlfriend had stayed there a couple of nights a week). (2) The court ruled that there was sufficient circumstantial evidence that the defendant knew or had reasonable grounds to know that the goods were stolen to support his conviction of possession of stolen goods. His girlfriend stole the goods and transported them to the defendant's house. A person assisting the girlfriend in transporting the goods testified that the goods looked suspicious; for example, the girlfriend cleaned people's houses and told the defendant that these people had given her the various items of property, yet it included a ladder that could be used in cleaning. The defendant referred to the stolen goods as "nice stuff" and told his girlfriend that "there better not be no stolen stuff in my house."

Evidence Was Sufficient to Support Defendant's Armed Robbery Conviction Involving Store Employee When Defendant Threatened To Harm Another Person in Store With a Knife If Employee Did Not Open Drawer of Cash Register

State v. Corum, 176 N.C. App. 150, 625 S.E.2d 889 (21 February 2006). The court ruled, relying on State v. Thomas, 85 N.C. App. 319, 354 S.E.2d 891 (1987), there was sufficient evidence to support the defendant's armed robbery conviction involving a store employee when the defendant threatened to harm another person in the store with a knife if the employee did not open the drawer of the cash register. The court noted that the jury could infer that the employee's life was endangered and threatened by the defendant's use of the knife.

Insufficient Evidence To Support Kidnapping Conviction When Restraint of Victim Did Not Expose Her to Greater Danger Than Inherent in Armed Robbery

State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610 (3 January 2006). The defendant was convicted of second-degree kidnapping and armed robbery. The defendant, one of the robbers, pointed a shotgun at the victim (a convenience store employee), demanded money, struck her in the back with the shotgun, and pushed her toward the cash register. He broke open the register and took money. The court ruled, relying on State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981), that this evidence was insufficient to support the defendant's kidnapping conviction. The victim's restraint was an inherent and integral part of the armed robbery and did not expose her to a greater danger than that inherent in such a robbery.

(1) Trial Judge in First-Degree Kidnapping Trial Did Not Err in Not Submitting Second-Degree Kidnapping When Evidence Showed That Defendants Did Not Release Victims in Safe Place
(2) Trial Judge in Multi-Defendant Trial Erred in Jury Selection Procedure By Alternating Between State and Each Defendant on Passing on Jury Panel Instead of Each Defendant Passing on Juror Panel Before Sending Jury Panel Back to State

State v. Love, ___ N.C. App. ___, 630 S.E.2d 234 (6 June 2006). (1) The court ruled that the trial judge in a first-degree kidnapping trial did not err in not submitting second-degree kidnapping when the evidence showed that the defendants did not release the victims in a safe place. After robbing the victims in their home, the defendants left them bound to chairs and gagged. (2) The court ruled that the trial judge

in a multi-defendant trial erred in the jury selection procedure set out in G.S. 15A-1214 by alternating between the state and each defendant on passing on the jury panel instead of each defendant passing on the juror panel before sending the jury panel back to the state.

(1) Indictment Charging Malicious Conduct by Prisoner Was Not Defective Although It Did Not Specifically Allege Defendant Was in Custody
(2) Trial Judge's Failure at Close of State's Evidence to Arraign Defendant for Prior Convictions Under Habitual Misdemeanor Assault Was Not Prejudicial Error Requiring New Trial
(3) Double Jeopardy Did Not Bar Convictions for Both Malicious Conduct by Prisoner and Habitual Misdemeanor Assault Based on Same Conduct
(4) Trial Judge Erred in Sentencing Defendant as Habitual Felon Because Judge Did Not Question Defendant Under G.S. 15A-1022(a) Concerning Defendant's Guilty Plea to Habitual Felon Status

State v. Artis, 174 N.C. App. 668, 622 S.E.2d 204 (6 December 2005). The defendant, while an inmate in a county detention center, threw his urine at a detention officer. The defendant was convicted of malicious conduct by prisoner and habitual misdemeanor assault; both offenses were based on the defendant's throwing of the urine. (1) The court ruled, relying on State v. Jordan, 75 N.C. App. 637, 331 S.E.2d 232 (1985), that the indictment charging malicious conduct by prisoner was not defective although it did not specifically allege that the defendant was in custody. The indictment alleged that the defendant assaulted a detention officer of a specified county detention center by throwing a bodily fluid, which sufficiently informed the defendant that he was in custody. A criminal pleading under G.S. 15A-924(a)(5) does not have to state every element of a charge offense; it is only required to assert facts supporting every element. (2) The court ruled, relying on State v. McDonald, 165 N.C. App. 239, 599 S.E.2d 50 (2004), that the trial judge's failure under G.S. 15A-928(c) to arraign the defendant at the close of the state's evidence for the prior convictions under habitual misdemeanor assault was not prejudicial error requiring a new trial. Defense counsel, after consulting with the defendant, affirmed the defendant's intent to stipulate to the prior convictions. (3) The court ruled that double jeopardy did not bar convictions for both malicious conduct by prisoner and habitual misdemeanor assault based on same conduct. (4) The court ruled, relying on State v. Gilmore, 142 N.C. App. 465, 542 S.E.2d 694 (2001), that the trial judge erred in sentencing the defendant as a habitual felon because the judge did not question defendant under G.S. 15A-1022(a) (judge's duties in taking guilty plea from defendant) concerning defendant's guilty plea to habitual felon status.

After Defendant Pled Guilty to Criminal Offenses, Admitted to Habitual Felon Status and Sentencing Was Continued Until Later Date, Felony Charge Brought Thereafter Must Be Accompanied By New Habitual Felon Indictment or Information

State v. Bradley, 175 N.C. App. 234, 623 S.E.2d 85 (20 December 2005). The defendant was indicted in 2001 for a cocaine offense and in 2003 for another cocaine offense. Under a plea agreement, the defendant on February 11, 2004, pled guilty to both cocaine offenses and admitted to habitual felon status on two bills of information charging habitual felon. Sentencing was continued until April 6, 2004. The defendant failed to appear for sentencing, and he was arrested on July 16, 2004, and also charged with a new cocaine offense committed on that date. On August 5, 2004, the defendant was sentenced as an habitual felon on the two old cocaine charges and the new cocaine charge. An habitual felon indictment or information was not brought for the cocaine offense committed on July 16, 2004. The court ruled that the state did not satisfy the requirements of G.S. 14-7.3 that there must be an indictment (or information) ancillary to the predicate substantive felony. Although the state had previously charged the defendant with being an habitual felon by the bills of information accompanying the two cocaine offenses committed in 2001 and 2003, the defendant already had been convicted of the substantive felonies associated with these bills of information by his guilty pleas on February 11, 2004. Thus, the trial judge

lacked the authority to sentence him as an habitual felon for the July 16, 2004, cocaine offense without a new habitual felon indictment or information.

Date of Prior Conviction Under Habitual Felon Law Is Jury's Return of Guilty Verdict, Not When Sentence Is Imposed

State v. McGee, 175 N.C. App. 586, 623 S.E.2d 782 (17 January 2006). The defendant was convicted of possession of cocaine and then pled guilty to being an habitual felon. The court ruled that in determining whether the commission of a felony occurred after the conviction of a prior felony, the date of conviction is the jury's return of a guilty verdict for the felony, not when the defendant was sentenced for that felony. In this case, the jury's guilty verdict for the first felony was returned before the commission of the second felony, although sentencing for the first felony occurred after the commission of the second felony.

Defendant Failed to Prove Intentional Discrimination in Prosecution of Habitual Felons

State v. Blyther, 175 N.C. App. 226, 623 S.E.2d 43 (20 December 2005). The defendant was prosecuted as an habitual felon in a county in which the state prosecutes as habitual felons all who are eligible. The defendant asserted that this was impermissible discrimination because in other counties not all eligible defendants are prosecuted. The court ruled that the defendant failed to prove intentional discrimination based on race, religion, or other arbitrary classification. See also State v. Gibson, 175 N.C. App. 223, 622 S.E.2d 729 (20 December 2005) (similar ruling).

(1) Road Was Public Vehicular Area in DWI Prosecution
(2) No Statutory Right to Discovery for Superior Court Trial de Novo Cases

State v. Cornett, ___ N.C. App. ___, 629 S.E.2d 857 (2 May 2006). The defendant was convicted of DWI in a superior court trial de novo. (1) The court ruled that the road on which the defendant drove was a public vehicular area. It was a dead-end dirt road with six homes, with driveways from the road to each of the homes, which had different owners. Both a law enforcement officer and the defendant testified that they drove on the road and there were no gates or signs indicating that it was a private road. The court noted that under G.S. 20-4.01(32)(c) ("road opened to vehicular traffic within or leading to a subdivision for use by subdivision residents, their guests, and members of the public, whether or not the subdivision roads have been offered for dedication to the public') a public vehicular area must only be opened to vehicular traffic, but not necessarily "offered for dedication to the public." (2) Before trial de novo in superior court, the defendant moved for discovery of written protocols concerning Intoxilyzer operation, calibration, and measures. The court ruled, relying on G.S. 15A-901 and the official commentary to the section, that there is no statutory discovery for criminal cases originating in district court. The court noted that the defendant did not argue that he had been denied exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963).

(1) Sufficient Evidence of Malice to Support Conviction of Second-Degree Vehicular Murder
(2) Defendant's Nine-Year-Old Prior DWI Conviction Was Properly Admitted on Issue of Malice and Was Not Too Remote To Be Relevant

State v. Westbrook, 175 N.C. App. 128, 623 S.E.2d 73 (20 December 2005). The defendant was convicted of second-degree murder based on a vehicular crash caused by the defendant in which a person died. (1) The court ruled that there was sufficient evidence of malice to support the defendant's conviction. The defendant was driving while impaired with an alcohol concentration of 0.156. He was on notice about the serious consequences of driving while impaired as a result of his prior DWI conviction that had occurred nine years earlier. He drove seventy-five to eighty miles per hour in a forty-five miles per hour zone, crossed the center lane, traveled in a lane in the opposite direction, and ran a red light

without attempting to brake or stop. (2) The court ruled, relying on State v. Goodman, 149 N.C. App. 57, 560 S.E.2d 196 (2002) (dissenting opinion), reversed per curiam for reasons stated in dissenting opinion, 357 N.C. 43, 577 S.E.2d 619 (2003), and other cases, that the defendant's nine-year-old prior DWI conviction was properly admitted under Rule 404(b) to show malice. The conviction was admissible for this purpose without showing the facts and circumstances supporting the conviction. The court also ruled, relying on State v. Rich, 351 N.C. 386, 527 S.E.2d 299 (2000), that the nine-year-old conviction was not too remote to be relevant.

