Recent Cases Affecting Criminal Law and Procedure
(December 8, 2009 – June 17, 2010)

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North Carolina Supreme Court

Arrest, Search, and Confession Issues

Juvenile Questioned in School by Law Enforcement Officer Was Not in Custody to Require Officer to Give *Miranda* Warnings and Statutory Warnings Under G.S. 7B-2101(a)—Ruling of Court of Appeals Is Affirmed

In re J.D.B., 363 N.C. 664, 686 S.E.2d 135 (11 December 2009), *affirming*, ___ N.C. App. ___, 674 S.E.2d 795 (7 April 2009). Two homes were broken into and a digital camera was among the items stolen. The juvenile was later seen in possession of the digital camera at school. A law enforcement officer went to the juvenile's school to speak with him. The juvenile was thirteen years old, in seventh grade, and enrolled in special education classes. He was escorted from his class into a conference room to be interviewed. Present were the officer, an assistant principal, a school resource officer, and an intern. The door was closed but unlocked. The officer asked the juvenile if he would agree to answer questions about the break-ins, and the juvenile consented. He initially denied any criminal activity. The assistant principal encouraged him to "do the right thing" and tell the truth. The officer questioned him further and confronted him with the fact that the camera had been found. Upon the juvenile's inquiry whether he would still be in trouble if he gave the items back, the officer responded that it would be helpful, but the matter was still going to court and he may need to seek a secure custody order. The juvenile then confessed to the break-ins. The officer informed the juvenile that he did not have to speak with him and he was free to leave. He asked him if he understood that he was not under arrest and did not have to talk with the officer. The juvenile indicated by nodding "yes." He continued to provide more details concerning where certain stolen items could be located and wrote a statement about his involvement with the crimes. The bell rang signaling the end of the day and he was allowed to leave to catch his bus home. The interview lasted from 30 to 45 minutes. The court ruled that the juvenile was not in custody to require the officer to give *Miranda* warnings and statutory warnings under G.S. 7B-2101(a). The court noted that "custody" involves application of an objective standard whether a reasonable person in the defendant's (juvenile's) position would believe himself in custody or deprived of his freedom of action in some significant way—that is, a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. For a student in the school setting to be considered in custody, law enforcement must subject the student to restraint on freedom of movement that goes well beyond the limitations that are characteristic of the general school environment. The court rejected the juvenile's argument that the determination of custody should consider the juvenile's age, noting Yarborough v. Alvarado, 541 U.S. 652 (2004), or his status as a special education student.

Court, Per Curiam and Without Opinion, Reverses Ruling of Court of Appeals for Reasons Stated in Dissenting Opinion, Which Concluded That Officers Had Reasonable Suspicion to Conduct Frisk of Defendant

State v. Morton, 363 N.C. 737, 686 S.E.2d 510 (11 December 2009), *reversing*, ___ N.C. App. ___, 679 S.E.2d 437 (21 July 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for reasons stated in section I of the dissenting opinion, which concluded that officers had reasonable suspicion to conduct a frisk of the defendant. The dissenting opinion stated that under the totality of circumstances, the officers were aware of the following: (1) at least one confidential informant who had provided information in the past had implicated the defendant in a recent drive-by shooting; (2) several informants and anonymous tipsters had reported that the defendant sold drugs in the area; (3) the defendant was traveling in a path from a food mart to his grandmother's house as the informants and tipsters had claimed he would; (4) the defendant picked up his pace when he saw the officers looking in his direction; (5) the defendant was visibly nervous when the officers attempted to question him; and (6) the defendant was wearing red pants, which indicated to one of the officers, a gang analyst, that the defendant may be affiliated with a local gang. (See the complete analysis of the frisk issue in the dissenting opinion.)

Criminal Law and Procedure

Trial Court Erred in Denying Defendant's Requested Jury Instructions on Self-Defense and Defense of Family Member—Ruling of Court of Appeals Is Reversed

State v. Moore, 363 N.C. 793, 688 S.E.2d 447 (29 January 2010), *reversing*, 194 N.C. App. 754, 671 S.E.2d 545 (6 January 2009). The defendant was convicted of voluntary manslaughter. The court ruled that the trial court erred in denying the defendant's requested jury instructions on self-defense and defense of a family member. The defendant, his wife, and grandson were working at their produce stand. The couple's cash box was bolted to a folding table located behind the truck containing much of the produce. Harris (the person killed by the defendant) approached the produce stand, walked over to the meat container, and began comparing different pieces of meat, stating he was attempting to find a piece suitable for his mother. Shortly thereafter, a struggle erupted between the defendant's wife and Harris when he attempted to steal the cash box and its contents. The defendant's wife testified she was frightened during the altercation and praying that she would not get hurt. Harris became more aggressive as the attempted robbery progressed, including picking the table off the ground. She testified that when Harris had reached for the cash box and began the struggle, she shouted for her husband, who rushed to her aid and shouted for Harris to back off. Harris backed off, but then came back toward her with his left hand in his pocket and began to pull his hand from his pocket. The defendant then shot and killed him. The defendant testified that he "wasn't going to wait to see no gun," and he feared for his, his grandson's, and his wife's safety. The court concluded that the defendant's evidence was sufficient to show that he believed it was necessary to use force to prevent death or great bodily injury to himself or a family member.

Defendant May Be Convicted of Felonious Possession of Stolen Goods Although Jury Found Defendant Not Guilty of Breaking or Entering and Larceny of Same Goods—Ruling of Court of Appeals Is Reversed

State v. Tanner, 364 N.C. 229, 695 S.E.2d 97 (17 June 2010), *reversing*, 193 N.C. App. 150 (7 October 2008). The defendant was indicted for felonious breaking or entering, felonious larceny, and felonious possession of stolen goods. The jury convicted the defendant of felonious possession of stolen goods but acquitted him of felonious breaking or entering and felonious larceny. The court noted its ruling in State v. Perry, 305 N.C. 225 (1982), that a defendant may not be convicted of felonious larceny if he was acquitted of breaking or entering on which the charge of felonious larceny was based. However, while a conviction of felonious larceny based

on the theory of the larceny being committed pursuant to a breaking or entering requires that the defendant also be the perpetrator of (or have aided or abetted) a breaking or entering, this is not so with felonious possession of stolen goods, which only requires proof that the defendant knew or had reasonable grounds to believe that goods were stolen pursuant to a breaking or entering. A jury's finding that a defendant did not take part in a breaking or entering but did possess stolen goods is not fatally contradictory as in *Perry*. The jury in this case could have found that the defendant knew the goods had been stolen pursuant to a breaking or entering based on the defendant's statements to an officer that the man who provided the stolen property to the defendant had made a "score" from the place that had been broken into. Thus, the court ruled that the defendant was properly convicted of felonious possession of stolen goods. In addition to reversing the court of appeals opinion in this case, the court also overruled contrary rulings in State v. Marsh, 187 N.C. App. 235 (2007), State v. Goblet, 173 N.C. App. 112 (2005), and other cases.

(1) Juvenile Court Counselor Timely Filed Delinquency Petition Under G.S. 7B-1703— Ruling of Court of Appeals Is Reversed
(2) Failure to Timely File Delinquency Petition Under G.S. 7B-1703 Does Not Deprive Juvenile Court of Jurisdiction Over Petition— Ruling of Court of Appeals Is Reversed

In re D.S., 364 N.C. 184, 694 S.E.2d 758 (17 June 2010), *reversing*, ___ N.C. App. ___, 682 S.E. 2d 709 (16 June 2009). A juvenile court counselor received a simple assault complaint on September 25, 2007, about a September 21, 2007, incident that occurred at a school, involving the juvenile's touching a female student several times with an object. On October 10, 2007, the counselor file a simple assault petition based on the complaint. On November 15, 2007, the counselor received a second complaint concerning the same incident, and the next day the counselor file a second petition alleging sexual battery. The trial court adjudicated the juvenile delinquent of both offenses. (1) The court ruled, reversing the court of appeals, that the counselor timely filed the sexual battery petition under G.S. 7B-1703 (maximum of thirty days to file petition after receiving complaint). It was filed within one day of the sexual battery complaint, which was a new complaint. The court rejected the argument that because both petitions apparently arose from the same incident, and because the counselor learned of these facts when he received the first complaint, the date he "received" the sexual battery complaint was September 25, 2007, not November 15, 2007. (2) The court ruled, reversing the court of appeals, that a counselor's failure to timely file a delinquency petition under G.S. 7B-1703 does not deprive a juvenile court of jurisdiction over the petition. [Author's note: The court's ruling effectively overruled a contrary ruling in In re J.B., 186 N.C. App. 301 (2007), and other cases based on *In re J.B.*]

G.S. 15-196.1 (Credit for Time Served in Criminal Cases) Does Not Apply to Juvenile Proceedings—Ruling of Court of Appeals Is Reversed

In re D.L.H., 364 N.C. 214, 694 S.E.2d 753 (17 June 2010), *reversing*, ___ N.C. App. ___, 679 S.E. 2d 449 (21 July 2009). The court ruled, reversing the court of appeals, that the juvenile was not entitled to have her term of confinement reduced by the time spent in secure custody pending her dispositional hearings. G.S. 15-196.1 (credit for time served in criminal cases) does not apply to juvenile proceedings.

Evidence

Trial Court Abused Discretion by Allowing State's Expert to Identify Pills as Controlled Substances Solely by Visual Examination Without Chemical Analysis of Any of the Pills—Ruling of Court of Appeals Is Affirmed

State v. Ward, 364 N.C. 133, 694 S.E.2d 738 (17 June 2010), *affirming*, ___ N.C. App. ___, 681 S.E. 2d 354 (18 August 2009). The defendant was convicted of several controlled substance offenses involving different substances. The state's drug expert testified that he conducted chemical analyses of some of the substances—for example, cocaine and pills determined to be amphetamines. However, other pills allegedly containing other substances were identified solely by a visual examination of their appearance and pharmaceutical markings and a comparison of the information derived from that process to information contained in Micromedix literature used by doctors in hospitals and pharmacies to identify prescription medicines. The court ruled that the trial court abused its discretion in allowing the state's expert to identify these pills as controlled substances solely by visual examination without a chemical analysis of any of the pills. The expert's visual identification of the purported controlled substances was not sufficiently reliable under Rule 702.

The court made the following statements about its ruling. Unless the state establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. The ruling in this case is limited to Rule 702 and does not affect visual identification techniques used by law enforcement for other purposes, such as conducting criminal investigations. Moreover, common sense limits the scope of chemical analysis that must be performed. In this case, the state submitted sixteen batches of items consisting of over four hundred tablets to the SBI laboratory. A chemical analysis of each individual tablet is not necessary. The SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures were not at issue. A chemical analysis is required, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration.

