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RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
(November 19, 1992 - June 4, 1993)

North Carolina Supreme Court

Arrest, Search, and Interrogation Issues

(1) Determining Custody Under *Miranda*
(2) Admission of Statements After *Miranda* Violation
(3) Voluntariness of Confession

State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992). (1) Defendant agreed to go to sheriff's office with deputy sheriff. Once there, however, a detective entered the room where the defendant was located, told him he could not leave the room, and handcuffed him. SBI agents, who were unaware of the defendant's handcuffing, questioned defendant forty-five minutes later without giving *Miranda* warnings. The court ruled that defendant was in custody to require *Miranda* warnings, and statement was inadmissible. (2) Once the SBI learned of defendant's handcuffing, they told the defendant he was not under arrest and was free to leave. Defendant voluntarily went with agents to his home to assist in consent search of his home. After the consent search, the defendant voluntarily returned to the sheriff's department, was told again that he was not under arrest and was free to leave, and was questioned by the agents without *Miranda* warnings. Defendant eventually gave two statements, and court ruled that defendant was not in custody to require *Miranda* warnings. (3) After the two statements, defendant was arrested, committed to jail, and properly given *Miranda* warnings, and he gave another statement. The court ruled that all statement given to agents after first inadmissible statement were admissible; see State v. Barlow, 330 N.C. 133, 409 S.E.2d 906 (1991). (4) Although agents told the defendant that they were his only friends and that they would help him with any problems he had, they did not intimate that by confessing he could avoid prosecution or that any sentence imposed would be lessened. The court ruled that defendant's statement was voluntary; it was not induced by hope or fear.

(1) Defendant Was In Custody During Polygraph Examination, Based On Facts In This Case
(2) Ruling In *Elstad v. Oregon* Adopted Under North Carolina Constitution
(3) State Must Prove *Miranda* Violation Harmless Beyond A Reasonable Doubt

State v. Hicks, 333 N.C. 467, 428 S.E.2d 167 (1993). (1) Officers asked defendant—who had been told by officer that he was a suspect in a murder because he and the victim had just broken up before she was murdered—to take polygraph test to "clear his name," and they transported defendant with his consent over an hour's drive away from his home in Mocksville to SBI office in Hickory for purpose of taking test. Although he refused to take polygraph three separate times during two hours of questioning, defendant was never taken home or offered transportation

home. Although polygraph operator informed defendant during explanation of polygraph procedure that he was not under arrest, defendant never was told that he was free to leave. After third refusal to take test, defendant told polygraph operator he wanted to go outside with him; during conversation in parking lot, defendant told operator that he wanted to take responsibility for murder. They came back into building, and operator informed two investigating officers that defendant wanted to confess. When defendant refused to elaborate on details of crime, officers told him he would have to tell them what had happened and any details he knew. The defendant then gave them details and demonstrated how he had shot victim. After defendant explained details of murder, officers advised defendant of *Miranda* rights and obtained valid waiver, and defendant gave a second confession. The court ruled that reasonable person in defendant's position, knowing he was suspect in murder case and having just stated to officer that he wanted to take responsibility for murder, would feel that he was compelled to stay and therefore was in custody for *Miranda* purposes immediately following that statement. Thus, the first confession taken without *Miranda* warnings should have been ruled inadmissible. (2) The court ruled that second confession, taken after *Miranda* warnings had been properly given and waived, was admissible under the ruling in Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) (fact that voluntary confession is inadmissible because of *Miranda* violation does not prohibit admission of later voluntary confession given after proper *Miranda* warnings and waiver). And court adopted *Oregon v. Elstad* ruling for determining violations under Article I, sections 19 and 23 of North Carolina Constitution. (3) The court ruled that state must prove that evidence admitted in violation of *Miranda* (in this case, the first confession) must be proven harmless beyond a reasonable doubt under G.S. 15A-1443(b); court concludes that state did so in this case.

Defendant Was Not In Custody At Hospital To Require *Miranda* Warnings

State v. Sweatt, 333 N.C. 407, 427 S.E.2d 112 (1993). Defendant was at hospital being treated for injuries sustained in an automobile accident. Officer who had responded to accident—but who had not yet had talked with defendant—came to hospital. After doctor alerted officer (who by now had been informed that defendant may have been involved in a homicide before the accident had occurred) that defendant was saying things the officer might be interested in, the officer walked to where the defendant was being treated and asked him questions. The court ruled that defendant was not in custody to require officer to give defendant *Miranda* warnings before questioning the defendant. There were no law enforcement actions that showed actual custody.

Defendant Asserted Fifth Amendment Right To Counsel

State v. Morris, 332 N.C. 600, 422 S.E.2d 578 (1992). An officer advised in-custody defendant of his *Miranda* rights and asked him if he would like to waive his right to counsel. Defendant responded, "I don't know." Officer then asked him if he would sign a waiver-of-counsel form. Defendant responded, "No, because I don't know how much I want to tell you." The court ruled that defendant invoked his right to counsel when he refused to sign waiver form. The court stated that defendant's statement when refusing to sign waiver form was negative because, without the assistance of counsel, he did not know his legal rights and position—and until he did—he could not know how much he was willing to say.