(1) Motorized Scooter Was "Vehicle" to Support DWI Conviction
(2) Defendant Had Fair Notice of Acts Prohibited by DWI Laws, and His Due Process Rights Were Not Violated

State v. Crow, 125 N.C. App. 119, 623 S.E.2d 68 (20 December 2005). The defendant was convicted of DWI while riding a motor scooter. The scooter was powered by an electric motor, had two wheels, approximately six to eight inches in diameter and arranged in tandem like the wheels of a bicycle. (1) The court ruled that the motorized scooter fell within the definition of "vehicle" in G.S. 20-4.01(49) and did not meet the requirements of any exceptions to the definition. (2) The court ruled that the defendant had fair notice of the acts prohibited by DWI laws, and his due process rights were not violated.

Court Reaffirms That Habitual DWI Is Substantive Felony Offense and Thus Superior Court Had Original Jurisdiction to Try Transactionally-Related Misdemeanors

State v. Bowden, ___ N.C. App. ___, 630 S.E.2d 208 (6 June 2006). The defendant was tried for habitual DWI, driving while license revoked, and DWI. He was convicted of habitual DWI and driving while license revoked. The court, relying on the ruling in State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (1994), reaffirmed that habitual DWI is a substantive felony offense, not a status offense, and thus the superior court had original jurisdiction to try the transactionally-related misdemeanors under G.S. 7A-271(a)(3). The court noted that in the post-*Priddy* case of State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001), habitual DWI was described as a recidivist offense. The court, relying on In re Appeal from Civil Penalty, 324 N.C. 373, 379 S.E.2d 30 (1989), stated that one panel of the Court of Appeals cannot overrule another panel, and that in any event *Vardiman* in fact reaffirmed *Priddy*'s ruling that habitual DWI is a substantive felony. The court also noted that the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense.

(1) Trial Judge Did Not Abuse Discretion in Denying Defendant's Motion to Prevent State in DWI Trial De Novo in Superior Court from Calling Extrapolation Expert As Witness When State Had Given Notice to Defendant on Day of Trial That It Would Do So
(2) State's Extrapolation Expert's Opinion of Defendant's Alcohol Concentration At Officers' First Contact With Defendant Was Admissible As Within "Relevant Time After Driving"
(3) Sufficient Evidence to Support Defendant's DWI Conviction on 0.08 Prong, Based on Extrapolation Evidence

State v. Fuller, 176 N.C. App. 104, 626 S.E.2d 655 (21 February 2006). The defendant was convicted of DWI in superior court after she had appealed her conviction in district court for trial de novo. Her Intoxilyzer test result was 0.07. The state's extrapolation expert testified that the defendant's blood alcohol concentration when officers first came into contact with her was 0.08. (1) The state gave notice to the defendant on the day of trial that it would call the extrapolation expert as a witness. The trial judge denied the defendant's motion to prevent the state from calling the expert because she was not notified in sufficient time to procure a rebuttal witness. The defendant conceded on appeal that there were no statutory discovery provisions applicable to the defendant for her trial de novo in superior court. The court noted that Article 48 (discovery) of Chapter 15A applies only to cases within the superior court's

original jurisdiction. The court ruled that, in light of the defendant's clear understanding of the importance of extrapolation evidence to the state's case and the longstanding acceptance of such evidence in state courts, the trial judge did not abuse his discretion in denying the defendant's motion. (2) The court ruled that the state's extrapolation expert's opinion of the defendant's alcohol concentration at the officers' first contact with the defendant was admissible as within a "relevant time after driving" as defined in G.S. 20-4.01(33a). (3) The court ruled there was sufficient evidence to support the defendant's DWI conviction based on the 0.08 prong, considering the state's extrapolation expert's testimony.

Jury's Note About Its Agreement on Issue in First Trial Ending in Hung Jury Did Not Under Collateral Estoppel or Double Jeopardy Bar Relitigation of Issue in Second Trial

State v. Herndon, ___ N.C. App. ___, 629 S.E.2d 170 (2 May 2006). The defendant was charged with first-degree murder. The first trial ended in a mistrial because the jury could not agree on a verdict. The jury during its deliberations at the first trial sent a note to the judge stating that the jurors agreed the defendant was not the aggressor but it was split on a verdict. At the second trial, the defendant was convicted of voluntary manslaughter. The defendant argued on appeal that the state at the second trial was collaterally estopped under the Double Jeopardy Clause from relitigating the issue that the defendant was the aggressor. The court ruled, relying on State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982) (jury's note at first first-degree murder trial ending in hung jury that it was deadlocked 7-5 on second-degree murder did not bar state from re-prosecuting defendant for first-degree murder), and State v. Mays, 158 N.C. App. 563, 582 S.E.2d 360 (2003) (jury's note at first first-degree murder trial ending in hung jury that it unanimously agreed that minimally defendant was guilty of second-degree murder did not bar state from re-prosecuting defendant for first-degree murder), that the doctrine of collateral estoppel does not apply because the jury note was not a final verdict in the case.

Trial Judge Did Not Err in Allowing State's Witness to Testify About Defendant's Bribery Offer Not to Testify That State Had Not Provided in Discovery to Defendant, Because State's Witness Did Not Reveal Bribery Offer Until He Testified on Re-Direct Examination at Trial

State v. Farmer, ___ N.C. App. ___, 630 S.E.2d 244 (6 June 2006). The court ruled, relying on State v. Godwin, 336 N.C. 499, 444 S.E.2d 206 (1994), that the trial judge did not err in allowing a state's witness to testify about the defendant's bribery offer not to testify that the state had not provided in discovery to the defendant, because the state's witness did not reveal the bribery offer until he testified on re-direct examination at trial.

Trial Judge Did Not Abuse Discretion When He Denied Defendant's Motion for Mistrial Based on State's Statutory Discovery Violations

State v. Jaaber, 176 N.C. App. 752, 627 S.E.2d 312 (21 March 2006). The court ruled that the trial judge did not abuse his discretion when he denied the defendant's motion for a mistrial based on the state's statutory discovery violations (not providing defendant with two witnesses' statements). Because a trial judge is not required to impose any sanctions for statutory discovery violations, what sanctions to impose, if any, are within the trial judge's discretion.

Sufficient Evidence of "Breaking" to Support Burglary Conviction When Victim Opened Front Door in Response to Knock on Door and Defendant and Others Grabbed Victim and Forced Their Way Into Home

State v. Reid, 175 N.C. App. 613, 625 S.E.2d 575 (7 February 2006). The court ruled, relying on State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979), and other cases, that there was sufficient evidence of "breaking" to support the defendant's burglary conviction when the victim opened the front door in

response to a knock on the door and the defendant and others grabbed the victim and forced their way into the victim's home.

(1) Sufficient Evidence of Burglary and Felonious Breaking or Entering Because Defendant Could Not Have Reasonably Believed Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Had Authority to Consent to Defendant's Entry Into Parents' Home for Purpose of Engaging in Sex With Victim
(2) Sufficient Evidence of Constructive "Breaking" for Burglary When Thirteen-Year-Old Victim of Statutory Rape and Sex Offenses Opened Bedroom Window Pursuant to Defendant's Instructions

State v. Brown, 176 N.C. App. 72, 626 S.E.2d 307 (21 February 2006). The defendant was convicted of first-degree burglary, felonious breaking or entering, statutory rape, statutory sexual offense, and indecent liberties with a thirteen year old. The defendant, who was 45 years old, contacted the victim through the Internet and eventually was invited by the victim into her parents' house where they engaged in various sex acts. (1) The court ruled, relying on State v. Upchurch, 332 N.C. 439, 421 S.E.2d 577 (1992), and other cases, that there was sufficient evidence of burglary and felonious breaking or entering because the defendant could not have reasonably believed that the thirteen-year-old victim had authority to consent to the defendant's entry into the victim's parents' home for purpose of engaging in sex with her. (2) The court ruled, relying on State v. Smith, 311 N.C. 145, 316 S.E.2d 75 (1984), that there was sufficient evidence of a constructive "breaking" for burglary when the thirteen-year-old victim opened the bedroom window pursuant to the defendant's instructions.

(1) When Trial Judge Failed to Instruct on Theories of Aiding and Abetting or Acting in Concert, State Must Prove That Defendant Personally Committed Every Element of Offense
(2) Sufficient Evidence to Support Two Conspiracy Convictions

State v. Roberts, 176 N.C. App. 159, 625 S.E.2d 846 (21 February 2006). The defendant and others agreed on December 15, 2002, to rob an apartment. For his participation in the robbery, the defendant was convicted of first-degree burglary, armed robbery, and conspiracy to commit first-degree burglary and armed robbery. On December 16, 2002, the defendant took part in another burglary and robbery of a different apartment. For his participation in these crimes, the defendant was convicted of various offenses, including first-degree burglary, kidnapping, first-degree sexual offense, armed robbery, and conspiracy to commit first-degree burglary and armed robbery. (1) When instructing the jury on first-degree sexual offense, the trial judge failed to instruct on the theories of aiding and abetting or acting in concert. Relying on State v. Wilson, 345 N.C. 119, 478 S.E.2d 507 (1996), and State v. Cunningham, 140 N.C. App. 315, 536 S.E.2d 341 (2000), the court ruled that the state was required to prove that the defendant personally committed every element of the crime. Because the defendant did not personally employ or display a dangerous weapon (his accomplice did), the evidence was insufficient to support the defendant's conviction of first-degree sexual offense. (2) The court ruled there was sufficient evidence to support the defendant's two conspiracy convictions (one on December 15, 2002, and another on December 16, 2002). The court noted that there was no evidence that the agreement formed on December 15, 2002, consisted of more than robbing someone that night. The mere fact that the defendant was involved in a similar crime the next night did not indicate the two crimes were committed as part of the agreement made on December 15, 2002.