Capital Case Issues

(1) Court Rules That 2001 Amendments to Capital Punishment Statutes Abrogated Ruling in *State v. Rorie* So Superior Court May Declare Case Noncapital as Sanction for State's Noncompliance With Rule 24 Pretrial Conference Requirement

(2) Court Rules That There Was Insufficient Evidence of Prejudice to Defendant's Cases to Justify Declaring Cases Noncapital

State v. Defoe, ___ N.C. ___, 691 S.E.2d 1 (15 April 2010). A grand jury on May 8, 2006, indicted the defendant for two counts of first-degree murder. On June 21, 2006, the state filed an application for a Rule 24 pretrial conference. Under Rule 24, the state must file the application no later than 10 days after the superior court obtains jurisdiction (in this case, May 8, 2006), and the trial court must enter an order requiring the prosecution and defense counsel to appear before the court within 45 days. The conference was not held until January 2009, more than 30 months after the state's filing the application. The trial court ruled, based on State v. Rorie, 348 N.C. 266 (1998) (trial court is not authorized to prohibit state from seeking death penalty because it failed to comply with Rule 24), it lacked authority to declare the cases noncapital. The trial court also ruled that there was not any prejudice to the defendant caused by the Rule 24 violations. The failure to appoint second counsel was not prejudicial because the cases were not scheduled for trial in the near future. The trial court also concluded that the lack of a mitigation specialist and investigator was not prejudicial because the defendant could have requested those resources

before the Rule 24 conference. The court ruled: (1) the 2001 amendments to the capital punishment statutes, which granted the state discretion whether to seek the death penalty in first-degree murder cases, abrogated the *Rorie* ruling so superior court may declare a case noncapital as a sanction for the state's noncompliance with Rule 24; and (2) there was insufficient evidence of prejudice to the defendant's cases to justify declaring the cases noncapital. The court agreed with the trial court that there was insufficient prejudice to declare the cases noncapital because the date of the trial was not imminent. It also noted that trial courts may grant continuances when appropriate to give defense counsel time to become familiar with the case and to acquire necessary witnesses.

(1) Trial Court Has Discretion to Submit Mental Retardation Issue to Jury in Bifurcated, Rather Than Unitary, Capital Sentencing Hearing
(2) Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion for Bifurcated Capital Sentencing Hearing

State v. Ward, 364 N.C. 157, 694 S.E.2d 729 (17 June 2010). The defendant was convicted of first-degree murder and sentenced to death. On appeal, the North Carolina Supreme Court affirmed the defendant's conviction but remanded the case for a new capital sentencing hearing. The defendant then made a motion to bifurcate the sentencing hearing so the jury would hear evidence concerning the defendant's alleged mental retardation, be charged on that issue, and determine whether he was, in fact, mentally retarded before hearing evidence of aggravating and mitigating circumstances and recommending a life or death sentence. The trial court denied the defendant's motion. The court ruled: (1) a trial court has the discretion to submit the mental retardation issue to the jury in a bifurcated, rather than unitary, capital sentencing hearing; and (2) the trial court in this case did not abuse its discretion in denying the defendant's motion for a bifurcated capital sentencing hearing.

(1) Trial Court Did Not Err in Not Ruling on Defendant's Pro Se Motion When He Was Represented by Counsel
(2) Court Did Not Lack Jurisdiction to Conduct Capital Sentencing Hearing When There Was Different Judge and Jury Than at Guilt/Innocence Phase
(3) Defendant's Right to Be Present at All Stages of Capital Trial Was Not Violated When Clerk Selected Forty-Eight Prospective Jurors From Pool in Jury Assembly Room

State v. Williams, 363 N.C. 689, 686 S.E.2d 493 (11 December 2009). The defendant was convicted of two first-degree murders and sentenced to death. (1) The court ruled that the trial court did not err in not ruling on the defendant's pro se motion to dismiss based on speedy trial grounds when he was represented by counsel. The court stated that defense counsel's statement to the trial court that the pro se motion needed to be ruled on did not represent counsel's adoption of the defendant's motion. (2) After the defendant was convicted of two counts of first-degree murder and before the beginning of the capital sentencing hearing, the defendant's two counsel met with him at a detention center. The defendant physically attacked one of the lawyers. Both counsel filed a motion to withdraw, which the trial court granted. The trial court declared a mistrial as to the capital sentencing hearing and dismissed the jury. Three years later, a different judge presided over the capital sentencing hearing and with a new jury. The court ruled that the trial court did not lack jurisdiction to conduct the capital sentencing hearing under these circumstances. (3) The court ruled that the defendant's right to be present at all stages of a capital trial was not violated when a deputy clerk selected forty-eight prospective jurors from the pool in the jury assembly room outside the defendant's presence. The court stated that to the extent that the defendant was challenging the initial organization of the entire venire into separate panels that

were later sent sequentially to the courtroom, such a process was a purely administrative matter and not a proceeding at which the defendant was entitled to be present.

North Carolina Court of Appeals

Criminal Law and Procedure

Mistake of Age Is Not a Defense to Indecent Liberties Under G.S. 14-202.1

State v. Breathette, ___ N.C. App. ___, 690 S.E.2d 1 (2 March 2010). The court ruled, relying on People v. Olsen, 685 P.2d 52 (Cal. 1984), and other cases, that mistake of age is not a defense to the offense of indecent liberties under G.S. 14-202.1. Thus, the trial court did not err in rejecting the defendant's proposed jury instruction that it was a defense to the charge if the jury found that the defendant had a reasonable but mistaken belief that the victim was older than 15 years old.

(1) Scar Resulting from Deep Cut Over Left Eye Was Permanent Disfigurement to Support Conviction of Assault Inflicting Serious Bodily Injury
(2) No Fatal Variance Between Allegations in Assault by Strangulation Indictment Concerning Method of Strangulation and Evidence at Trial
(3) Sufficient Evidence to Support Conviction of Assault by Strangulation
(4) Punishment Was Not Permitted for Convictions of Both Assault Inflicting Serious Bodily Injury and Assault by Strangulation for Same Conduct
(5) Punishment Was Permitted for Convictions of Assault Inflicting Serious Bodily Injury and First-Degree Kidnapping
(6) Punishment Was Not Permitted for Convictions of Both Assault With A Deadly Weapon Inflicting Serious Injury and Assault Inflicting Serious Bodily Injury Based on Single Assault
(7) Insufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury
(8) Convictions of Two Counts of First-Degree Sexual Offense Were Permitted Based on Defendant's Insertion of Fingers into Victim's Vagina and Rectum at Same Time
(9) Convictions of Both First-Degree Kidnapping and First-Degree Sexual Offense Were Permitted Based on Jury Instruction
(10) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury

State v. Williams, ___ N.C. App. ___, 689 S.E.2d 412 (8 December 2009). The defendant was convicted in a single trial of multiple offenses involving five different victims over a time period from 2004 to 2006. The offenses included sexual assault, robbery, assault, and kidnapping. The court ruled: (1) There was sufficient evidence to support a conviction of assault inflicting serious bodily injury when the injury to the victim, L.T., included a scar resulting from a deep cut over her left eye, which was a permanent disfigurement (she had other injuries as well). (2) An indictment alleging assault by strangulation alleged the defendant strangled the victim, L.T., by placing his hands around her throat. The court ruled that even if there was a variance between the allegation concerning the method of strangulation and evidence introduced at trial, the variance was immaterial and not fatal. The method of strangulation alleged in the indictment was surplusage and should be disregarded. (3) There was sufficient evidence to support the defendant's conviction of assault by strangulation of L.T. She stated that she felt that the defendant was trying to crush her throat, he pushed down with his weight on her neck with his

foot, she thought he was trying to "chok(e) her out" or make her go unconscious, and she thought she was going to die. The court rejected the defendant's argument that the state must prove that the victim had difficulty breathing. (4) G.S. 14-32.4(b) (unless conduct is covered under some other provision of law providing greater punishment) shows a legislative intent to prohibit a court from sentencing a defendant for the same conduct under both G.S. 14-32.4(b) (assault inflicting serious bodily injury, Class F felony) and G.S. 14-32.4(a) (assault by strangulation, Class H felony). Punishment can only be imposed for the assault inflicting serious bodily injury, which provides for greater punishment than assault by strangulation. (5) Punishment was permitted for convictions of both assault inflicting serious bodily injury and first-degree kidnapping, which was elevated from second-degree to first-degree based on a finding that the victim was seriously injured. Assault inflicting serious bodily injury requires the additional proof of "serious bodily injury" beyond the element of "serious injury" to prove first-degree kidnapping. Also, proof in the kidnapping case that the victim was abducted "for the purpose of doing serious bodily injury" and the act of committing serious bodily injury are two different elements, the latter being more serious than the former. (6) Punishment was not permitted for convictions of both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury based on a single assault. Punishment was only permitted for the more serious offense of assault with a deadly weapon inflicting serious injury. (7) There was insufficient evidence of serious bodily injury of victim M.L.W. to support the defendant's conviction of assault inflicting serious bodily injury. Although the victim received a vicious beating, the evidence did not show that her injuries placed her at a substantial risk of death. Though her ribs were still sore five months after the assault, to satisfy the statutory definition the victim must experience "extreme pain" in addition to the "protracted condition." The state did not present evidence of extreme pain. (8) Convictions of two counts of first-degree sexual offense were permitted based on the defendant's insertion of his fingers into the victim's vagina and rectum at the same time. The court relied on State v. Gobal, 186 N.C. App. 308 (2008). (9) Convictions of both first-degree kidnapping and first-degree sexual offense were permitted based on the jury instruction for first-degree kidnapping that required proof of serious injury or not released in a safe place, with no reference to the sexual assault. (10) There was sufficient evidence of serious bodily injury to victim K.L.A. to support the defendant's conviction of assault inflicting serious bodily injury. She suffered a puncture wound to the back of her scalp and a parietal scalp hematoma. She also went into premature labor as a result of the assault. This was sufficient evidence of a bodily injury that created a substantial risk of death, which is included in the definition of serious bodily injury.

(1) No Discovery Violation Because Victim's Statement To Prosecutor, Which Was Not Disclosed to Defendant, Did Not Offer Any Significantly New or Different Information From Victim's Prior Statement to Law Enforcement That Had Already Been Provided to Defendant
(2) Trial Court Did Not Err in Using Transferred Intent Instruction in Trial of Discharging Firearm into Occupied Property
(3) Muzzle Velocity Provision in G.S. 14-34.1 (Discharging Firearm or Barreled Weapon into Occupied Property) Does Not Apply to Firearms

State v. Small, ___ N.C. App. ___, 689 S.E.2d 444 (8 December 2009). The defendant was convicted of discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. (1) The court ruled that there was no discovery violation under G.S. 15A-903(a)(1) because the assault victim's statement to the prosecutor, which was not disclosed to the defendant, did not offer any significantly new or different information from the victim's prior statement to law enforcement that had already been provided to the defendant. (2) The state presented evidence that the defendant intentionally fired a weapon toward the assault victim, who was outside a home, and some projectiles penetrated the home's exterior. Evidence was also

introduced that the defendant knew people other than the victim were present inside the home. The court ruled that the trial court did not err in using a transferred intent instruction to transfer the intent to shoot a particular person to the offense of discharging a firearm into occupied property. (3) The court ruled that the provision in G.S. 14-34.1 (discharging firearm or barreled weapon into occupied property) requiring a muzzle velocity of at least 600 feet per second does not apply to firearms.