(1) Defendant Invoked Right To Counsel; No Questions Permitted About Unrelated Crimes
(2) Gun Admissible Under Inevitable Discovery Exception

State v. Pope, 333 N.C. 106, 423 S.E.2d 740 (1992). (1) Defendant invoked right to counsel on two occasions (on 17 September 1987, when he told detective that he did not want to answer any questions then, but he might be willing to make a statement after he talked with a lawyer; on 2 October 1987, when he told detective that he did not want to talk until he conferred with an attorney). The court ruled that detectives improperly initiated interrogation about unrelated crimes (the defendant remained in continuous custody after his assertions for counsel). See Arizona v. Roberson, 486 U.S. 675 (1988). (2) Although defendant's admissions, obtained in violation of *Arizona v. Roberson*, led to the discovery of the handgun used in a murder, court ruled that the gun and tests performed on handgun were admissible under the inevitable discovery exception; see State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992). Handgun was found under seat in 1953 model Ford truck owned by Alan Estridge. Estridge later sold the truck, and testified at the suppression hearing that when he sells something, he looks in "every crack and crevice of the truck—car or anything—to make sure there's nothing valuable in there or anything left, or even change." He also testified that if he had found handgun, he would have delivered it to the detectives.

Officer Properly Clarified Defendant's Mistaken Signature On *Miranda* Waiver

State v. McKoy, 332 N.C. 639, 422 S.E.2d 713 (1992). In-custody defendant indicated to officers that he wanted to waive his *Miranda* rights. The defendant was given a waiver form, but he signed at the place on the form that indicated that he did *not* waive his rights. Officers then asked defendant whether he had made a mistake. The defendant indicated that he still desired to answer questions and did not want a lawyer, and he scratched his signature from the form and signed in the appropriate place for a waiver of rights. The court ruled that officers properly may ask questions to clarify the apparently mistaken way in which the defendant answered their questions.

(1) Officers Had Probable Cause To Make Warrantless Arrest For Felony
(2) Defendant Was Not In Custody And Therefore Did Not Have *Miranda* Right To Counsel
(3) Defendant Did Not Assert Right To Counsel; Even If He Did, He Executed Valid Waiver

State v. Medlin, 333 N.C. 280, 426 S.E.2d 402 (1993). (1) Atlantic Beach officers arrested defendant in a breezeway outside motel room for murder and robbery committed in Wake County, based on mistaken belief that arrest warrant had been issued in Wake County for these offenses. Court determines, however, that Atlantic Beach officers had sufficient information to establish probable cause to arrest, based on the facts in this case. Therefore, the warrantless arrest was proper. (2) When Atlantic Beach officers learned that there were no arrest warrants for the defendant after they had brought him to the police station, they told him that he was not under arrest and was free to leave, that investigators were coming from Wake County and wanted to

talk to him, that he could stay and move around the police station at will, and that if he needed anything, to let them know. The defendant indicated that he wanted to stay, and in fact remained there and later gave statements to the officers. Based on these and other facts, the court concluded that the defendant was no longer in custody, and therefore he was not entitled to *Miranda* rights, including the right to counsel under Edwards v. Arizona, 451 U.S. 477 (1981). Therefore the court ruled that it was unnecessary to decide whether the defendant properly waived his right to counsel. (3) (Three-justice plurality) Assuming the defendant was in custody and did have a right to counsel, defendant effectively waived this right. In response to officer's question concerning desire for counsel, defendant stated, "Yes—I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial." The officer indicated to the defendant that he was not personally going to get an attorney for the defendant, but he would get a telephone book for the defendant so that he could look up an attorney. Defendant then responded, "No, sir, I don't want an attorney." Plurality opinion stated that defendant did not invoke his right to counsel since he did not indicate that he wanted the assistance of counsel during questioning (defendant later wrote on his *Miranda* form regarding a lawyer, "Not at this time but when I go to court"). Even if defendant's response was an ambiguous request for counsel, the officer's response was an attempt to clarify whether the defendant in fact wanted counsel.

Defendant Was Not Seized Under Fourth Amendment Or State Constitution

State v. Farmer, 333 N.C. 172, 424 S.E.2d 120 (1993). Based on facts in this case, officers' encounter and conversation with defendant on the roadside was not a seizure under Fourth Amendment or North Carolina Constitution. Defendant had no objective reason to believe that he was not free to end his encounter with the officers and to proceed on his way.

Error To Admit Evidence Of Defendant's Refusal To Consent To Search

State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993). Evidence of the defendant's refusal to give consent to search is not admissible.

Officer's Statements In Search Warrant Affidavit Were Not Deliberately False Or Made With Reckless Disregard Of Truth

State v. Barnes, 333 N.C. 666, 430 S.E.2d 223 (1993). Court examined officer's statements in search warrant affidavit and determined that they were not deliberately false or made in reckless disregard of the truth under Franks v. Delaware, 438 U.S. 154 (1978).