Indictment for Statutory Rape of Thirteen Year Old Under G.S. 14-27.7A (Statutory Rape or Sexual Offense of 13, 14, or 15 Year Old) Was Insufficient To Support Judgment on Guilty Plea to Attempted Second-Degree Rape Under G.S. 14-27.3

State v. Frink, 177 N.C. App. 144, 627 S.E.2d 472 (4 April 2006). The defendant was indicted for statutory rape of a thirteen year old under G.S. 14-27.7A (statutory rape or sexual offense with 13, 14, or 15 year old). He pled guilty to attempted second-degree rape under G.S. 14-27.3. The court ruled that the indictment was insufficient to support the judgment on the guilty plea because it failed to alleged the essential elements of attempted second-degree rape (that is, by force or with a mentally disabled person, etc.). Because the indictment was fatally defective, the trial court had no jurisdiction to accept the plea. And jurisdiction may be raised at any time, including for the first time on appeal. [Author's note: Attempted second-degree rape under G.S. 14-27.3 is not a lesser-included offense of statutory rape of a thirteen year old under G.S. 14-27.7A. To accept the defendant's guilty plea in this case, an information or a new indictment was necessary.]

Lack of Mistake-of-Fact Defense to Statutory Rape of 13, 14, or 15 Year Old Is Not Unconstitutional Under Ruling in *Lawrence v. Texas*

State v. Browning, ___ N.C. App. ___, 629 S.E.2d 299 (16 May 2006). The court ruled that the lack of a mistake-of-fact defense to statutory rape of a 13, 14, or 15 year old under G.S. 14-27.7A is not unconstitutional under the ruling in Lawrence v. Texas, 539 U.S. 558 (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).

Sufficient Evidence to Support Conviction of First-Degree Arson When Defendant Burned Outbuilding (Detached Garage) Within Curtilage of House While People Were Inside House

State v. Nipper, ___ N.C. App. ___, 629 S.E.2d 883 (6 June 2006). The court ruled, relying on State v. Teeter, 165 N.C. App. 680, 599 S.E.2d 435 (2004), and rejecting a possible conflict with *Teeter* in State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993), that there was sufficient evidence to support the defendant's conviction of first-degree arson when the defendant burned an outbuilding (a detached garage) within curtilage of a house while people were inside the house.

(1) Defendant May Not Be Tried Without His or Her Consent During Same Week of Arraignment on Charges for Trial De Novo in Superior Court in Counties Subject to Mandatory Arraignment Under G.S. 15A-943(a)
(2) Requirement Under G.S. 15A-941(d) That Defendant Make Written Request for Arraignment in Superior Court Is Applicable Only to Cases Involving Indictments

State v. Vereen, ___ N.C. App. ___, 628 S.E.2d 408 (18 April 2006). The defendant was convicted of various offenses in Durham County District Court and appealed for trial de novo in superior court. (Author's note: Durham County Superior Court is subject to the arraignment requirements of G.S. 15A-943.) When the defendant was formally arraigned on the charges in superior court on the day of the trial, he moved for a continuance so he could obtain evidence that he had subpoenaed. The trial judge immediately proceeded to trial. The court ruled that the defendant's trial violated G.S. 15A-943(b), which prohibits a trial without the defendant's consent in the week in which the defendant is arraigned. The court also ruled that the defendant's motion for a continuance to obtain evidence constituted a lack of consent to a trial during the same week. (2) The court ruled that the requirement under G.S. 15A-941(d) that a defendant make a written request for an arraignment in superior court is applicable only to cases involving indictments. The requirement does not apply to trial de novo cases because an indictment is not

involved. The court noted that while there was no indictment, an arraignment was still required under G.S. 15A-943 to enable the defendant to submit a plea in superior court.

(1) Prosecutor in Jury Argument Impermissibly Commented on Defendant's Silence in His Interaction with Law Enforcement
(2) G.S. 15A-959(c) Prohibits Use of Testimony from Pretrial Insanity Hearing , Including Use of Testimony to Impeach Trial Witness

State v. Durham, 125 N.C. App. 202, 623 S.E.2d 63 (20 December 2005). The defendant was convicted of first-degree murder. The only trial issue was whether the defendant was insane. A pretrial hearing was conducted under G.S. 15A-959 on the defendant's motion to dismissal the charge, which was denied. (1) The court ruled, relying on State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (2001), that the prosecutor in jury argument impermissibly commented on the defendant's silence in his interaction with law enforcement. The jury argument implied that the defendant must have been sane and known right from wrong based on his refusal to talk to law enforcement once he was in custody. (2) The court ruled that G.S. 15A-959(c) ("testimony or evidence taken at the hearing is not admissible as evidence at the trial") prohibits the use of testimony from a pretrial insanity hearing, including the use of testimony to impeach a trial witness.

Trial Judge Did Not Err in Granting State's Motion to Join for Trial Charges of Possession of Firearm by Felon and Felonious Assault Arising from Same Transaction

State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677 (4 April 2006). The court ruled, relying on State v. Floyd, 148 N.C. App. 290, 558 S.E.2d 237 (2002), that the trial judge did not err in granting the state's motion to join for trial charges of possession of firearm by felon and assault with a deadly weapon with intent to kill inflicting serious injury, when both charges arose from the same transaction (the defendant's using a firearm to shoot the victim). Joinder of the two charges did not prejudice the defendant's ability to defend himself on the felonious assault charge.

Indictment Charging Possession of Firearm by Felon (G.S. 14- 415.1) Was Not Fatally Defective When It Failed to Comply With Statutory Requirement to Allege Date of Prior Felony Conviction

State v. Inman, 174 N.C. App. 567, 621 S.E.2d 306 (15 November 2005). The court ruled that an indictment charging possession of firearm by felon (G.S. 14-415.1) was not fatally defective when it failed to comply with the statutory requirement in G.S. 14-415.1(c) to allege the date of a prior felony conviction. All required information about the prior felony conviction was alleged except the date of the conviction. The court stated that the failure was not material and did not affect a substantial right. The requirement to allege the date of the prior felony conviction was merely directory, not mandatory.

Evidence Was Insufficient to Support Conviction of Larceny Because Defendant Did Not Commit Trespassory Taking When She Dug Up Money Buried on Real Property On Which She Had Leasehold Interest Granting Her Lawful Possession of the Real Property

State v. Jones, ___ N.C. App. ___, 628 S.E.2d 436 (18 April 2006). The defendant was convicted of felony larceny. In June 2002, the alleged larceny victim buried $13,400 in cash in her mother's backyard (in two separate containers, one of which had a note stating to whom the money belonged). Her mother died in November 2002. In January 2004, the alleged victim returned to the property to retrieve her money. Her mother's mobile home was now being rented to the defendant. The defendant later admitted to finding some of the money and spending it. The court noted that the defendant was in lawful possession of the real property where the alleged larceny victim had buried her money. The defendant had a valid lease to rent not only the mobile home, but also the property on which the mobile home was

located. The defendant's leasehold entitled her to lawful possession of the real property and consequently the buried money. Relying on State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975) (defendant who rented mobile home and inside furnishings did not commit larceny when taking furnishings, although title remained in landlord, because defendant had complete access and control over furnishings as tenant), the court ruled the defendant did not commit a trespassory taking. Therefore, the evidence was insufficient to support the defendant's conviction of felony larceny. The court indicated that the defendant may have been guilty of violating G.S. 14-168.1 (conversion by lessee). [Author's note: Although the defendant had possession of the real property under the leasehold interest, the containers and their contents having been buried by the victim, with an clue to ownership in the note left with one of them, may still have been constructively in the victim's possession, and the defendant at most had custody of the containers when she took them and spent the money. *See generally* State v. Courtsol, 89 Conn. 564, 94 A. 973 (1915).]

Larceny Indictment Alleging Property Owner as "N.C. FYE, Inc." Was Not Defective

State v. Cave, 174 N.C. App. 580, 621 S.E.2d 299 (15 November 2005). The court ruled that a larceny indictment alleging the property owner as "N.C. FYE, Inc." was not defective. The abbreviation "Inc." imports a corporation, which is a legal entity capable of owning property. [Author's note: To make an allegation clearer, an indictment could allege, after the description of the owner, the words: "a legal entity capable of owning property."]

When Defendant Was Convicted of Felonious Larceny But Jury Did Not Reach Verdict on Felonious Breaking and Entering, Remand Was Required for Entry of Judgment for Misdemeanor Larceny When Jury Did Not Make Finding That Value of Goods Taken Was More Than $1,000.00

State v. Matthews, 175 N.C. App. 550, 623 S.E.2d 815 (17 January 2006). Relying on State v. Keeter, 35 N.C. App. 574, 241 S.E.2d 708 (1978), the court ruled that when the defendant was convicted of felonious larceny but the jury did not reach a verdict on felonious breaking and entering, remand was required for the entry of a judgment for misdemeanor larceny when the jury did not make a finding that the value of goods taken was more than $1,000.00.

Sufficient Evidence to Support Adjudication of Delinquency for Intimidating Witness Under G.S. 14-226

In re R.D.R., 175 N.C. App. 397, 623 S.E.2d 341 (3 January 2006). The court ruled that there was sufficient evidence to support the juvenile's adjudication of delinquency for intimidating a witness under G.S. 14-226. Another juvenile, B.T., admitted to participating in a criminal offense with the juvenile. In court and in the juvenile's presence, B.T. agreed to be a witness for the state against the juvenile. The juvenile stood up, turned toward B.T., and mouthed the words, "I'm going to kick your ass." A court counselor saw what the juvenile had done and asked B.T. if the juvenile had threatened him, and B.T. responded, "Yes."