(1) Defendant's Statements Were Not Inadmissible Under Rule 410
(2) Convictions Are Reversed Due to Absence of Acting-in-Concert Instruction
(3) Concurrent Habitual Felon Sentences for Convictions at Same Trial Are Authorized
(4) Sentence May Have Been Improperly Based on Defendant's Failure to Accept Pretrial Plea Offer

State v. Haymond, ___ N.C. App. ___, 691 S.E.2d 108 (6 April 2010). The defendant was convicted of multiple offenses involving break-ins, larcenies, and possession of stolen property concerning multiple victims. He received ten consecutive habitual felon sentences. The court ruled: (1) the defendant's statements during a pretrial hearing were not inadmissible under Rule 410 (statement made by defendant during plea discussions) because they were made during the defendant's various requests to the trial court and the defendant did not subjectively believe he was negotiating a plea with the prosecutor or with the prosecutor's express authority; (2) when the trial court did not instruct the jury on the theory of acting in concert and the evidence did not show that the defendant committed the offenses himself, the defendant's convictions must be reversed; (3) the trial court has the authority to impose concurrent habitual felon sentences for convictions that occur at the same trial; and (4) the trial court's statements at the sentencing hearing raised an inference that the trial court based its sentences at least in part on the defendant's failure to accept the state's plea offer at a pretrial hearing, and thus a new sentencing hearing must be held.

(1) Sufficient Evidence to Support Conviction of Malicious Conduct by Prisoner When Officer Testified That Handcuffed Defendant Spit on His Leg
(2) Indictments Alleging Malicious Conduct by Prisoner and Assault on Governmental Official Need Not Allege Duty Officer Was Performing

State v. Noel, ___ N.C. App. ___, 690 S.E.2d 10 (2 March 2010). The defendant was convicted of malicious conduct by a prisoner and assault on a governmental official. After stopping a vehicle that had attempted to evade law enforcement and from which plastic bags had been thrown, officers removed the defendant-passenger, placed him on the curb, and handcuffed him. As an officer approached the defendant to question him, the defendant yelled at the officer and spit on the officer's right leg. (1) The court ruled that the state presented sufficient evidence to support the defendant's conviction of malicious conduct by prisoner, G.S. 14-258.4(a). (2) The court ruled, distinguishing State v. Ellis, 168 N.C. App. 651 (2005) (charge of resisting an officer under G.S. 14-223 must allege duty officer was discharging), that indictments alleging malicious conduct by a prisoner and assault on a governmental official need not allege the duty the officer was performing. Thus, the indictments' allegations of the duty the officer was performing were surplusage, and there was not a fatal variance between the allegations and the proof of the duty at trial.

(1) Insufficient Evidence That Defendant Constructively Possessed Drugs to Support Drug Convictions

(2) Arrested Defendant's False Confirmation of Officer's Question About Last Four Digits of Defendant's Social Security Number Was Sufficient Evidence to Support Identity Theft Conviction

State v. Barron, ___ N.C. App. ___, 690 S.E.2d 22 (2 March 2010). The defendant was convicted of possession of cocaine, possession of marijuana, and identity theft. (1) The court ruled that there was insufficient evidence that the defendant constructively possessed cocaine or marijuana to support the defendant's possession convictions. The drugs were found in a house in which the defendant did not live and three other people were in the house when it was searched. The court noted that unless a defendant had exclusive possession of the place where drugs were found, the state must show "other incriminating circumstances" that the defendant had constructive possession, and the court concluded there was insufficient evidence of other incriminating circumstances (see the court's opinion). (2) Upon arrest, the defendant falsely gave his brother's name and birth date as his, and falsely confirmed in response to an officer's question about the last four digits of the defendant's social security number (which were his brother's). The court ruled that the defendant's false confirmation of the last four digits of his social security number was sufficient evidence to convict him of identity theft. It was "identifying information" under G.S. 14-113.20(b)(1).

(1) Sufficient Evidence of Anal Penetration to Support Conviction of First-Degree Statutory Sexual Offense
(2) Controlled Substances Indictments Alleging Substance as Schedule IV Benzodiazepene Were Fatally Defective

State v. Lepage, ___ N.C. App. ___, 693 S.E.2d 157 (18 May 2010). The defendant was convicted of first-degree statutory sexual offense, various controlled substance offenses, and indecent liberties. (1) The court ruled that there was sufficient evidence of anal penetration to support the conviction of first-degree statutory sexual offense. The victim felt nothing out of the ordinary in her private area before arriving at the defendant's house. The defendant drugged a pie that he served to the victim. The defendant later came into the victim's room during the night. She testified that she felt the defendant's hand go down into her pants and up into her body. She drifted in and out of consciousness and was under the influence of a chemical that caused anterograde amnesia. The next morning, she had a fresh anal laceration that was so sensitive that it caused her to cry out in pain when a doctor examined the area. (2) The indictments charging controlled substance offenses alleged the substance as "benzodiazepines" and as a Schedule IV controlled substance. The evidence at trial showed that the drug was Clonazepam, which is specifically listed in Schedule IV and is a benzodiazepine (the indictment, however, did not allege "Clonazepam"). Benzodiazepine itself is not listed in Schedule IV. Not all benzodiazepines are Clonazepam and not all benzodiazepines are listed in Schedule IV. The court ruled, relying on State v. Ledwell, 171 N.C. App. 328 (2005), and State v. Ahmadi-Turshizi, 175 N.C. App. 783 (2006), the indictments were fatally flawed because (i) they incorrectly stated that benzodiazepine is listed in Schedule IV; and (ii) they charged the defendant with a category of substances, some of which are not regulated under Schedule IV.

(1) Sufficient Circumstantial Evidence Proved That Defendant Knew Packages Delivered to Residence Contained Controlled Substance
(2) Trial Court Had Discretion Whether to Make Sentences for Two Drug Trafficking Convictions at Same Trial to Run Concurrently With or Consecutively To Each Other

State v. Nunez, ___ N.C. App. ___, 693 S.E.2d 223 (18 May 2010). The defendant was convicted of trafficking by possessing marijuana and trafficking by transporting marijuana.

Officers discovered 25.5 pounds in two packages at a United Parcel Service hub addressed to "Holly Wright" at an address in Greenville, who no longer lived at the address with the defendant. A controlled delivery was made to the address, the defendant accepted the packages, dragged them into the apartment, and never mentioned to the delivery person that the addressee no longer lived there. The addressee testified that she had not ordered the packages. The defendant told a neighbor that her boyfriend had ordered the packages for her. The defendant did not open the packages, but immediately called her boyfriend to tell him that they had arrived. After getting off the phone with her boyfriend, she acted like she was in a hurry to leave. The boyfriend came to the apartment within thirty-five minutes of the packages being delivered. (1) The court ruled there was sufficient circumstantial evidence to prove that the defendant knew the packages delivered to the residence contained a controlled substance. (2) The court ruled that the trial court had the discretion whether to make the sentences for the two drug trafficking convictions run concurrently with or consecutively to each other. In this case, the trial court erroneously believed that it had to make the sentences run consecutively.

(1) No Fatal Variance Between Burglary Indictment and Evidence at Trial, Although Alleged Street Number of Residence Was Incorrect
(2) Trial Court Did Not Err in Taking Judicial Notice of Time of Sunset for Burglary Offense

State v. McCormick, ___ N.C. App. ___, 693 S.E.2d 195 (18 May 2010). The defendant was convicted of first-degree burglary and other offenses. (1) The court ruled, relying on State v. Davis, 282 N.C. 107 (1972), that there was not a fatal variance between the burglary indictment and evidence presented at trial although the alleged street number of the residence was incorrect. A nominal or inconsequential error in a street address does not render an indictment fatally defective. (2) The court ruled, relying on evidence Rule 201, State v. Dancy, 297 N.C. 40 (1979), and other cases, that the trial court did not err in taking judicial notice of the time of sunset on the date of the burglary offense.

When Two Controlled Substances Are Contained in Same Pill, Defendant May Be Convicted and Sentenced for Possession of Both Substances

State v. Hall, ___ N.C. App. ___, 692 S.E.2d 446 (4 May 2010). The defendant was convicted of possession of a Schedule I controlled substance popularly known as ecstasy and possession of ketamine, a Schedule III controlled substance. The defendant possessed two pills, each determined to contain both ecstasy and ketamine. The court ruled that double jeopardy did not bar the defendant's convictions and sentences for both substances.

(1) When Defendant and Defense Counsel Reached Absolute Impasse Whether to Exercise Peremptory Challenge of Prospective Juror, Trial Court Erred in Not Permitting Defendant to Make Decision Instead of Defense Counsel
(2) Trial Court Did Not Err in Allowing Offense of Attempted Sale of Cocaine That Had Been Committed With a Firearm to Be Used as Underlying Felony Under Felony Murder Rule

State v. Freeman, ___ N.C. App. ___, 690 S.E.2d 17 (2 March 2010). (1) The court ruled, relying on State v. Ali, 329 N.C. 394 (1991), that when the defendant and defense counsel reached an absolute impasse whether to exercise a peremptory challenge of a prospective juror, the trial court erred in not permitting the defendant to make the decision instead of defense counsel. (2) The court ruled that the trial court did not err in allowing the offense of attempted sale of cocaine that had been committed with a firearm to be used as the underlying felony under

the felony murder rule. On April 8 and April 10, 2006, the defendant delivered cocaine to the victim, but payment was not made then. When the defendant sought payment on April 17 after phoning the victim in advance to tell her he was coming to collect the money, he shot and killed her. The court noted that the sales were not complete on April 8 and 10 because payment had not been made. The defendant's actions on April 17 constituted an attempt to complete the transactions of the sale of cocaine.

Convictions of Both Second-Degree Murder and DWI Did Not Violate Double Jeopardy

State v. Armstrong, ___ N.C. App. ___, 691 S.E.2d 433 (20 April 2010). The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled that double jeopardy does not prohibit the convictions of both second-degree murder and DWI; the court relied on State v. McAllister, 138 N.C. App. 252 (2000)..

(1) G.S. 14-269.4 (Possessing Deadly Weapon in Courthouse), As Applied to Defendant, Did Not Violate North Carolina Constitution
(2) G.S. 14-269.4 Does Not Require State to Prove That Defendant Committed Statutory Violation "Knowingly" or "Willfully"

State v. Sullivan, ___ N.C. App. ___, 691 S.E.2d 417 (16 February 2010). The defendant openly displayed a firearm while in the clerk's office in a courthouse. He was convicted of possessing a deadly weapon in a courthouse under G.S. 14-269.4. The court ruled: (1) G.S. 14-269.4, as applied to the defendant, was not an unconstitutional violation of his right to bear arms under Article I, Section 30 of the North Carolina Constitution; and (2) the trial court did not err when it refused the defendant's request to instruct the jury that it must consider whether the defendant "knowingly" or "willfully" violated G.S. 14-269.4 because the defendant's intent was not an element of the offense.