(1) Trial Judge Did Not Err in Not Allowing Defendant to Withdraw Guilty Plea Before Sentencing Because Defendant Did Not Show Fair or Just Reason for Doing So
(2) Trial Judge Did Not Abuse Discretion in Concluding Defendant Did Not Provide Substantial Assistance in Drug Trafficking Case

State v. Robinson, ___ N.C. App. ___, 628 S.E.2d 252 (18 April 2006). (1) The defendant pled guilty to a drug trafficking charge pursuant to a plea agreement in sentencing was continued, with the requirement that the defendant must testify truthfully and consistently with prior statements to law enforcement if called upon to testify in a pending federal prosecution. About three and one-half months later (during which time the federal prosecutor did not call the defendant as a witness apparently because of the

defendant's inconsistent statements), the defendant moved to withdraw his guilty plea, which the trial judge denied. After discussing the factors for withdrawing a guilty plea set out in State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990), the court ruled that the defendant did not show a fair or just reason for withdrawing his guilty plea. The court rejected the defendant's argument that there was confusion over the conditions of the plea agreement. (See the court's discussion of the factors and the evidence in this case.) (2) The court ruled that the trial judge did not abuse his discretion in concluding that the defendant did not provide substantial assistance in the drug trafficking case and in not departing from the mandatory sentence.

Defendant's Confession to Deputy Sheriff in Interview Conducted After Defendant Entered Plea Agreement With Federal Government Was Admissible Notwithstanding Deputy Sheriff's Statement to Defendant Before Interview

State v. Lacey, 175 N.C. App. 370, 623 S.E.2d 351 (3 January 2006). The defendant pled guilty in federal court to a drug offense under a plea agreement with a federal prosecutor, accepted by a federal judge, in which the federal government agreed it would not prosecute the defendant for any crime he confessed to, except crimes of violence, and it would not share information with other prosecuting entities except as provided in the agreement. Afterward, the defendant with counsel present agreed to be interviewed by a Beaufort County deputy sheriff, who told the defendant that anything he said would not be used against him, unless it was murder. The defendant confessed to a violent home invasion committed in Wilson County, and the federal government provided the confession to Wilson County authorities. The confession was used to support the defendant's convictions by guilty plea in Wilson County of felonious assault, kidnapping, and burglary. The court ruled that the Beaufort County deputy sheriff had neither actual nor apparent authority to modify the terms of the defendant's plea agreement with the federal government, and the federal government did not breach the plea agreement by informing Wilson County authorities of the defendant's confession to the home invasion.

Unavailability of Trial Transcript for Appeal of Conviction That Occurred in 1988, When Transcript Was Unavailable Through No Fault of State, Did Not Violate Defendant's Constitutional or Statutory Rights

State v. Upshur, 176 N.C. App. 174, 625 S.E.2d 911 (21 February 2006). The defendant was convicted of two offenses at a trial conducted in 1988. The defendant did not appeal his conviction then. In 2000, the court of appeals allowed the defendant's writ of certiorari to review the defendant's conviction. The court ruled, relying on Novell v. Illinois, 373 U.S. 420 (1963), that the unavailability of the trial transcript for the appeal of the defendant's conviction, when the transcript was unavailable through no fault of the state, did not violate defendant's constitutional or statutory rights.

Duke University Campus Police Officer Was a "Public Officer" Under G.S. 14-223 (Resist, Delay, or Obstruct Public Officer)

State v. Ferebee, ___ N.C. App. ___, 630 S.E.2d 460 (6 June 2006). The court ruled that a Duke University campus police officer, who has arrest authority under G.S. 74G-6(b), was a "pubic officer" under G.S. 14-223 (resist, delay, or obstruct public officer).

State Did Not Have Right to Appeal Order Granting Judge's Own Motion for Appropriate Relief Setting Aside Defendant's Sentence as Habitual Felon

State v. Starkey, ___ N.C. App. ___, 628 S.E.2d 424 (18 April 2006). The defendant was convicted of possession of cocaine and having attained the status of an habitual felon. The trial judge sentenced the defendant accordingly. Immediately after entering a judgment on that sentence, the judge, sua sponte,

entered an order granting his own motion for appropriate relief. The judge found that the defendant's sentence violated the Eighth Amendment, vacated the defendant's sentence as an habitual felon, and sentenced him for possession of cocaine. The court ruled, after reviewing G.S. 15A-1422 and G.S. 15A-1445, that that state did not have a right to appeal the judge's order. The court also ruled that the state's petition for a writ of certiorari did not satisfy any of the conditions of Rule 21 of the Rules of Appellate Procedure. The court also declined the state's request to suspend the Rules of Appellate Procedure under Rule 2 to review the judge's ruling.

Evidence

Based on North Carolina Supreme Court Rulings in State v. Lewis, 360 N.C. 1, (2005), and State v. Smith, 312 N.C. 361 (1984), Court Rules That Lab Reports or Lab Technician's Notes Prepared for Use in Criminal Prosecution Are Nontestimonial Business Records Under Crawford v. Washington, 541 U.S. 36 (2004), Only When Testing Is Mechanical, As With Intoxilyzer Tests, and Information Contained in Documents Are Objective Facts Not Involving Opinions or Conclusions Drawn by Analyst

State v. Cao, 175 N.C. App. 434, 626 S.E.2d 301 (17 January 2006). The defendant was on trial for several cocaine offenses. The drug testing laboratory technician did not testify at trial. Instead, the trial judge allowed the state's investigating detective to read into evidence the technician's laboratory reports identifying the substances sold by the defendant as cocaine. The defendant argued on appeal that this testimony violated the ruling in Crawford v. Washington, 541 U.S. 36 (2004). The court discussed the analysis of "testimonial evidence" in State v. Lewis, 360 N.C. 1, 619 S.E.2d 830 (2005). The court stated that it could not discern a meaningful distinction between the investigating detective's request that the lab test the substances obtained from the defendant and the detective's request in *Lewis* that the victim view a photo lineup and attempt to identify the assailant. The detective's sole purpose in the case before the court was to obtain evidence to support the drug charges, and a reasonable lab technician would expect his or her conclusions would be used at trial. On the other hand, the court noted that *Crawford* suggested that business records by their nature may not be testimonial; the court also cited State v. Windley, 173 N.C. App. 187, 617 S.E.2d 682 (2005) (fingerprint card maintained in AFIS was business record and not testimonial under *Crawford*). The court quoted extensively from the ruling in State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984) (upholding against constitutional challenge the admissibility in district court of Breathalyzer affidavit), and emphasized by its own italics the *Smith* court's statements that the analyst does not render an opinion or draw conclusions and is required to record alcohol concentration as indicated by the machine. The court also quoted the statement in *Smith* that the need for *and* ("and" italicized in *Smith* opinion) utility of confrontation at a district court trial is minimal. The court stated that, based on the North Carolina Supreme Court rulings in *Lewis* and *Smith*, it holds that lab reports or lab technician's notes prepared for use in criminal prosecution are nontestimonial business records under Crawford v. Washington, 541 U.S. 36 (2004), only when testing is mechanical, as with Intoxilyzer tests, and information contained in documents are objective facts not involving opinions or conclusions drawn by the analyst. (Author's note: The court used the term "Breathalyzer," but the Intoxilyzer is the instrument currently being used.) The court stated that while cross-examination may not be necessary for blood alcohol concentrations, the same cannot be said for fiber or DNA analysis or ballistics comparisons, for example. In the case before the court, it stated that the lab reports' specification of the weight of the substances would likely qualify as an objective fact obtained through mechanical means. The record on appeal, however, did not contain enough information about the procedures involved in identifying the presence of cocaine in a substance to allow the court to determine whether that portion of the testing met the same criteria. The court ruled that, even assuming error in admitting the lab reports, the error was harmless beyond a reasonable doubt. See also State v. Melton, 175 N.C. App. 733, 625 S.E.2d 609 (7 February 2006) (court ruled that testimony of laboratory manager of Laboratory Corporation of America concerning a lab report showing that defendant had genital herpes was admissible under business records

exception, but court did not decide whether the defendant's confrontation right under Crawford v. Washington, 541 U.S. 36 (2004), was violated because, even assuming a violation, any error in admitting the lab report was harmless beyond a reasonable doubt). [Author's note: The *Cao* ruling does not affect prior rulings such as State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (2005) (SBI lab analyst's expert opinion testimony that substances were marijuana and opium, based on analysis of drugs performed by another SBI lab analyst who did not testify at defendant's trial, did not violate *Crawford v. Washington*); State v. Lyles, 172 N.C. App. 323, 615 S.E.2d 890 (2 August 2005) (drug lab report of non-testifying analyst was properly admitted as basis of expert opinion testimony by analyst's supervisor and did not violate *Crawford v. Washington*).]

No *Crawford v. Washington* Violation When Testifying Forensic Pathologist Relied on Autopsy Report Prepared by Nontestifying Forensic Pathologist in Forming Opinion About Cause of Death

State v. Durham, 176 N.C. App. 239, 625 S.E.2d 831 (21 February 2006). The court ruled that there was no error under Crawford v. Washington, 541 U.S. 36 (2004), when a testifying forensic pathologist, accepted as an expert, relied on an autopsy report prepared by a nontestifying forensic pathologist in forming her opinion about the deceased's cause of death. The court noted that the autopsy report was not tendered to prove the truth of the matter asserted therein, but to demonstrate the basis of the testifying pathologist's opinion. The court relied on State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), State v. Delaney, 171 N.C. App. 141, 613 S.E.2d 699 (2005), and other cases.

No *Crawford v. Washington* Violation When SBI DNA Expert Testified About Results of DNA Test Performed by Nontestifying SBI Expert

State v. Hocutt, ___ N.C. App. ___, 628 S.E.2d 832 (2 May 2006). The court ruled, relying on State v. Walker, 170 N.C. App. 632, 613 S.E.2d 330 (2005), and other cases, that there was no *Crawford v. Washington* violation when a SBI DNA expert testified about the results of a DNA test performed by a nontestifying SBI expert.

Non-Testifying Campus Police Officer's Statement to Defendant, "Campus Police Officer, Stop" Was Not Testimonial Under *Crawford v. Washington*

State v. Ferebee, ___ N.C. App. ___, 630 S.E.2d 460 (6 June 2006). The defendant was convicted of resisting, delaying, and obstructing a public officer, a Duke University campus police officer, under G.S. 14-223. The Duke officer [who had arrest authority under G.S. 74G-6(b)] and a security guard were chasing the defendant to make an investigative stop. The security guard testified that he yelled, "campus security, stop," and then the Duke officer (who did not testify at trial) yelled, "campus police officer, stop." The court ruled that the Duke officer's statement was not testimonial under Crawford v. Washington, 541 U.S. 36 (2004). The statement was not made for the purpose of later establishing in court that the defendant resisted arrest. Rather, the officer made the statement while carrying out his duties as an officer by attempting to apprehend the defendant who was suspected of improper behavior.

(1) Trial Judge Did Not Abuse Discretion in Allowing Lay Witness to Identify Substance as Methamphetamine
(2) Evidence of Defendant's Providing Methamphetamine to Involuntary Manslaughter Victim at Prior Occasion Was Admissible Under Rule 404(b) to Establish Nature of Victim's Relationship With Defendant

State v. Yelton, 175 N.C. App. 349, 623 S.E.2d 594 (3 January 2006). The defendant was convicted of involuntary manslaughter, sale and delivery of methamphetamine, and possession with intent to sell and deliver methamphetamine. The defendant provided methamphetamine to the victim, who died as a result

of digesting it. (1) The court ruled that the trial judge did not abuse his discretion under Rule 701 in allowing a lay witness to identify a substance as methamphetamine. The evidence showed that the witness had extensive personal knowledge of methamphetamine, smoked the methamphetamine that the defendant had given to the victim, and her testimony was helpful to a clear understanding of her testimony or a fact in issue. (2) The state introduced statements of the defendant (during an interview with a law enforcement officer) that he provided the victim with methamphetamine two to three weeks before his death and gave him drugs for work performed by the victim. The court ruled, relying on State v. Agee, 326 N.C. 542, 391 S.E.2d 171 (1990), that these statements were admissible under Rule 404(b) to establish the nature of the victim's relationship with the defendant. The statements helped to describe the chain of circumstances leading to the provision of methamphetamine to the victim on the date of his death and provided context for the charge of selling the drug. [Author's note: It would appear that the defendant's statements were independently admissible under other rules of evidence: Rule 801(d)(A) (statement by party-opponent), and relevant under Rule 401 for the reasons given in the court's opinion.]

(1) Statement Made By Extremely-Upset Defendant's Girlfriend Immediately After Being Handcuffed Was Properly Admitted as Excited Utterance Under Rule 803(2)
(2) Evidence That Shotgun Was Found in Dwelling Was Properly Admitted in Drug Trafficking Trial

State v. Boyd, ___ N.C. App. ___, 628 S.E.2d 796 (18 April 2006). The defendant was convicted of trafficking in cocaine and other drug offenses. Officers executed a search warrant to search a dwelling for cocaine. They found the defendant in the dwelling attempting to stuff plastic bags in his mouth that appeared to contain cocaine. They found trafficking amounts of cocaine elsewhere in the dwelling as well as a shotgun. The defendant's girlfriend appeared at the dwelling shortly after the beginning of the execution of the search warrant. She was handcuffed and shown a copy of the search warrant. She was extremely upset and shaking. As soon as she saw the defendant, she said, "[W]e gots to be more careful" and started to cry. (1) The court ruled, relying on State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986), and State v. Guice, 141 N.C. App. 177, 541 S.E.2d 474 (2000), that the girlfriend's statement was properly admitted as an excited utterance under Rule 803(2) and also admissible under Rule 403. (2) The court ruled, relying on State v. Smith, 99 N.C. App. 67, 392 S.E.2d 642 (1990), and State v. Willis, 125 N.C. App. 537, 481 S.E.2d 407 (1997), that evidence that a shotgun was found in a dwelling was properly admitted because it was relevant to the drug charges (the association of weapons with illegal drug trade).

(1) State's Failure to Give Defendant Written Notice As Required Under Rule 609(b) of Its Intent to Use Over-Ten-Year-Old Convictions to Impeach Defendant Did Not Bar State's Use of Convictions When Defendant Was Aware of State's Intent Well in Advance of Trial
(2) Trial Judge Did Not Err in Admitting Under Rule 609(b) Over-Ten-Year-Old Convictions of Common Law Robbery, Felonious Larceny, and Credit Card Fraud, Which Implicate Dishonesty, Deceit, and Moral Turpitude

State v. Shelly, 176 N.C. App. 575, 627 S.E.2d 287 (21 March 2006). (1) The court ruled that the state's failure to give the defendant written notice as required under Rule 609(b) of its intent to use over-ten-year-old convictions to impeach the defendant did not bar the state's use of the convictions when the defendant was aware of state's intent well in advance of trial. The state had provided the defendant's conviction record during discovery, and the defendant had filed a motion a month before trial to bar the state from using the old convictions at trial. The court noted that it was obvious the defendant had actual notice that the state intended to use the convictions and had a fair opportunity to contest the use of the evidence. (2) The court ruled that the trial judge did not err in admitting under Rule 609(b) over-ten-year-old convictions of common law robbery, felonious larceny, and credit card fraud, which implicate dishonesty, deceit, and moral turpitude.

Victim's Reference to Defendant as Gang Member Was Relevant to Her Identification of Defendant as Perpetrator of Crimes

State v. Medina, 174 N.C. App. 723, 622 S.E.2d 176 (6 December 2005). The defendant was on trial for first-degree murder and attempted first-degree murder. The defendant's identity as the perpetrator was an issue at trial. The victim of the attempted first-degree murder told detectives at the crime scene that the defendant had worn a bandanna, blue or black in color, about his face. She testified at trial about her knowledge of the defendant's involvement with a gang and the gang's color being blue. The court ruled, relying on State v. Ruof, 296 N.C. 623, 252 S.E.2d 720 (1979), that the victim's testimony about gang involvement was admissible for the purpose of identifying the defendant.

Statement Made Before Existence of Conspiracy Was Not Admissible Under Rule 801(d)(E)

State v. Stephens, 175 N.C. App. 328, 623 S.E.2d 610 (3 January 2006). The court ruled that the trial judge erred in admitting a statement of an alleged coconspirator because the statement was made before the existence of a conspiracy and thus was not admissible under Rule 801(d)(E). (See the court's discussion of the evidence on this issue.)

Sufficient Chain of Custody to Introduce Defendant's Computers and Their Contents

State v. Brown, 176 N.C. App. 72, 626 S.E.2d 307 (21 February 2006). The defendant was convicted of several sex offenses involving a thirteen year old. Officers seized the defendant's computers and introduced some of their contents into evidence. The court rejected the defendant's argument that admission of the evidence was error because the state did not properly establish a chain of custody for the computers and their contents from when they were seized to the time of trial. Relying on State v. Campbell, 311 N.C. 386, 317 S.E.2d 391 (1984), the court noted that a detailed chain of custody need be established only under certain conditions, not present in this case, and any weak links affect the weight to be given the evidence and not its admissibility. The court rejected the defendant's argument that the computers' contents were susceptible to alteration because of the number of officers with access to them and the failure to store them in a secure location, when the defendant failed to identify any reason to believe the contents may have been altered.

Trial Judge Did Not Abuse Discretion in Allowing Law Enforcement Officer to Testify as Expert in Murder Trial on Subjects of Lividity of Victim's Body and Approximate Time of Death

State v. Steelmon, 177 N.C. App. 127, 627 S.E.2d 492 (4 April 2006). The court ruled, relying on State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995), and Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004), that the trial judge did not abuse his discretion in allowing a law enforcement officer to testify as an expert in a murder trial on the subjects of lividity of victim's body and the approximate time of death. (See the court's opinion for its review of the officer's background.)

Testimony of State's Firearm Identification Expert Was Sufficiently Reliable to Be Admitted Under Rule 702

State v. Anderson, 175 N.C. App. 444, 624 S.E.2d 393 (17 January 2006). The court ruled that the testimony of the state's firearm identification expert was sufficiently reliable to be admitted under Rule 702 and the standard set out in State v. Morgan, 359 N.C. 131, 604 S.E.2d 886 (2004) [court rejects standard under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)].

State Was Properly Allowed to Impeach Defendant Under Rule 608(b) by Cross-Examining Defendant About His False Statements to Police Concerning Offense That Had Been Subject to Deferred Prosecution

State v. Browning, ___ N.C. App. ___, 629 S.E.2d 299 (16 May 2006). The court ruled, relying on State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986), and distinguishing State v. Cook, 165 N.C. App. 630, 599 S.E.2d 67 (2004), that the state was properly allowed to impeach the defendant under Rule 608(b) by cross-examining the defendant about his false statements to police concerning an offense that had been the subject to deferred prosecution. The defendant's false statements about a theft of a camera showed the defendant's untruthfulness. The court noted that the state did not offer extrinsic evidence of the defendant's false statements.

State Was Improperly Permitted to Call Rebuttal Witness to Contradict Testimony of Defense Witness Who Had Denied Making Prior Statement to Rebuttal Witness

State v. Reid, 175 N.C. App. 613, 625 S.E.2d 575 (7 February 2006). A defense witness testified to several matters on direct examination, but not whether the defense witness had made a statement to the victim's mother that the defendant had shot the victim. The defense witness denied on cross-examination that he had made such a statement. The state was permitted to call the victim's mother on rebuttal to testify that the defense witness had made such a statement. The court ruled, relying on State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (1993), and other cases, that the trial judge erred in allowing the rebuttal testimony. Once a witness denies having made a prior inconsistent statement, the state may not introduce a prior statement in an attempt to discredit the witness—the prior statement concerns only a collateral matter, whether the statement was ever made.