Convictions of Possession of Firearm by Felon and Habitual Felon Are Affirmed

State v. Taylor, ___ N.C. App. ___, 691 S.E.2d 755 (20 April 2010). The defendant was convicted of possession of a firearm by felon and habitual felon. The court ruled: (1) the indictments for both charges were not insufficient based on errors in the allegations of the date of a felony offense that resulted in a conviction (the indictments alleged "12/8/1992" but the evidence showed "12/18/92"); (2) the discrepancies in the dates of offenses for both indictments did not result in a fatal variance; (3) the trial court did not err in allowing the state to amend the habitual felon indictment to correct the date of the commission of the felony; and (4) there was sufficient evidence of the defendant's constructive possession of a firearm to support the conviction of possession of a firearm by felon (see the facts set out in the court's opinion).

(1) Jury Instruction on Counterfeit Controlled Substance Was Not Erroneous
(2) Evidence Was Sufficient to Support Convictions Involving Counterfeit Controlled Substance

State v. Bivens, ___ N.C. App. ___, 693 S.E.2d 378 (1 June 2010). The defendant sold for twenty dollars to undercover officers a white rock-like substance that the officers believed to be crack cocaine. It was calcium carbonate. The defendant was convicted of three counterfeit controlled substances offenses. (1) The court ruled that the trial court did not err in its jury instruction concerning what constitutes a counterfeit controlled substance. The court rejected the defendant's argument that the instruction was erroneous because it did not include paragraph two of the definition in G.S. 90-87(6)b. The court noted that the statute states that it is *evidence* that

the substance has been intentionally misrepresented as a controlled substance if the specified factors are established. That does not require those factors to exist to find that a controlled substance has been intentionally misrepresented. (2) The court ruled that the evidence was sufficient to support the convictions. The defendant approached a vehicle, asked its occupants (the undercover officers) what they were looking for, departed to fill their request for a "twenty," and handed the occupants a little baggie containing a white rock-like substance. These acts were sufficient to prove that the defendant represented the substance as an illegal drug. The court also noted that the state is not required to prove that the defendant knew the substance sold was counterfeit.

Defendant Was Mentally Competent to Represent Himself

State v. Reid, ___ N.C. App. ___, 693 S.E.2d 227 (18 May 2010). The court ruled, after considering evidence of the defendant's mental capacity, that the trial court did not err under Indiana v. Edwards, 554 U.S. 164 (2008), in allowing the defendant to represent himself. The court also noted that the trial court complied with G.S. 15A-1242 before allowing the defendant to represent himself.

Trial Court's Jury Instruction on Conspiracy Comported With Allegations in Conspiracy Indictment

State v. Pringle, ___ N.C. App. ___, 694 S.E. 2d 505 (15 June 2010). The defendant was indicted for conspiracy to commit armed robbery in which the indictment alleged that the defendant conspired with "Jimon Dollard and another unidentified male." The trial court's jury instruction stated that the state had to prove that the defendant had conspired "with at least one other person." The evidence showed that the defendant and two other men entered into a conspiracy to commit armed robbery. One of the two men was identified as Jimon Dollard. The other man was never identified. The court ruled, relying on State v. Johnson, 337 N.C. 212 (1994), that the jury instruction was in accord with the indictment's allegations and the evidence presented at trial.

Jury Instruction in Eluding Arrest Trial Was Not Erroneous

State v. Graves, ___ N.C. App. ___, 690 S.E.2d 545 (16 March 2010). The defendant was convicted of felony eluding arrest and other offenses. The court ruled that the pattern jury instruction was not erroneous when it required proof that the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer. The court rejected the defendant's argument that the jury should not be allowed to base its verdict on the defendant's having reasonable grounds to know that the officer was a law enforcement officer.

Double Jeopardy Did Not Bar Second Trial on Indictment of Felony Possession of Stolen Goods After Defendant Initially Had Been Tried Under That Indictment But Judge Had Erroneously Instructed Jury on Felony Possession of Motor Vehicle Under G.S. 20-106, and Appellate Court Had Reversed Conviction of Felony Possession of Motor Vehicle

State v. Rahaman, ___ N.C. App. ___, 688 S.E.2d 58 (19 January 2010). The defendant was indicted for felony possession of stolen goods (Toyota truck) under G.S. 14-71.1. The trial court erroneously instructed the jury on felony possession of a stolen motor vehicle under G.S. 20-106. The defendant appealed his conviction of felony possession of a stolen motor vehicle to the North Carolina Court of Appeals, which arrested judgment on that conviction. The state then prosecuted the defendant on the same indictment for a violation of G.S. 14-71.1, and the defendant was

convicted of that offense. The court ruled that double jeopardy did not bar the second trial because the trial court's error at the first trial did not amount to an acquittal of the crime of possession of stolen goods; thus, the defendant could be retried for that offense.

(1) Definition of "Aggravated Offense" in G.S. 14-208.6(1a) Is Not Unconstitutionally Vague
(2) Second-Degree Rape Is an "Aggravated Offense" to Support Trial Court's Order That Defendant Be Enrolled in Lifetime Satellite-Based Monitoring

State v. McCravey, ___ N.C. App. ___, 692 S.E.2d 409 (4 May 2010). The defendant was convicted of second-degree rape and other offenses, and the trial court ordered that the defendant be enrolled in lifetime satellite-based monitoring (SBM) when his prison sentences were completed. The court ruled: (1) the definition of "aggravated offense" in G.S. 14-208.6(1a) is not unconstitutionally vague; and (2) second-degree rape is an "aggravated offense."

Trial Court Improperly Determined That Defendant Must Be Enrolled in Satellite-Based Monitoring for Life

State v. Davison, ___ N.C. App. ___, 689 S.E.2d 510 (8 December 2009). The defendant was convicted of attempted first-degree sexual offense and indecent liberties with a child and sentenced to imprisonment. The trial court ordered enrollment in a satellite-based monitoring program for life after his release from his prison sentence. The court ruled that the trial court erred by failing to follow the statutory procedure under G.S. 14-208.40A when it failed to properly make determinations pursuant to subsection (b), and by doing so prematurely ordered a risk assessment and improperly considered sentencing pursuant to subsections (c) and (d). The court also ruled that the trial court incorrectly found that the defendant had been convicted of an "aggravated offense" because neither offense fits the statutory definition in G.S. 14-208.6(1a). In determining what constitutes an "aggravated offense," a court may only consider the elements of the offense and not the underlying facts of the offense. For other rulings finding error in trial court orders to enroll defendants in satellite-based monitoring, see State v. Smith, ___ N.C. App. ___, 687 S.E.2d 525 (5 January 2010), and State v. Singleton, ___ N.C. App. ___, 689 S.E.2d 562 (5 January 2010) (**Author's note: The North Carolina Supreme Court on April 14, 2010, granted the state's petition to review this ruling**).

Intoxilyzer Test Results From First and Third Breath Samples Were From "Consecutively Administered Tests" Under Former Version of G.S. 20-139.1(b3) When Defendant Failed to Provide Adequate Sample for Second Test

State v. Shockley, ___ N.C. App. ___, 689 S.E.2d 455 (8 December 2009). The defendant was arrested for DWI and requested to take the Intoxilyzer test. The defendant provided a valid breath sample and the result was 0.16. The defendant failed to provide an adequate breath sample for the second test. The defendant provided a valid breath sample for the third test and the result was 0.15. The defendant failed to provide an adequate breath sample for the fourth test. The court ruled that the test results from the first and third breath samples were from "consecutively administered tests" under the former version of G.S. 20-139.1(b3). An insufficient sample does not produce a valid reading. [Author's note: The current version of G.S. 20-139.1(b3) requires "at least duplicate sequential" breath samples. The court's ruling in *Shockley* would likely apply to the current version as well.]

Trial Court Committed Plain Error by Not Submitting Assault on a Government Official as Lesser Offense of Assault with Deadly Weapon on Government Official

State v. Clark, ___ N.C. App. ___, 689 S.E.2d 553 (8 December 2009). The court ruled that the trial court committed plain error by not submitting assault on a government official as a lesser offense of assault with a deadly weapon on a government official. Based on the facts in this case, the jury could have found that the truck used to assault the officer was not a deadly weapon.

Sentence Enhancement Under G.S. 14-3(c) (Misdemeanor Committed Because of Victim's Race) Was Properly Applied When White Defendant Committed Misdemeanor Assault Against White Victim Because Victim Had Interracial Relationship With Black Person

State v. Brown, ___ N.C. App. ___, 689 S.E.2d 210 (16 February 2010). The defendant was convicted of assault with a deadly weapon, a Class A1 misdemeanor. He was sentenced as a Class H felon under G.S. 14-3(c) (offense was committed because of the victim's race). The evidence showed that the white defendant assaulted the white victim because the victim had an interracial relationship with a black person. The court ruled, relying on cases from other jurisdictions, that the sentencing enhancement was properly applied to the defendant.

Trial Court Did Not Err in Allowing State to Amend Habitual Impaired Driving Indictment

State v. White, ___ N.C. App. ___, 689 S.E.2d 595 (16 February 2010). The habitual impaired driving indictment alleged that the three prior impaired driving convictions had occurred within seven years of the habitual impaired driving offense. A recent statutory change applicable to this impaired driving offense permitted the state to prove that the convictions occurred within ten years, and at least one conviction alleged in the indictment had occurred more than seven years but less than ten years of the impaired driving offense. The court ruled, distinguishing State v. Winslow, 360 N.C. 161 (2005), *adopting dissenting opinion in* 169 N.C. App. 137 (2005) (error to allow habitual impaired driving indictment to be amended to change date of conviction so it fell within seven years of impaired driving offense), that the trial court did not err in allowing the state to amend the habitual impaired driving indictment to allege that all the convictions had occurred with ten years of the impaired driving offense.

(1) Trial Court's Failure to Follow Procedure in G.S. 15A-1022 in Accepting Guilty Plea Did Not Prejudice Defendant's Decision to Enter Plea
(2) "Package Deal" in Which Prosecutor Offered Plea Arrangement to Defendant's Wife Contingent on Defendant's Agreement to Plead Guilty Did Not Violate Defendant's Constitutional Rights
(3) Trial Court Did Not Err in Denying Defendant's Post-Sentencing Motion to Set Aside His Guilty Plea

State v. Salvetti, ___ N.C. App. ___, 687 S.E.2d 698 (19 January 2010). The defendant entered an *Alford* guilty plea to Class E felony child abuse and his wife entered guilty pleas to other child abuse offenses. The defendant was sentenced to a term of imprisonment. Two days after his plea, the defendant filed a motion to withdraw the plea, which the trial court denied. The defendant filed a notice of appeal and a writ of certiorari for review of other issues. (1) The court ruled that the trial court's failure to follow the procedure in G.S. 15A-1022 in accepting the defendant's guilty plea did not prejudice the defendant's decision to enter the plea. (See the court's extensive analysis in its opinion.) (2) The court rejected the defendant's argument that the prosecutor's offer of a "package deal" constituted undue pressure and violated the defendant's constitutional rights. The prosecutor offered the defendant's wife a plea deal contingent on the defendant's agreement to plead guilty. The court noted that other jurisdictions have found that package deal pleas are not per se involuntary, although they present a greater risk of inducing a false guilty plea

by altering the defendant's assessment of the attendant risks. The court ruled that the prosecutor in this case did not use improper pressure to induce the defendant's plea. (3) The court ruled that the trial court did not err in denying the defendant's post-sentencing motion to set aside his guilty plea.

Trial Court Did Not Err by Prohibiting Defendant to Proceed Pro Se

State v. Wheeler, ___ N.C. App. ___, 688 S.E.2d 51 (19 January 2010). The defendant before trial requested and was granted the right to proceed pro se. The trial court appointed standby counsel. During jury selection, the defendant informed the trial court that he wanted standby counsel to select the jury. After a colloquy with the defendant, the defendant agreed to allow standby counsel to represent him and no longer proceed pro se. The day after jury selection, the defendant sought to discharge counsel and proceed pro se. The defendant admitted to the trial court that he had already discharged four or five attorneys before trial. The trial court denied the defendant's motion to discharge counsel and proceed pro se. The court upheld the trial court's ruling. The defendant waived his right to proceed pro se when he told the trial court that wanted counsel to take over and select the jury.

Defendant Does Not Have Right to Appeal Order Denying Relief After Hearing on Results of Post-Conviction DNA Testing

State v. Norman, ___ N.C. App. ___, 688 S.E.2d 512 (2 February 2010). The defendant filed a motion for post-conviction DNA testing under G.S. 15A-269. Testing was conducted, a hearing was held on the results, and the trial court denied relief. The defendant filed a notice of appeal challenging the denial of relief. The court noted that G.S. 15A-270.1 provides a defendant with the right to appeal a denial of a defendant's motion for DNA testing. However, there is no statutory provision providing a right to appeal the denial of relief after a hearing on the DNA test results. The court dismissed the defendant's appeal. The court also ruled, based on Bailey v. State, 353 N.C. 142 (2000), that the court is without authority to issue a writ of certiorari or to suspend the appellate rules under Rule 2 to review the denial of relief.

Arrest, Search, and Confession Issues

Court Upholds Trial Court's Ruling That License Checkpoint Was Constitutional

State v. Veazey, ___ N.C. App. ___, 689 S.E.2d 530 (8 December 2009). [Author's note: This case was previously before the court in State v. Veazey, 191 N.C. App. 181 (2008), and the court had remanded the case to the trial court for additional findings of fact and conclusions of law concerning the constitutionality of a checkpoint.] The court upheld the trial court's ruling that the license checkpoint was constitutional. The trial court found that (1) the primary programmatic purpose of the checkpoint was valid (enforcement of state's motor vehicle laws), and (2) the checkpoint was reasonable—the state has a strong interest in enforcing motor vehicle laws, the checkpoint was tailored to meet this purpose, and the checkpoint constituted a minimal intrusion on drivers' liberty.

(1) Driver's License Checkpoint Was Valid Under Fourth Amendment
(2) Officer Had Reasonable Suspicion to Detain Defendant for Further Investigation

State v. Jarrett, ___ N.C. App. ___, 692 S.E.2d 420 (4 May 2010). The defendant was convicted of DWI. The defendant, accompanied by a passenger, approached a stationary driver's license checkpoint at approximately 11:16 p.m. An officer noticed an aluminum can located between the

driver's and passenger's seats. The can was open and a light liquid residue was on the top of the can. The passenger leaned toward the defendant, apparently trying to conceal the can from view. The defendant provided the officer with his license, which revealed that the defendant was eighteen years old, and the vehicle's registration. Before returning these items, the officer asked, "What is in the can?" Neither the defendant nor the passenger responded. When questioned again, the passenger raised the can, revealing that it was a Busch Ice beer. The officer directed the defendant to a nearby parking lot, where he was eventually arrested for DWI. (1) The court ruled that the driver's license checkpoint was valid under the Fourth Amendment. It was conducted under a written department policy. Six officers with flashlights, two in each lane of traffic, stopped every car coming through the checkpoint to determine if drivers possessed a valid driver's license and vehicle registration. A supervisory officer was at the checkpoint. All officers wore uniforms and traffic vests. Their vehicles had activated blue lights. The court discussed the trial court's findings concerning the checkpoint's primary programmatic purpose and the reasonableness of the checkpoint. (2) The court ruled that the officer had reasonable suspicion to detain the defendant for further investigation based on the officer's observation of the beer can and the occupants' behavior involving the beer can.

Officer's Warrantless Compelling of DWI Defendant to Give Blood Sample at Hospital for Alcohol Testing After Defendant Had Refused to Take Breath Test Was Lawful Under G.S. 20-139.1(d1) and United States and North Carolina Constitutions

State v. Fletcher, ___ N.C. App. ___, 688 S.E.2d 94 (19 January 2010). The defendant was arrested at a checkpoint for DWI, taken to a police station for Intoximeter breath testing, which the defendant refused. An officer then transported the defendant to a hospital to compel a blood test. The defendant's blood was drawn, and the blood test result was 0.10. The court ruled the officer reasonably believed under G.S. 20-139.1(d1) that the delay necessary to obtain a court order would result in the dissipation of alcohol in the defendant's blood. The officer testified that the entire process of driving to the magistrate's office, standing in line, completing the required forms, returning to the hospital, and having the defendant's blood drawn would have taken from two to three hours. The court also ruled that probable cause and exigent circumstances supported the warrantless compelling of the blood sample and did not violate the Fourth Amendment or various provisions of the Constitution of North Carolina.

Officer Did Not Seize Defendant Under Fourth Amendment During Encounter

State v. Williams, ___ N.C. App. ___, 686 S.E.2d 905 (22 December 2009). An officer saw the defendant driving a vehicle displaying a 30-day tag he suspected was expired because it was dirty and torn. Before a computer inquiry about the tag came back, the defendant pulled into a driveway. The officer did not activate his blue lights or siren, nor did he give any other indication for the defendant to stop. The officer stopped his vehicle on the other side of the street and approached the defendant's vehicle. The officer asked the defendant about the status of the 30-day tag, and the defendant said that it was expired. The officer then asked the defendant for his license, and the defendant handed him an expired registration and admitted that he did not have a driver's license. The officer asked the defendant to step out of his vehicle to speak with him. After a brief conversation, the defendant consented to a search of his person, which resulted in a seizure of cocaine. The court ruled, relying on State v. Isenhour, ___ N.C. App. ___, 670 S.E.2d 264 (16 December 2008), that the officer did not seize the defendant under the Fourth Amendment during the encounter.

Officer Had Reasonable Suspicion to Stop Vehicle

State v. McRae, ___ N.C. App. ___, 691 S.E.2d 56 (6 April 2010). The court ruled that an officer A had reasonable suspicion to stop a vehicle for two independent reasons. First, the officer A had the authority to stop the vehicle because the officer had reasonable suspicion that the defendant had committed a violation of G.S. 20-154(a) by failing to use his turn signal when he pulled off the highway into a gas station parking lot. There was medium traffic and the defendant's vehicle was a short distance in front of the officer. The court relied on State v. Styles, 362 N.C. 412 (2008), and distinguished State v. Ivey, 360 N.C. 562 (2006). Second, the officer also had the authority to stop the vehicle based on an confidential informant's tip to another officer (officer B) that had been broadcast to officer A and other officers before the stop, as follows: be on the lookout for a black male driving a green Grand Am with Pembroke city limits. The informant has worked with officer B on several occasions and had provided reliable information in the past that led to the arrest of drug offenders. The informant identified the driver by name, a name that officer B recognized as someone associated with the drug trade. The informant also described the specific car (a green Grand Am) and advised the officer that the defendant would be driving the car within the city limits of Pembroke with 60 grams of cocaine in his possession.

(1) Anonymous Information Was Insufficient Evidence to Support Reasonable Suspicion to Stop Vehicle
(2) Knowledge That Registered Owner's Driver's License Was Suspended Was Sufficient Evidence to Support Reasonable Suspicion to Stop Vehicle
(3) Ruling in *Arizona v. Gant* Applied to Require Suppression of Evidence Seized Pursuant to Search of Vehicle Incident to Arrest of Driver for Driving While License Suspended

State v. Johnson, ___ N.C. App. ___, 693 S.E.2d 711 (1 June 2010). An anonymous caller at 12:14 p.m. reported that a black male wearing a white t-shirt and blue shorts was selling illegal drugs and guns at the corner of Pitts and Birch streets in the Happy Hill Garden community. The caller said the sales were occurring out of a blue Mitsubishi with a license plate of WT 3456. The caller refused to provide a name, and officers could not contact the caller. The officers did not know how the caller obtained his or her information. The caller telephoned again at 12:32 p.m. and stated that the suspect had just left the area, but would return shortly. Officers were stationed at the only two entrance points to the community. They saw a blue Mitsubishi with a license plate of WT 3453 being driven by a black male wearing a white t-shirt. An officer entered the license plate information into his computer, which revealed that the vehicle was registered to a Kelvin Johnson, black male, date of birth as August 5, 1964. It also showed that Johnson's driver's license was suspended. Officers stopped the vehicle, arrested the defendant for driving while license revoked, placed him in the back of a patrol car, and searched the defendant's vehicle incident to his arrest. (1) The court ruled, relying on State v. Hughes, 353 N.C. 200 (2000), and State v. Peele, ___ N.C. App. ___, 675 S.E.2d 682 (2009), that the anonymous information was insufficient evidence to support reasonable suspicion to stop the defendant's vehicle. The court stated that when an anonymous tip forms the basis for a traffic stop, the tip itself must exhibit sufficient indices of reliability, or it must be buttressed by sufficient law enforcement corroboration. The court examined the facts and concluded that neither ground was satisfied. (2) The court ruled that even though the anonymous tip did not support the vehicle stop, the officers had reasonable suspicion to stop the vehicle based on their knowledge that the registered owner's driver's license was suspended. [Author's note: Although not cited by the court, see State v. Hess, 185 N.C. App. 530 (2007) (when officer ran vehicle's registration plate and then registered owner's driver's license, which was reported to be suspended, officer had reasonable suspicion to stop vehicle when there was no evidence that owner was not driving vehicle). (3) The court ruled that the ruling in Arizona v. Gant, 129 S. Ct. 1710 (2009) (Court ruled that officers may search vehicle incident to arrest only if (i) arrestee is unsecured and within reaching distance of

passenger compartment when search is conducted; or (ii) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), applied to the defendant's case because it was on direct appeal and not yet final. And the search incident to arrest of the defendant's vehicle violated the Fourth Amendment because it did not satisfy the *Gant* ruling.