Trial Judge Did Not Err in Sexual Assault Trial in Admitting Under Rule 404(b) Evidence of Assault on Another Female to Show Common Plan or Scheme

State v. Summers, ___ N.C. App. ___, 629 S.E.2d 902 (6 June 2006). The defendant was convicted of first-degree rape, three counts of first-degree sexual offense, and other offenses committed in November 1992. The defendant around midnight brandished a knife, forced the victim into her car, and committed the offenses there after driving the car a short distance. The court ruled that the trial judge did not err in admitting under Rule 404(b) evidence of an assault on another female to show a common plan or scheme. In January 1993, the defendant in the evening accosted a female with a pistol while the victim was loading items in her car. The defendant struck her with a pistol several times, grabbed her around the waist, and she fell to the ground. The victim fought off the defendant's attacks and was able to get up and run away.

Arrest, Search, and Confession Issues

(1) After United States Supreme Court's Remand For Further Consideration of Prior Ruling in This Case, Court Rules That Walking Drug Dog Around Defendant's Car When Defendant Was Lawfully Detained on Reasonable Suspicion of Driver's License Violation and Failure to Appear in Court Did Not Require Additional Justification Under Fourth Amendment
(2) Entry of Ruling on Suppression Motion Made Out of Term Was Nullity; Defendant Had Consented to Trial Judge's Request to Take Motion Under Advisement and Issue Later Order, But Did Not Explicitly Consent to Order's Entry Out of Term

State v. Branch, 177 N.C. App. 104, 627 S.E.2d 506 (4 April 2006). (1) Officers were conducting a driver's license checkpoint. They stopped all cars approaching an intersection and quickly assessed whether the registration and license were valid. Officers with a drug dog unit were available for

assistance. The defendant was stopped at the checkpoint by an officer who recognized her as someone whom he had previously arrested for drug possession and whose driver's license might be revoked. The defendant presented a duplicate driver's license. The officer testified at the suppression hearing that duplicate licenses are often used by drivers whose originally-issued licenses have been taken due to license revocations. Another officer, who was with the drug dog unit, testified that he saw the defendant and recalled previously issuing her a citation for a moving violation for which she had failed to appear in court—an act that would normally result in a license revocation. After the two officers conferred, the defendant was directed to the side of the road so they could check for outstanding warrants and the status of her license. While that check was being done, an officer took a drug dog for a walk around the defendant's vehicle. The dog alerted. A search resulted in the discovery of illegal drugs and the defendant's conviction. In the defendant's initial appeal to the North Carolina Court of Appeals, the court ruled, 162 N.C. App. 707, 591 S.E.2d 923 (2004), that there was reasonable suspicion to detain the defendant in her vehicle while the check was being done based on the interaction of two facts: presentation of a duplicate license and not appearing in court. However, the court also ruled in the initial appeal that these facts did not support reasonable suspicion to walk the drug dog around the car's exterior. After this ruling was issued, the United States Supreme Court ruled in Illinois v. Caballes, 543 U.S. 405 (2005), that walking a drug dog around a vehicle while the driver was lawfully detained while an officer was issuing a warning ticket for speeding did not violate Fourth Amendment. The United States Supreme Court granted the State of North Carolina's petition for a writ of certiorari to review the *Branch* ruling, vacated the ruling, and remanded it to the North Carolina Court of Appeals for further consideration in light of *Caballes*. The court of appeals on remand stated that once the lawfulness of a defendant's detention was established, the *Caballes* ruling required no additional justification under the Fourth Amendment to walk the drug dog around the exterior of the defendant's vehicle. (2) After the suppression hearing had ended, the trial judge did not issue announce a ruling on the motion. However, with the consent of the state and defendant to the trial judge's request to take the motion under advisement and issue a later order, the trial judge did not issue an order for several months. The court ruled, relying on State v. Trent, 359 N.C. 583, 614 S.E.2d 498 (2005), that the trial judge's order was issued out of term and a nullity. (This issue had not been decided in the initial appeal because of the favorable disposition on the defendant's search issue.) The court noted the parties had consented to allow the judge to issue a later order, but it was not explicit consent to the order's entry out of term. Thus, the purported consent was insufficient. The court vacated the trial judge's order denying the defendant's motion to suppress and remanded the matter for a new suppression hearing. The court stated that the new hearing will not be bound by its previous opinion in this case nor the prior suppression order, and should necessarily address whether the officers' investigative detention at the license checkpoint while verifying her driving privileges was constitutional.

Reasonable Suspicion Did Not Exist to Make Investigative Stop

In re J.L.B.M., 176 N.C. App. 613, 627 S.E.2d 239 (21 March 2006). The court ruled, relying on State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992), that the following evidence was insufficient to support reasonable suspicion to make an investigative stop of the juvenile. The stopping officer relied solely on a dispatch that there was a suspicious person at a gas station, the juvenile matched the "Hispanic male" description of the suspicious person, the juvenile was wearing baggy clothes, and the juvenile chose to walk away from the patrol car. The officer was not aware of any graffiti or property damage before the officer stopped the juvenile, and the officer noticed a bulge in the juvenile's pocket only after the stop.

(1) Officers Lawfully Seized Defendant Under Public Intoxication Statute, G.S. 122C-303
(2) Defendant's Recorded Jail Telephone Conversations Were Properly Obtained Under Fourth, Sixth, and Fourteenth Amendments

State v. Hocutt, ___ N.C. App. ___, 628 S.E.2d 832 (2 May 2006). The defendant was convicted of first-degree murder. (1) When officers left the murder scene around 11:30 p.m., they saw the defendant walking barefoot along a road. He had scratches all over his body, was very dirty, and was staggering. The officers recognized the defendant and saw that he was very intoxicated. They placed him in handcuffs and took him to jail for "detox purposes," "to sober up." The court ruled, distinguishing Davis v. Town of Southern Pines, 116 N.C. App. 663, 449 S.E.2d 240 (1994), that the officers lawfully seized the defendant under the public intoxication statute, G.S. 122C-303. The court concluded that the defendant met the statutory criteria because he was "apparently in need of and apparently unable to provide for himself" clothing and possibly shelter. The court rejected the defendant's argument that the officers only had the authority to take the defendant to his home, but not to jail. (2) While in jail, the defendant made incriminating statements over the phone to his girlfriend and to his brother, which were recorded pursuant to jail policy. Inmates receive an informational handbook concerning this policy, notices are posted in the cell blocks telling inmates that their telephone calls are monitored, and before being connected, both the caller and the person being called hear a recorded warning that " all calls are subject to monitoring and recording," except for "attorney calls." The court ruled that the defendant's recorded jail telephone conversations were properly obtained under the Fourth, Sixth, and Fourteenth Amendments.

(1) Officer Had Authority to Enter Dwelling With Arrestee While Arrestee Got Dressed
(2) Defendant May Not Challenge Prosecutor's Questioning of Defense Witness on Ground That Questioning Violated Witness's Fifth Amendment Rights

State v. Weakley, 176 N.C. App. 642, 627 S.E.2d 315 (21 March 2006). (1) The defendant appeared at the front door of a residence and was told that officers had an arrest warrant for her. The defendant was not fully clothed. One of the officers accompanied her into the residence while she got dressed. Relying on Washington v. Chrisman, 455 U.S. 1, 1982), the court ruled that the officer's presence in the residence was lawful because the officer was entitled to monitor the defendant's movements while she got dressed. (2) The defendant argued on appeal that the state was improperly permitted to cross-examine a defense witness concerning her failure to give a statement to a law enforcement officer because the cross-examination violated the witness's Fifth Amendment rights. The court ruled, relying on State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986), and other cases, the defendant had no standing to assert the witness's constitutional right against self-incrimination.

Assuming Without Deciding That Officer Had Seized Defendant Under Fourth Amendment After Defendant's Vehicle Had Evaded Driver License Checkpoint, Officer's Seizure Was Valid Under Fourth Amendment Based on Ruling in *State v. Foreman*

State v. Bowden, ___ N.C. App. ___, 630 S.E.2d 208 (6 June 2006). Law enforcement officers established a driver license checkpoint late at night at the bottom of a hill. It was not visible to motorists until they crested the hill about 250 feet away. One officer was assigned to identify drivers who might try to elude the checkpoint. He saw a pickup truck driven by the defendant crest the hill and descend rapidly toward the checkpoint. The truck braked hard, causing the front headlights to dip low. The truck then made an abrupt turn into the parking lot of the nearest apartment complex. As the officer approached in his patrol car without blue lights on, he saw the truck pull out of a parking space into which it had apparently backed, travel towards the parking lot's exit, but then drive head first into a new parking space as the patrol car drew near. The officer pulled his patrol car behind the truck and activated his blue lights. The court ruled, assuming without deciding that the officer had seized the defendant under the Fourth

Amendment when pulling his patrol car behind the truck and activating blue lights, that the officer's seizure was supported by reasonable suspicion, based on the ruling in State v. Foreman, 351 N.C. 627, 527 S.E.2d 921 (2000) (quick, but legal, left turn immediately before DWI checkpoint supported officer's stop of defendant's vehicle for DWI). The totality of circumstances justified the officer's pursuing and stopping the defendant's vehicle to inquire why he turned before the checkpoint.

Officer's Search of Van Exceeded Scope of Consent Search

State v. Johnson, 177 N.C. App. 122, 627 S.E.2d 488 (4 April 2006). **(Author's note: On June 29, 2006, the North Carolina Supreme Court ordered that this case be remanded to the trial court for findings of fact and conclusions of law on the issue whether probable cause supported the officer's search of the van.]** An officer stopped a passenger van and issued a warning ticket for a license plate display violation. The officer asked the defendant if he had in the van any illegal guns or drugs or amounts of money exceeding $10,000. The defendant said "no" several times. The defendant then gave consent to a search of the van. The officer discovered a piece of rubber that had been glued where it normally is not on a plastic wall panel inside the van. The officer pulled back the wall panel and discovered cocaine. The court ruled, applied the objective reasonableness test of Florida v. Jimeno, 500 U.S. 248 (1991), and other cases, that the defendant's general statement of consent to search could not reasonably have been interpreted to include the intentional infliction of damage to the van.