Officers Had Reasonable Suspicion to Stop Vehicle Based on Confidential Informant's Information

State v. Crowell, ___ N.C. App. ___, 693 S.E.2d 370 (1 June 2010). A confidential informant phoned an officer that a black male with cocaine would arrive in a few minutes in a black Lexus SUV at a carwash on Highway 301 in Benson. The informant said he had seen the cocaine. The officer had known the informant for thirteen years and knew his mother and other family members. A month before this phone call, the informant had provided the officer with reliable information about illegal drug activity that resulted in an arrest. Fifteen minutes after the phone call, a black Lexus SUV pulled into the carwash and parked. The informant was also at the carwash, and he called the officer to confirm the black Lexus SUV was the correct one and the defendant was the driver. Officers stopped the vehicle after it left the carwash. The court ruled that the officers had reasonable suspicion to stop the vehicle based on the confidential informant's information. The court noted that the informant's basis of knowledge was not an essential factor under the totality of circumstances test for determining reasonable suspicion (or probable cause). The informant's information correctly predicted the defendant's future actions, including his mode of transportation, destination, and time of arrival. This information, corroborated by the officers, sufficiently demonstrated that the informant had inside knowledge about the defendant, giving them a basis for believing that the rest of his information concerning the defendant's transportation of cocaine was also accurate.

Based on State's Stipulation and Other Facts, Officer Did Not Have Reasonable Suspicion to Continue Detention of Defendant After Initial Stop

State v. Huey, ___ N.C. App. ___, 694 S.E. 2d 410 (15 June 2010). An officer was looking for two robbery suspects. The state stipulated at the suppression hearing that he knew they were black males and about eighteen years old, with one suspect wearing a light colored hoodie and the other suspect wearing a darker hoodie. An officer stopped the defendant, who was wearing a light colored hoodie. The defendant presented a North Carolina identification card, which revealed he was fifty-one years old. The officer then ran a warrant check and arrested him on an outstanding arrest warrant. (Although the officer testified at the suppression hearing that he learned that the suspects were about eighteen years old only after he discovered the defendant's outstanding arrest warrant, the court ruled that the trial court was bound by the state's stipulation.) Even if the officer could not have known the defendant's age when he initially saw the defendant with his hoodie on, he should have been able to recognize that the defendant was much older than eighteen years of age when face to face with him. In any event, the court stated that as soon as the defendant provided his identification card with his birth date, the officer knew that the defendant did not match the descriptions of the suspects, and at that point the investigative stop should have ended because reasonable suspicion did not exist.

Officer Conducting Frisk of Drug Suspect Lawfully Seized Digital Scale from His Pocket Because Its Identity Was Immediately Apparent Without Manipulating It

State v. Morton, ___ N.C. App. ___, 694 S.E. 2d 432 (15 June 2010). The court ruled, relying on Minnesota v. Dickerson, 508 U.S. 366 (1993), that an officer conducting a frisk of a drug suspect lawfully seized a digital scale from his pocket because its identity was immediate apparent

without manipulating it. (Author's note: "immediately apparent" means the same as probable cause). The officer testified that scales are often used to weigh controlled substances before distribution.

Court Rules That Roadside Strip Search of Vehicle Occupant in Daylight Hours Violated Fourth Amendment

State v. Battle, ___ N.C. App. ___, 688 S.E.2d 805 (16 February 2010). Officers received a tip from a confidential informant that three named people were going to Durham to obtain cocaine and then transport it back to Granville County, exiting at the Linden Avenue exit off Interstate 95. The officers stopped the vehicle shortly after exiting there. It was daylight (a summer day around 5:00 p.m.). Two male passengers were searched and no illegal drugs were found. The third passenger, a female, was strip searched by a female officer between the open doors of the vehicle at the roadside, which included pulling her underwear out from her body and discovering a folded five dollar bill and a crack pipe. (1) The opinion for the court, which was not joined by the two other judges on the three-judge panel, noted that for purposes of this appeal, it was assumed that the officers had probable cause to arrest the defendant and search her incident to arrest. However, the opinion stated that for a roadside strip search to be constitutional, there must be both probable cause and exigent circumstances to show some significant government or public interest would be endangered were law enforcement officers to wait until they could conduct the search in a more discreet location, usually at a private location within a law enforcement facility. The opinion, which extensively discussed the facts and case law from North Carolina and other jurisdictions, ruled that the strip search violated the defendant's Fourth Amendment rights. The opinion stated that the trial court's order denying the defendant's motion to suppress did not show that there were exigent circumstances justifying any search more intrusive than that allowed incident to any arrest. (2) A second judge on the three-judge panel concurred only in the result (granting the defendant's motion to suppress) without an opinion. (3) A third judge on the three-judge panel concurred with an opinion that noted the North Carolina Supreme Court in State v. Stone, 362 N.C. 50 (2007) (defendant's general consent to search did not include officer's flashlight search of genitals inside defendant's underwear), had ruled that an officer's search with at least questionable consent was not permissible under the Fourth Amendment. And because the search in *Battle* without the defendant's consent was more intrusive than that in *Stone*, it was not permissible under the Fourth Amendment. [Author's note: Although a majority of the three-judge panel agreed that the strip search violated the Fourth Amendment, there was not majority agreement why the search violated the Fourth Amendment.]

Defendant's Admission That Grocery Bag in Vehicle Contained "Cigar Guts" Did Not, Without More Information, Establish Probable Cause to Search Bag for Illegal Drugs

State v. Simmons, ___ N.C. App. ___, 688 S.E.2d 28 (5 January 2010). An officer stopped a vehicle to issue the driver a seat belt citation. The officer noticed a white plastic grocery bag sticking out of the storage holder on the passenger side of the defendant's vehicle. He was suspicious that the bag contained illegal contraband because he had found illegal contraband in that sort of container on at least three prior occasions. The officer asked the defendant what was in the bag. The defendant responded that the bag contained "cigar guts." The officer took this response to mean that tobacco had been removed from a cigar. He had previously seized marijuana with cigars. Based on his training, he had learned that marijuana was sometimes placed in cigars to smoke them. However, the officer could not see inside the bag nor did he smell any illegal contraband. The officer searched the bag. The court ruled that the defendant's response that the grocery bag contained "cigar guts" did not, without more information, establish probable cause to search the bag. The officer's training and experience established a link between the

presence of hollowed out cigars and marijuana, not a link between the presence of loose tobacco and marijuana. Furthermore, there was no evidence that the defendant was stopped in a drug area or at an unusual time of day.

Discovery of Odor of Marijuana from Spare Tire in Luggage Area of Chevrolet Suburban Provided Probable Cause to Make Warrantless Search for More Marijuana in Rest of Vehicle, Including Second Spare Tire in Undercarriage of Vehicle

State v. Toledo, ___ N.C. App. ___, 693 S.E.2d 201 (18 May 2010). An officer noted the odor of marijuana from a spare tire in the luggage area of a Chevrolet Suburban after the defendant had validly consented to a search of the vehicle. The officer had conducted a "ping" test, pressing the tire valve to release some of the air, and noted a very strong odor of marijuana. The officer arrested the defendant for possession of marijuana. The officer then warrantlessly searched a second spare tire located in the undercarriage of the vehicle and noted the odor of marijuana after conducting a ping test. Marijuana was found in both spare tires. At issue was the validity of the search of the second spare tire. The court ruled, relying on United States v. Ross, 456 U.S. 798 (1982), that the officer had probable cause to make a warrantless search for more marijuana in the rest of the vehicle, which included the second spare tire. [Author's note: The court in footnote four appeared to suggest a separate justification for the search of the vehicle, including the spare tire in the undercarriage, under Arizona v. Gant, 129 S. Ct. 1710 (2009) (court ruled that officers may search vehicle incident to arrest only if (1) arrestee is unsecured and within reaching distance of passenger compartment when search is conducted; or (2) it is reasonable to believe that evidence relevant to crime of arrest might be found in vehicle), because it was reasonable to believe that the vehicle contained evidence of the crime of arrest, possession of marijuana.]

Trial Court Properly Denied Defendant's Motion to Suppress Cellular Telephone Records Obtained by State

State v. Stitt, ___ N.C. App. ___, 689 S.E.2d 539 (8 December 2009). The defendant was convicted of first-degree murder of one victim, second-degree murder of another victim, and armed robbery. After the killings, the defendant used two cell phones of one of the victims. The cell phones were seized from the defendant when he was arrested in New York. The defendant made a motion to suppress cellular telephone records obtained by the state. The court affirmed the trial court's ruling that the defendant failed to meet his burden to show that he had a Fourth Amendment privacy interest in the cell phones to contest the records obtained by the state. [Author's note: In any event, a person does not have a Fourth Amendment right to privacy in his or her telephone records. Smith v. Maryland, 442 U.S. 735 (1979).] The court also ruled, assuming arguendo that the state did not fully comply with federal law [18 U.S.C. § 2703(d)] in obtaining the telephone records, federal law does not authorize the suppression of evidence as a remedy for a violation of this federal law. It only provides civil remedies and criminal punishment. The court cited United States v. Ferguson, 508 F.Supp. 2d 7 (D.D.C. 2007), and United States v. Smith, 155 F.3d 1051 (9th Cir. 1998).

Even Assuming Defendant Was Arrested Without Probable Cause Under Fourth Amendment, Exclusionary Rule Does Not Bar Evidence of Defendant's False Statements to Officer After Arrest That Supported Identity Theft Conviction

State v. Barron, ___ N.C. App. ___, 690 S.E.2d 22 (2 March 2010). The defendant was convicted of identity theft. Upon arrest, the defendant falsely gave his brother's name and birth date as his, and falsely confirmed in response to an officer's question about the last four digits of the defendant's social security number (which were his brother's). The court ruled that the

defendant's false confirmation of the last four digits of his social security number was sufficient evidence to convict him of identity theft. It was "identifying information" under G.S. 14-113.20(b)(1). The court rejected the defendant's argument that the trial court erred in denying his motion to suppress his post-arrest statements concerning his false name, date of birth, and social security number. The court ruled, even assuming the defendant was arrested without probable cause under the Fourth Amendment, the exclusionary rule does not bar evidence of the defendant's false statements that supported his identity theft conviction. Relying on State v. Miller, 282 N.C. 633 (1973), and In re J.L.B.M., 176 N.C. App. 613 (2006), the court stated that the exclusionary ruled does not exclude evidence of crimes committed after an illegal search or seizure. The false statements were not fruits of the poisonous tree.