Confidential Informant's Information Provided Officer With Probable Cause to Arrest Defendant

State v. Stanley, 175 N.C. App. 171, 622 S.E.2d 680 (20 December 2005). A law enforcement officer received a call from a confidential informant concerning a person selling drugs outside a local convenience store. The officer had worked with the informant for 14 years, and the informant's information had proven to be reliable, leading to at least 100 arrests and convictions. The person was described by the informant as a black male wearing a blue ski hat, dark jacket, and blue jeans, standing beside a Citgo gas station on Sugar Creek Road, and the person possessed crack cocaine and was selling it. Approximately 30 to 45 minutes later, the officer and another officer met with the informant a short distance from the Citgo. The informant told him that the person was still there and selling crack cocaine. The two officers went to the Citgo and saw the person (along with two or three others in the parking lot who did not match the informant's description), later identified as the defendant, matching the description given by the informant. The court ruled that this information provided the officers with probable cause to arrest the defendant.

Officer's Statement to Arrestee Before Conducting Strip Search Was Not Interrogation Under *Rhode Island v. Innis*

State v. Dent, 174 N.C. App. 459, 621 S.E.2d 274 (15 November 2005). An officer arrested the defendant for driving while license revoked. He did not administer *Miranda* warnings to the defendant. While searching him, the officer noted the smell of burnt marijuana but did not find any marijuana. When the officer asked the defendant several times whether he had any marijuana, the defendant said no. Before taking the defendant inside the detention facility, the officer asked the defendant whether he had any controlled substances. The defendant said no. Once in the detention center and inside a search room, the officer informed the defendant that he would be strip searched. The defendant then stated that he had "residue" in his right sock. Distinguishing State v. Phelps, 156 N.C. App. 119, 575 S.E.2d 818 (2003), *reversed*, 358 N.C. 142, 592 S.E.2d 687 (2004), and relying on Rhode Island v. Innis, 446 U.S. 291 (1980), and State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), the court ruled that the officer's statement before the strip search (that the defendant would be strip searched) was not intended or reasonably expected to elicit an incriminating response from the defendant and therefore did not constitute interrogation under *Miranda*. The officer was merely informing him of the extent of the then-

impending search. [Author's note: The officer's questions to the defendant whether he had any marijuana or controlled substances clearly were interrogation, although the admissibility of the defendant's responses was not an issue in this case.]

Defendant's Request for Aunt to Be Present During Custodial Interrogation Did Not Require Officers to Stop Interrogation, Because Aunt Was Not "Guardian" Under Juvenile Interrogation Statute, G.S. 7B-2101

State v. Oglesby, 174 N.C. App. 658, 622 S.E.2d 152 (6 December 2005). The court ruled that the request of the defendant (who was sixteen years old) for his aunt to be present custodial interrogation did not require officers to stop interrogation, because his aunt was not a "guardian" under the juvenile interrogation statute, G.S. 7B-2101. Distinguishing State v. Jones, 147 N.C. App. 527, 556 S.E.2d 644 (2001), the court noted that no governmental entity had conferred legal authority over the defendant to the aunt.

Officer's Question About Home Address During Booking Process of In-Custody Defendant Who Had Not Been Given *Miranda* Warnings Did Not Qualify Under *Miranda* Booking Question Exception Because Question Was Reasonably Likely To Elicit Incriminating Response

State v. Boyd, ___ N.C. App. ___, 628 S.E.2d 796 (18 April 2006). The defendant was arrested for drug trafficking and other drug offenses. Before *Miranda* warnings were administered, an officer asked booking questions, including the location of the defendant's residence. The defendant gave as his address the place where officers had seized illegal drugs. One of the issues in the case was the defendant's relationship to the dwelling where the illegal drugs had been seized. The court ruled, relying on the *Miranda* bookings question exception discussed in State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the exception did not apply to this question because it was reasonably likely to elicit an incriminating response.

Defendant's Reply Letters While in Custody Awaiting Trial to Letters Written by Mother of Child Victim Were Not Inadmissible Under *Miranda*

State v. Pittman, 174 N.C. App. 745, 622 S.E.2d 135 (6 December 2005). The defendant was convicted of various offenses involving a six-week-old infant, including attempted first-degree murder. While in custody awaiting trial, the mother of the infant wrote letters to the defendant asking him why he had committed the crimes. The mother testified at trial that although the defendant replied to the letters, he never answered her questions. The court ruled that the admission of the mother's testimony did not violate Doyle v. Ohio, 426 U.S. 610 (1976) (impermissible use of defendant's post-arrest silence after giving *Miranda* warnings), because any silence of the defendant was not in response to questioning by law enforcement officers. Nor was the mother acting as the agent of officers in writing these letters. [Author's note: It is questionable whether North Carolina rulings applying the *Miranda* ruling to agents of law enforcement officers are still valid after the ruling in Illinois v. Perkins, 496 U.S. 292 (1990). See the discussion of *Perkins* and Alexander v. Connecticut, 917 F.3d 747 (2d Cir. 1990), on pages 429-30 of Robert L. Farb, Arrest, Search, and Investigation in North Carolina (3d ed. 2003)]. The court ruled, alternatively, that even if *Miranda* were applicable, the defendant did not choose to remain silent. Instead, he voluntarily wrote back to the mother, and the state may inquire about the defendant's failure to disclose certain information in the reply letters.

Sentencing

Defendant Was Entitled to Credit Against Sentence For Time Spent in DART, Which Had Been Required As Special Condition of Probation

State v. Lutz, 177 N.C. App. 140, 628 S.E.2d 34 (4 April 2006). The court ruled, relying on State v. Hearst, 356 N.C. 138, 567 S.E.2d 129 (2002) (defendant entitled to credit against sentence for attending IMPACT), that the defendant was entitled to 91 days credit against his sentence for time spent in DART, a substance abuse program, which had been required as a condition of special probation. The trial judge had revoked the defendant's probation and activated his suspended sentence.

(1) When Court of Appeals Granted Defendant's Writ of Certiorari and Limited Review to Defendant's Sentence Under G.S. 15A-1444(a1) and (a2) Resulting From Defendant's 1995 Guilty Plea, Defendant Could Not Raise *Blakely* Issue
(2) Trial Judge Erred in Finding Statutory Aggravating Factor for Sentencing of Armed Robbery Conviction That $1,300 Taken in Robbery Was Property of Great Monetary Value

State v. Pender, 176 N.C. App. 688, 627 S.E.2d 343 (21 March 2006). (1) The court ruled that when it granted the defendant's writ of certiorari and limited review to the defendant's sentence under G.S. 15A-1444(a1) and (a2) resulting from 1995 guilty plea, defendant could not raise *Blakely* issue. The court's ruling rested on the retroactivity ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005). (2) The court ruled, distinguishing State v. Simmons, 65 N.C. App. 804, 310 S.E.2d 139 (1984) ($2,500 was property of great monetary value), that the trial judge erred in finding a statutory aggravating factor for sentencing of an armed robbery conviction that $1,300 taken in the robbery was property of great monetary value.

(1) Alleged *Blakely v. Washington* Error Not Retroactively Applicable to Defendant's Case That Became Final As of December 23, 2003
(2) Defendant Did Not Receive Ineffective Assistance of Appellate Counsel Who Had Not Asserted Sentencing Error After Rulings in *Apprendi v. New Jersey* and *Ring v. Arizona* But Before Ruling in *Blakely v. Washington*

State v. Simpson, 176 N.C. App. 719, 637 S.E.2d 271 (21 March 2006). In July 2002 the defendant pled guilty to various offenses. The trial judge found as an aggravating factor that the victim was physically infirm and sentenced the defendant in the aggravated range. The defendant appealed his sentence to the North Carolina Court of Appeals, which upheld his sentence in a ruling that became "final" on December 23, 2003 (for retroactivity purposes, the date the defendant's time expired for seeking discretionary review by the North Carolina Supreme Court of the North Carolina Court of Appeals opinion). On October 15, 2004, a trial judge denied the defendant's motion for appropriate relief based on *Blakely* error (failing to submit aggravating factor to jury when sentence had been imposed in aggravated range). The North Carolina Court of Appeals allowed the defendant's writ of certiorari limited to the issues of retroactive application of *Blakely* and ineffective assistance of counsel. (1) The court noted that the defendant's case was before it on collateral, not direct review. The court ruled, relying on State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005) (ruling applicable to cases not yet indicted, on direct review, or not yet final as of *Allen*'s certification date, July 21, 2005). that *Blakely* was not retroactively applicable to defendant's sentence because his case had become final before July 21, 2005. (2) The court ruled that the defendant did not receive ineffective assistance by appellate counsel who had not asserted sentencing error after the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), but before the ruling in Blakely v. Washington, 542 U.S. 296 (2004). The court also rejected an ineffective-assistance-of-counsel claim based on the assertion that appellate counsel in 2003 should have pursued the case to the North Carolina Supreme Court and United States Supreme Court. The court

ruled that the defendant had no constitutional right to counsel after the initial appeal, and thus there cannot be ineffective assistance of counsel for failing to pursue an appeal after the initial appeal.

Court Applies Ruling in *Blakely v. Washington* to 1988 Conviction When Direct Appellate Review Had Been Allowed by Writ of Certiorari in 2000 and Was Pending in 2004 When *Blakely* Was Decided

State v. Upshur, 176 N.C. App. 174, 625 S.E.2d 911 (21 February 2006). The defendant was convicted in 1988 of first-degree rape and assault with a deadly weapon inflicting serious injury. The defendant did not exercise his right to appeal his convictions. The court of appeals in 2000 allowed review of the convictions by writ of certiorari. The court applied the ruling in Blakely v. Washington, 542 U.S. 296 (2004), to the imposition of an aggravated range sentence for the 1988 conviction of assault with a deadly weapon inflicting serious injury and remanded for a new sentencing hearing. The court noted that the defendant's appeal of this conviction was pending in the court of appeals when *Blakely* was decided.

There Was No Factual Basis to Find That Any Stipulation to Aggravating Factors by Defendant or Defense Counsel Was Knowing and Intelligent Waiver of Constitutional Right to Jury Determination of Existence of Aggravating Factors Under *Blakely v. Washington*

State v. Harris, 175 N.C. App. 360, 623 S.E.2d 588 (3 January 2006). The defendant was convicted of second-degree murder and was sentenced by a judge to an aggravated range punishment. The judge, not a jury, found the existence of the aggravating factors. The court ruled that there was no factual basis to find that any stipulation to aggravating factors by the defendant or defense counsel was a knowing and intelligent waiver of the constitutional right to a jury determination of the existence of aggravating factors under Blakely v. Washington, 542 U.S. 296 (2004). The court stated that in light of *Blakely* and State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), the relevant inquiry is not whether the defendant stipulated to a factual basis for a finding of an aggravating factor by the trial judge, but rather whether the defendant effectively waived his or her constitutional right to have a jury determine the existence of an aggravating factor. The court remanded for a resentencing hearing where the state either proves aggravating factors before a jury or the defendant admits to the existence of aggravating factors by a waiver of the constitutional right to a jury trial through a knowing and intelligent surrender of that right.

No *Blakely v. Washington* Error When Judge Found Aggravating Factor and Sentenced Defendant to Minimum Term of Imprisonment in Aggravated Range for Class C Felony, Prior Record Level IV, When Minimum Term Was the Same Number of Months (133) as Highest Number of Months (133) Authorized in Presumptive Range for Class C Felony, Prior Record Level IV

State v. Garcia, 174 N.C. App. 498, 621 S.E.2d 292 (15 November 2005). The court ruled that there was no error under Blakely v. Washington, 542 U.S. 296 (2004), when the sentencing judge found an aggravating factor and sentenced the defendant to a minimum term of imprisonment in the aggravated range for a Class C felony, Prior Record Level IV, when the minimum term was the same number of months (133) as the highest number of months (133) authorized in the presumptive range for a Class C felony, Prior Record Level IV. The court stated, relying on the ruling in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), that because the defendant's sentence fell within the presumptive range, the trial judge's finding of an aggravating factor not admitted by the defendant or submitted to the jury did not violate *Blakely*.

Error Under Ruling in *Blakely v. Washington* Occurred When Judge Revoked Probation and Activated Suspended Sentences That Had Been Unconstitutionally Aggravated Under *Blakely*

State v. McMahan, 174 N.C. App. 586, 621 S.E.2d 319 (15 November 2005). The court ruled that error occurred under the ruling in Blakely v. Washington, 542 U.S. 296 (2004), when a judge revoked the defendant's probation and activated suspended sentences that had been unconstitutionally aggravated under *Blakely.* The judge who imposed the probationary sentence had found an aggravating factor and imposed a suspended sentence in the aggravated range. The court also ruled that the *Blakely* rulings in State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), and State v. Speight, 359 N.C. 602, 614 S.E.2d 262 (2005), applied to this case because the defendant's assignment of sentencing error was pending on appeal on the date the *Allen* and *Speight* opinions were certified.

Defendant's Prior Record Calculation Properly Included Three Prior DWI Convictions Even Though Those Convictions Formed Basis for Two Habitual DWI Convictions, Which Also Were Included in Calculation

State v. Hyden, 175 N.C. App. 576, 625 S.E.2d 125 (17 January 2006). The court ruled, relying on State v. Vardiman, 146 N.C. App. 381, 552 S.E.2d 697 (2001), and distinguishing State v. Baldwin, 117 N.C. App. 713, 453 S.E.2d 193 (1995), that the defendant's prior record calculation properly included three prior DWI convictions even though those convictions formed the basis of two habitual DWI convictions, which also were included in the calculation. The trial judge properly counted all five convictions in determining the defendant's prior record level. Each conviction resulted from a separate offense.

Prior DWI Convictions Admitted at Trial to Prove Malice for Second-Degree Vehicular Murder Were Properly Used as Points in Calculating Defendant's Prior Record Level

State v. Bauberger, 176 N.C. App. 465, 626 S.E.2d 700 (7 March 2006). **(Author's note There was a dissenting opinion in this case, but not on this issue.)** The defendant was convicted of second-degree murder involving a vehicular crash. The court ruled that the defendant's prior DWI convictions admitted at trial to prove malice for second-degree vehicular murder were properly used as points in calculating the defendant's prior record level. The court stated that the prohibition in G.S. 15A-1340.16(d) (proof of element of offense may not also be used to prove aggravating factor) does bar the use of the same evidence to calculate a prior record level. The court noted that the legislature in G.S. 14-7.6 has specifically prohibited using prior convictions to calculate a prior record level when the convictions were used to prove habitual felon status. [Author's note: The court also ruled in State v. Gentry, 135 N.C. App. 107, 519 S.E.2d 68 (1999), that DWI convictions used to prove habitual DWI may not be used to calculate the defendant's prior record level.]

(1) Computer Printouts of Defendant's Prior Convictions from Other Jurisdictions Were Admissible at Sentencing Hearing Under G.S. 15A-1340.14(f)(4)
(2) State Failed to Prove Defendant's Out-of-State Convictions Were Felonies and Substantially Similar to North Carolina Class I Felony Offenses

State v. Cao, 175 N.C. App. 434, 626 S.E.2d 301 (17 January 2006). (1) At a sentencing hearing, the state submitted computer printouts as evidence of the defendant's prior convictions in other jurisdictions. The printouts stated that they contain information from "NLETS," "Crime Records Service DPS Austin TX," and the FBI. The court ruled that these printouts were admissible under G.S. 15A-1340.14(f)(4). (2) The court ruled that the state failed to prove defendant's out-of-state convictions were felonies and substantially similar to North Carolina Class I felony offenses.

(1) Defendant Failed Under G.S. 15A-980 to Meet Burden of Proof in Suppressing Prior Convictions Used in Calculating Prior Record Level Based on Denial of Right to Counsel
(2) Defendant Has No Sixth Amendment Right to Have Jury Determine Whether Prior Convictions Used in Calculating Prior Record Level Were Obtained in Violation of Right to Counsel

State v. Jordan, 174 N.C. App. 479, 621 S.E.2d 229 (15 November 2005). The trial judge determined that the defendant was in Prior Record Level III based on several prior convictions. (1) The court ruled that the defendant failed under G.S. 15A-980 to meet his burden of proof on a motion to suppress prior convictions used in calculating his prior record level based on the denial of the right to counsel. The defendant's only evidence was his testimony that he did not have an attorney for each conviction and he was not able to afford one at that time. Relying on State v. Rogers, 153 N.C. App. 203, 569 S.E.2d 657 (2002), and State v. Brown, 87 N.C. App. 13, 359 S.E.2d 265 (1987), the court ruled that the defendant's testimony was insufficient to support a finding of indigency. (2) The court ruled that the defendant had no Sixth Amendment right to have a jury determine whether prior convictions used in calculating the defendant's prior record level were obtained in violation of his right to counsel.

No Right to Jury Trial Under *Blakely v. Washington* on Finding of Prior Convictions in Determining Defendant's Prior Record Level or Finding That Defendant's Out-of-State Convictions Were Substantially Similar to Offense Under North Carolina Law

State v. Hadden, 175 N.C. App. 492, 624 S.E.2d 417 (17 January 2006). The court ruled, distinguishing Shepard v. United States, 544 U.S. 13 (2005), that the defendant in this case did not have a right to a jury trial under Blakely v. Washington, 542 U.S. 296 (2004), concerning the findings of prior convictions in determining the defendant's prior record level or that the defendant's out-of-state convictions were substantially similar to offenses under North Carolina law.

Defense Lawyer's Colloquy With Judge at Sentencing Hearing Constituted Stipulation to Defendant's Convictions Set Out in Sentencing Worksheet

State v. Cromartie, 177 N.C. App. 73, 627 S.E.2d 677 (4 April 2006). The court ruled, relying on State v. Alexander, 359 N.C. 824, 616 S.E.2d 914 (2005), that although a sentencing worksheet, without more, is insufficient to prove the defendant's convictions set out in the worksheet, the defense lawyer's colloquy with the trial judge at the sentencing hearing constituted a stipulation to the defendant's convictions. Defense counsel specifically acknowledged some of the convictions in the worksheet and then used information in it to minimize the defendant's prior record as nonviolent. Counsel never disputed any of the convictions in the worksheet.

Although Judge Must Consider Mitigating Factors, Judge Has No Duty to Find Mitigating Factors, Even If Preponderance of Evidence Supports Their Finding, When Judge Imposes Sentence in Presumptive Range

State v. Brown, 176 N.C. App. 72, 626 S.E.2d 307 (21 February 2006). The court noted that although a judge must consider evidence of mitigating factors, it is within the judge's discretion whether to depart from the presumptive range. A judge has no duty to find mitigating factors, even if a preponderance of evidence supports their finding, when the judge imposes a sentence in the presumptive range.

New Department of Correction Rules Providing for Loss of Good Behavior Time Credits for Minor Infractions Did Not Violate Ex Post Facto or Due Process Clauses or State Law

Smith v. Beck, 176 N.C. App. 757, 627 S.E.2d 284 (21 March 2006). The court ruled, relying on Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993), distinguishing Weaver v. Graham, 450 U.S. 24 (1981), and

interpreting state legislation, that new Department of Correction rules providing for the loss of good behavior time credits for minor infractions did not violate the Ex Post Facto or Due Process clauses or state law.

Civil Liability

Court Rules on Civil Liability Issues Concerning Officers' Obligations With Enforcing Domestic Violence Protective Order

Cockerham-Ellerbee v. Town of Jonesville, 176 N.C. App. 372, 626 S.E.2d 685 (7 March 2006). The court ruled: (1) the "shall arrest" and "shall enforce" language in G.S. 50B-4.1 (arrest of violator and enforcement of domestic violence protective order) allows discretionary enforcement, and therefore the public duty doctrine is applicable in a civil lawsuit against law enforcement officers for negligent failure to enforce a domestic violence protective order; and (2) the plaintiff demonstrated an exception to the public duty doctrine to survive the defendants' motion to dismiss the lawsuit: the officers' promise to protect her and her daughter, their failure to fulfill their promise to arrest the alleged violator for violating the protective order, and the plaintiff's and her daughter's reliance on the promise of protection to their detriment.