Trial Court Did Not Err in Denying Defendant's Motion to Require State to Disclose Confidential Informant's Identity

State v. Dark, ___ N.C. App. ___, 694 S.E. 2d 502 (15 June 2010). The defendant was convicted of cocaine offenses involving a sale to an undercover officer set up with the assistance of a confidential informant. The defendant told the informant to come to a specific parking place at an apartment complex. The undercover officer drove there with the informant. The officer paid the defendant for crack cocaine and marijuana. The officer later identified the defendant in a photo lineup. The defendant did not offer evidence at trial. The court ruled that the trial court did not err in denying the defendant's motion to require the state to disclose the confidential informant's identity. Although the informant's presence and role in arranging the purchase was a factor favoring disclosure, the court agreed with the trial court's finding that the defendant did not show how the informant's identity could provide useful information for the defendant to clarify any contradiction between the state's evidence and the defendant's denial that he committed the offenses. Moreover, the informant's testimony was not admitted at trial. The testimony of the undercover officer and another officer established the defendant's guilt.

(1) School Resource Officer's Searches of Juvenile at School Were Constitutional
(2) Juvenile's Unsolicited and Spontaneous Statement Made While in Custody Was Admissible
(3) Officer Was Properly Allowed to Give Lay Opinion Testimony About Drug Transactions

In re D.L.D., ___ N.C. App. ___, 694 S.E.2d 395 (20 April 2010). The juvenile was adjudicated delinquent of possession of marijuana with the intent to sell or deliver. An officer was assigned to a high school as a resource officer and had made many arrests for controlled substances at one of the school's bathrooms. The officer and an assistant principal (hereafter, principal) noticed on monitoring cameras that two male juveniles were entering the bathroom and one was standing outside. The principal told the officer that the situation "looked kind of fishy," and suggested they check it. As they approached the bathroom, they saw one male student outside the men's bathroom and another male student outside the women's bathroom, and both stared at the officer and principal. They then saw the juvenile and two other male students leave the bathroom. When the juvenile saw them, he ran back into the bathroom, followed by the officer and principal. When the officer said that he saw the juvenile put something in his pants, the principal replied, "we need to check it." The officer frisked the juvenile and found a container used to hold BB gun pellets. Inside the container were three individually-wrapped bags of marijuana worth $20.00 each. The officer handcuffed the juvenile and took him to a school office. The principal told the officer that they needed to check the juvenile to make sure that he did not have anything else. The officer searched the juvenile and discovered $59.00 in his pocket. The juvenile immediately stated, "the money was not from selling drugs," but was his mother's rent money. (1) The court

ruled the Fourth Amendment reasonableness standard for school searches applied to the searches by the officer, citing New Jersey v. T.L.O., 469 U.S. 325 (1985), In re D.D., 146 N.C. App. 309 (2001), and other cases, and the searches at the bathroom and school office were constitutional. (2) The court ruled that although the juvenile was in custody and had not been given *Miranda* and statutory warnings, his statement in the school office was admissible because it was unsolicited and spontaneous and not as a result of interrogation. The court cited State v. Hall, 131 N.C. App. 427 (1998), and other cases. (3) The officer testified at the juvenile's trial that based of the officer's six years as a drug investigator, it was traditional for a person selling drugs to have in his possession both money and drugs. Also, if the person hasn't started selling yet, he will have more inventory than money. If he is selling well, he will have more money than inventory. The court ruled, citing State v. Hargrave, ___ N.C. App. ___, 680 S.E.2d 254 (2009), and other cases, that the trial court did not err in allowing the officer to give this lay opinion testimony.

Search Warrant Was Valid

State v. Haymond, ___ N.C. App. ___, 691 S.E.2d 108 (6 April 2010). The defendant was convicted of multiple offenses involving break-ins, larcenies, and possession of stolen property concerning multiple victims. He received ten consecutive habitual felon sentences. The court ruled that the search warrant of the defendant's residence was valid (see the court's discussion of issues such as the affiant-officer's alleged intentional omission of material facts and the application of the plain view doctrine

Defendant's Consent to Search Included Outbuilding Located Within Curtilage of Mobile Home

State v. Hagin, ___ N.C. App. ___, 691 S.E.2d 429 (20 April 2010). The defendant was convicted of manufacture of methamphetamine. The defendant and his wife executed a written consent to search that permitted a search of the personal or real property located at an address in Wadesboro and described a single wide mobile home. The officer informed them that they could withdraw their consent at any time. The defendant accompanied the officer and another officer as they searched the mobile home. They then went outside to the rear of the mobile home and one of the officers saw a small outbuilding located about 15-20 feet from the home's back porch. The officers searched the outbuilding, and neither the defendant nor his wife withdrew their consent to search their real property. The court ruled, relying on State v. Williams, 67 N.C. App. 519 (1984), and other cases, that the search of the outbuilding was within the scope of the consent given. A reasonable person who believed that his consent did not include the outbuilding would have objected to the search. The defendant's silence was some evidence that he believed the outbuilding to be within the scope of his consent. [Author's note: In preparing a written consent involving a residence, an officer may want to include a specific reference to "all outbuildings on the property, wherever located." A person giving consent would have a better understanding of the scope of the proposed search, and a reviewing court would more likely find that an outbuilding was included in the consent to search.]

(1) Defendant Was Not in Custody to Require *Miranda* Warnings
(2) Defendant Made Ambiguous Request for Counsel

State v. Little, ___ N.C. App. ___, 692 S.E.2d 451 (4 May 2010). The defendant was convicted of first-degree murder. The defendant voluntarily drove to the police station about six hours after the shooting. There was no warrant for the defendant's arrest and the police had not attempted to contact him or request his presence for an interview. A detective who knew the defendant met him in the public lobby and invited him into a secure area that required a passkey to enter, but

anyone could leave the secure area without a key. The detective patted him down for weapons (the defendant did not object to the frisk) and told him a detective wanted to speak with him. The other detective arrived and told the defendant he was not under arrest and was free to leave. The defendant voluntarily accompanied the detective and another officer upstairs. The defendant was later told at two different occasions that he was not under arrest and was free to leave. Unbeknownst to the defendant, the other officer entered an adjacent room and took notes on the interview. Also, a detective stayed in the hallway to keep the defendant from leaving, but the defendant was unaware of the detective's intentions. The detective began to question the defendant about his actions during the day and about the shooting. At one point, the defendant asked if he needed an attorney. The detective replied, "I don't know, I can't answer that for you, are you asking for one?" The defendant did not reply to this question and continued talking with the detective. At another point the defendant stood up and said, "I'm trying to leave, I didn't do it." The detective did not restrain the defendant, who then set back down and continued talking. The defendant made inculpatory statements that he sought to suppress. (1) The court ruled that the defendant was not in custody to require *Miranda* warnings. The facts did not show the indicia of an arrest. The court relied on State v. Gaines, 345 N.C. 647 (1997), and other cases. Also, the presence of a note-taking officer and an officer's unarticulated determination not to let the defendant leave had no bearing whether the defendant was in custody because the defendant was unaware of these facts. (2) The defendant argued on appeal, relying on State v. Torres, 330 N.C. 517 (1992) (when defendant makes ambiguous request for counsel, interrogation must stop except for narrow questions designed to clarity the defendant's intent), that he made a sufficiently unambiguous request for counsel to require that questioning be stopped. The court first noted that because the defendant was not in custody when the interview occurred, the defendant was not entitled to *Miranda* protections. (Author's note: That is, the defendant's purported assertion of the right to counsel did not require the officer to stop the noncustodial interrogation because *Miranda* protections were inapplicable.) The court then stated that as a guide to trial courts, it would address the defendant's argument about the request for counsel. The court noted that *Torres* was decided before Davis v. United States, 512 U.S. 452 (1994) (Court rejected requirement that officer must stop interrogation when defendant makes ambiguous or equivocal request for counsel to ask questions clarifying whether defendant wants a lawyer). The later ruling in State v. Dix, 194 N.C. App. 151 (2008), stated that the trial court's assumption that the officer was required to ask clarifying questions, and its later conclusion that it was required to resolve any ambiguity in the defendant's favor, was error. In *Little*, the defendant did not unambiguously ask for an attorney; rather, he asked for the detective's opinion about the matter. The detective went beyond federal and state case law when he asked a clarifying question, "are you asking for one?"

Officer's Conduct and Statements to Defendant After Arrest Constituted Interrogation to Require *Miranda* Warnings

State v. Hensley, ___ N.C. App. ___, 687 S.E.2d 309 (5 January 2010). The court ruled that an officer's conduct and statements to the defendant after his arrest constituted interrogation to require *Miranda* warnings. The officer should have known that his conduct and statements were reasonably likely to elicit an incriminating response from the defendant; see the definition of interrogation in State v. Golphin, 352 N.C. 364 (2000), and Rhode Island v. Innis, 446 U.S. 291 (1980). The defendant took a drug overdose and was taken to a hospital. The following day the officer arrested the defendant at the hospital when informed that he was about to be released. The officer told the defendant (whom he knew from a prior investigation) that he hoped that the defendant would continue to cooperate even though he had been arrested. The officer inquired whether or not the defendant would agree to talk with him the next day if the officer came to work on overtime to obtain a statement from him. The defendant then made an incriminating statement. (See a detailed recitation of the facts in the court's opinion.)

Defendant's Mother Was Not Acting as Agent of Law Enforcement to Require *Miranda* Warnings to Be Given to Defendant

State v. Clodfelter, ___ N.C. App. ___, 691 S.E.2d 22 (16 March 2010). The defendant was convicted of first-degree murder and other offenses. The court ruled, distinguishing State v. Morrell, 108 N.C. App. 465 (1993), and State v. Hauser, 115 N.C. App. 431 (1994), that the defendant's mother was not acting as an agent of law enforcement to require *Miranda* warnings to be given to the defendant. The mother testified that all the officers asked her to do, and all she in fact did do, was ask her son to tell the truth about his involvement in the murder.

Police Department's Interception of One of Its Own Officer's Oral Communications in His Vehicle to Check If Officer Was Tipping-Off Drug Dealers About Confidential Police Department Information Did Not Violate North Carolina's Electronic Surveillance Act Because Interception Was Not Done "Willfully"

Wright v. Town of Zebulon, ___ N.C. App. ___, 688 S.E.2d 786 (16 February 2010). The plaintiff, a police officer, sued his department, the city, and various officers and others for allegedly violating the North Carolina Electronic Surveillance Act (G.S. 15A-286 to -298) by intercepting his oral communications in his vehicle. The police chief and others intercepted these communications to check, based on information from an informant and others, if the officer was tipping-off drug dealers about confidential police department information. The trial court granted summary judgment for the various defendants (the police chief and others), and the plaintiff appealed to the North Carolina Court of Appeals. The court ruled that the defendants did not violate the act because they did not act "willfully" [see G.S. 15A-287(a)(1)] as that term has been interpreted by federal case law involving the federal electronic surveillance law, on which the North Carolina law was modeled. Based on the police chief's purpose in conducting the interception as an integrity check to ensure public safety (to determine if officers, informants, and the general public were in danger of harm), the defendants did not act with a bad purpose or without a justifiable excuse.

Evidence

Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Brewington, ___ N.C. App. ___, 693 S.E.2d 182 (18 May 2010). The court ruled, relying on Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) , State v. Locklear, 363 N.C. 438 (2009), State v. Brennan, ___ N.C. App. ___, 692 S.E.2d 427 (4 May 2010), and other cases, and distinguishing State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), and State v. Hough, ___ N.C. App. ___, 690 S.E.2d 285 (2 March 2010), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine when the analysis of the substance was performed by a non-testifying expert. The court stated that it was clear that the testifying expert was not involved in testing the substance, nor did she conduct any independent analysis of the substance. The court rejected the state's argument that the expert's testimony was admissible as peer view under *Hough*.

Defendant's Right to Confrontation Under Sixth Amendment Was Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Brennan, ___ N.C. App. ___, 692 S.E.2d 427 (4 May 2010). The court ruled, relying on State v. Locklear, 363 N.C. 438 (2009), and distinguishing State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), that the defendant's right to confrontation under the Sixth Amendment was violated when the trial court allowed a state's expert to testify to the identity of a substance as cocaine base when the analysis of the substance was performed by a non-testifying expert. The court stated that it was obvious from the testifying expert's testimony that she was merely reporting the results of the non-testifying expert.

Defendant's Right to Confrontation Under Sixth Amendment Was Not Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Hough, ___ N.C. App. ___, 690 S.E.2d 285 (2 March 2010). The court ruled, relying on State v. Mobley, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), and other cases, that the defendant's right to confrontation under the Sixth Amendment was not violated when the trial court allowed a state's expert to testify to an analysis that provided the composition and weight of the controlled substances found in the defendant's residence when the analysis was performed by a non-testifying expert. The expert's opinion was based on her independent review and confirmation of the test results. The court stated that it is was not its position that every peer review will suffice to establish the testifying expert is testifying to his or her expert opinion; however, in this case, the testifying expert's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

Admission of Drug Lab Report Under G.S. 95-90(g) When Defendant Failed to Object Under Statute Did Not Violate Defendant's Sixth Amendment Right to Confrontation

State v. Steele, ___ N.C. App. ___, 689 S.E.2d 155 (5 January 2010). The court ruled that the admission of a drug lab report under G.S. 95-90(g) when the defendant failed to object under the statute did not violate the defendant's Sixth Amendment right to confrontation. The court noted that Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), explicitly approved as constitutional notice-and-demand statutes and G.S. 95-90(g) qualifies as such a statute.

Trial Court Erred in Allowing SBI Drug Chemist to Identify Pills by Visual Inspection Without Performing Chemical Analysis

State v. Brunson, ___ N.C. App. ___, 693 S.E.2d 390 (1 June 2010). The defendant was convicted of trafficking in hydrocodone by possession and transportation. The court ruled, relying on its ruling in State v. Ward, ___ N.C. App. ___, 681 S.E.2d 354 (18 August 2009), the trial court erred in allowing the state's witness, a SBI drug chemist, to identify pills as hydrocodone, an opium derivative, by visual identification and the use of a Micromedics database. [Author's note: The North Carolina Supreme Court on October 8, 2009, granted the state's petition to review the *Ward* ruling. Thus, the supreme court's future ruling in *Ward* may have a direct impact on the precedential impact of the *Brunson* ruling.]

(1) Evidence That Defendant Abused Her Other Children Was Admissible Under Rule 404(b) and Rule 403

(2) Expert Was Properly Permitted to Testify That Victim and Other Children Were Subjected to Ritualistic Child Abuse, Sadistic Child Abuse, and Torture

State v. Paddock, ___ N.C. App. ___, ___ S.E.2d ___ (1 June 2010). The defendant was convicted of first-degree murder (based on torture) and felonious child abuse inflicting serious bodily injury involving the death of one of her children. (1) The defendant's other children were allowed to testify how the defendant physically abused them in an effort to control their behavior in a similar manner to the defendant's abuse of her son, the murder victim. The court ruled, relying on State v. Anderson, 350 N.C. 152 (1999), that the trial court did not err under Rule 404(b) and Rule 403 in admitting this testimony to show the defendant's intent, plan, scheme, system or design to inflict cruel suffering, as well as malice and lack of accident. (2) The court ruled that the trial court did not err in permitting the state's witness, an expert in developmental and forensic pediatrics, to testify that the victim and other children were subjected to ritualistic child abuse, sadistic child abuse, and torture. The court rejected the defendant's argument that the testimony improperly opined on the testifying children's credibility, and the expert's use of the word "torture" was potentially misleading because it differed from the legal definition. The expert testified that she used the term "torture" based on her medical expertise, not its legal meaning.

Officer's Opinion Testimony That Substances Were Marijuana Was Admissible

State v. Ferguson, ___ N.C. App. ___, 694 S.E. 2d 470 (15 June 2010). The defendant was convicted of two marijuana offenses. The court ruled, relying on State v. Fletcher, 92 N.C. App. 50 (1988) (officers with appropriate background properly offered opinion testimony that substance was marijuana), the trial court did not err in allowing a law enforcement officer to testify that in his opinion the substances seized from a motor vehicle and the defendant's pocketbook were marijuana. The court stated that the decision in State v. Llamas-Hernandez, 363 N.C. 8 (2009) (reversing court of appeals ruling based on dissenting opinion, which stated that officer's opinion testimony that white powder was cocaine was inadmissible), did not cast doubt on the continuing validity of the *Fletcher* ruling.

(1) G.S. 14-415.1(b) Provides Sufficient Basis for Admission of Felony Conviction in Trial of Possession of Firearm by Felon
(2) Defendant Was Not Unfairly Prejudiced Under Rule 403(b) by Admission of Felony Conviction in Trial of Possession of Firearm by Felon

State v. Fortney, ___ N.C. App. ___, 687 S.E.2d 518 (5 January 2010). The defendant was on trial for possession of firearm by felon, possession of a Schedule II controlled substance, possession of marijuana, possession of drug paraphernalia, and carrying a concealed weapon. The defendant offered to stipulate to having a prior felony conviction, an element of possession of a firearm by a felon. After the state declined to accept the stipulation, the trial court, over the defendant's objection, allowed the state to introduce into evidence the defendant's first-degree rape conviction. The court ruled: (1) G.S. 14-415.1(b) provides a sufficient basis for the admission of a felony conviction; and (2) the defendant was not unfairly prejudiced under Rule 403(b) by the admission of the felony conviction. Relying on State v. Jackson, 139 N.C. App. 721 (2000), *rev'd in part on other grounds*, 353 N.C. 495 (2001), and State v. Little, 191 N.C. 655 (2008), the court noted that the prior conviction in this case was not substantially similar to the other offenses being tried.

NarTest Machine Used by Officer to Determine Substance Was Cocaine Was Not Shown to Be Reliable to Allow Test Result to Be Admitted at Trial

State v. Meadows, ___ N.C. App. ___, 687 S.E.2d 305 (5 January 2010). The court ruled that the NarTest machine used by an officer to determine that a substance was cocaine was not shown to be reliable to allow a test result to be admitted at trial. The state did not present any evidence to indicate the machine uses an established technique to analyze controlled substances or that the machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method. The court stated that it was unaware of any cases in which the machine had been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States.

Trial Court Abused Discretion by Allowing Law Enforcement Officer to Testify That Defendant Was Person Depicted in Surveillance Video Tape

State v. Belk, ___ N.C. App. ___, 689 S.E.2d 439 (8 December 2009). The court ruled that the trial court abused its discretion by allowing a law enforcement officer to testify that the defendant was the person depicted in a surveillance video tape, based on its analysis of the facts in this case and the factors set out in United States v. Dixon, 413 F.3d 540 (6th Cir. 2005).

Sentencing

Sentence Imposed at Re-Sentencing Hearing Violated G.S. 15A-1335

State v. Daniels, ___ N.C. App. ___, 691 S.E.2d 78 (6 April 2010). The defendant was convicted of first-degree rape and first-degree kidnapping. He was sentenced to consecutive terms of imprisonment of 307 to 378 months for the first-degree rape conviction and 133 to 169 months for the first-degree kidnapping conviction. He appealed his sentences to the North Carolina Court of Appeals, which remanded for new sentencing hearing for both convictions, requiring the trial court to either (1) arrest judgment for the first-degree kidnapping conviction and resentence for second-degree kidnapping; or (2) arrest judgment for the first-degree rape conviction and resentence for first-degree kidnapping. The trial court chose the first option, sentencing the defendant from 370 to 453 months for first-degree rape and a consecutive 46 to 65 months for second-degree kidnapping. The court ruled that the trial court's sentence for first-degree rape violated G.S. 15A-1335 because it exceeded the sentence imposed at the first sentencing hearing. The court distinguished State v. Moffitt, 185 N.C. App. 308 (2007) (court may consider whether new sentences in the aggregate are greater than original sentences in the aggregate), noting that the ruling in that case addressed the consolidation of the defendant Moffit's multiple convictions at his resentencing hearing, whereas defendant Daniels' convictions were not consolidated.

Trial Court Abused Discretion in Finding Extraordinary Mitigating Factors in Sentencing Defendant

State v. Riley, ___ N.C. App. ___, 688 S.E.2d 477 (2 February 2010). The defendant was convicted of first-degree burglary and another offense. The trial court found two factors in extraordinary mitigation, which were statutory mitigating factors: (1) the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense [G.S. 15A-1340.16(e)(3)]; and (2) the defendant aided in the apprehension of another felon [G.S. 15A-1340.16(e)(7)]. The trial court sentenced the defendant to special probation, as permitted under G.S. 15A-1340.13(g) (dispositional deviation for extraordinary mitigation), instead of an active sentence that was otherwise required for first-degree burglary. The state appealed the finding of extraordinary mitigation and the sentence imposed. Relying on State v. Melvin, 188 N.C. App. 827 (2008), the court ruled that the trial court abused its discretion in finding the two factors in extraordinary mitigation. The statutory

mitigating factors are not by themselves sufficient to support a finding of extraordinary mitigation. There must additional facts over and above the facts required to support a statutory mitigating factor.

Use of Alabama DUI Convictions in Sentencing Was Proper

State v. Armstrong, ___ N.C. App. ___, 691 S.E.2d 433 (20 April 2010). The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled that for sentencing purposes, the defendant's Alabama convictions of driving under the influence of alcohol were substantially similar to an offense classified as a Class 1 misdemeanor in North Carolina. The court found that DWI was found, albeit in a different context, to be a Class 1 misdemeanor in State v. Gregory, 154 N.C. App. 718 (2002).

NCIC Report Contained Sufficient Identifying Information to Be Admitted to Prove Defendant's Out-of-State Convictions

State v. Fortney, ___ N.C. App. ___, 687 S.E.2d 518 (5 January 2010). The court ruled that a NCIC report contained sufficient identifying information (defendant's name, date of birth, sex, race, height, weight, eye color, hair color, etc.) to be admitted to prove the defendant's out-of-state convictions. With other admitted evidence, the court ruled that the state had sufficiently proved that the defendant had been convicted of the out-of-state felonies.