Capital Case Issues

(1) Prospective Juror Properly Excused For Cause On Death Penalty Issue
(2) Court Reaffirms Pattern Jury Instruction On Heinous, Atrocious, Or Cruel

State v. Syriani, 333 N.C. 350, 428 S.E.2d 118 (1993). (1) Based on all of the prospective juror's answers (including his response, "I could possibly say yes" to the prosecutor's question whether his beliefs would prevent or substantially impair the performance of his duties in

accordance with the court's instructions and his oath), which revealed that he did not believe in the death penalty and his views on the death penalty would interfere with the performance of his duties at both the guilt and sentencing phases, court upheld removal of the prospective juror for cause. (2) Court reaffirmed constitutionality of N.C.P.I.—Crim. 150.10 (1992) on definition of aggravating circumstance of especially heinous, atrocious, or cruel.

No-Significant-Prior-Criminal-History Statutory Mitigating Factor Should Have Been Submitted

State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992). Evidence showed that the defendant had no record of criminal convictions and her prior criminal history consisted of using illegal drugs and stealing money and credit cards to support her drug habit. The court ruled that this evidence required trial judge to submit, without regard to wishes of the state or defendant, the statutory mitigating factor of no significant prior criminal history. See also State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988); State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985).

(1) Evidence Of Victim's Good Character Admitted At Trial Was Admissible At Penalty Phase
(2) "Especially Heinous, Atrocious, Or Cruel" Properly Submitted

State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993). (1) When evidence of victim's good character was properly admitted at capital trial, it was also proper to be admitted at capital sentencing hearing under G.S. 15A-2000(a)(3) [court noted that defendant's Eighth Amendment argument was foreclosed by Payne v. Tennessee, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991)]. (2) When defendant was convicted of first-degree murder on theories of torture and premeditation and deliberation, it was proper to submit aggravating circumstance of "especially heinous, atrocious, or cruel."

(1) *Witherspoon*/*Witt* Error Only Affects Sentencing Hearing
(2) Statute Doesn't Require Bench Conferences To Be Recorded; Reconstruction Of Subject Matter Is Required On Request
(3) Course-Of-Conduct Aggravating Factor Was Properly Submitted, Although Conduct Was Twenty-Six Months Apart

State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992). (1) Court reaffirmed prior ruling in State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990) that any *Witherspoon/Witt* error in death qualifying prospective jurors affects only the capital sentencing phase; defendant is not entitled to new trial. (2) G.S. 15A-1241 doesn't require that bench conferences between trial judge and attorneys must be recorded. If, however, attorney for either side requests that subject matter of private bench conference be set out in the record for possible appellate review, trial judge must reconstruct matters discussed, as accurately as possible. (3) The court ruled that evidence of defendant's murder of two sisters, committed twenty-six months apart, was sufficient evidence to support the course-of-conduct aggravating factor under G.S. 15A-2000(a)(11). Court noted similar motivations for both murders (defendant's overpowering desire to assert his

relationship with his children) and that victims were sisters. Evidence also showed defendant had another motive to kill them: he believed they had taken advantage of him in a cocaine deal. Also, the *modus operandi* was the same for both murders (both victims were shot in the back of the head, were naked when killed, wrapped in similar plastic and sheets, and buried in shallow graves). See the court's discussion of the factors to consider in determining the sufficiency of evidence for this aggravating factor.

Judge's Private Conversation With Prospective Jurors Before Capital Defendant's Case Called For Trial Did Not Violate Defendant's Rights

State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993). Trial judge on 14 August 1990 first announced commencement of criminal session and welcomed pool of potential jurors. Judge then acknowledged names of five potential jurors who had requested to speak with the judge about jury service. Judge then held unrecorded bench conferences with the five jurors and excused three of them. Clerk then administered oath to jury pool. Judge authorized the calling of the calendar. After the calendar was called, the judge was advised that defendant's capital case would be called for trial. The court ruled that capital defendant's nonwaivable state constitutional right to be present at all stages of his or her trial was not violated because defendant's trial has not begun when the judge's unrecorded bench conferences with prospective jurors took place; they occurred before any case had been called for trial.

Conduct Of Jury View Of Home Did Not Violate Defendant's State Constitutional Rights

State v. Harris, 333 N.C. 543, 428 S.E.2d 823 (1993). During a jury view of the home where the homicide was committed, members of jury were permitted to roam independently about the home and were not held together as a body to inspect the home. The trial judge, prosecutors, defense counsel, and the defendant were all present at the home. The court ruled that this did not violate the defendant's state constitutional right to be present at all stages of capital trial or right to unanimous jury verdict.

Evidence

Expert Testimony on Diminished Capacity Was Improperly Excluded

State v. Daniel, 333 N.C. 756, 429 S.E.2d 724 (1993). Defendant was on trial for murder of one person and assault with a deadly weapon with intent to kill inflicting serious injury of another person. Psychiatric expert's testimony that, as a result of defendant's chronic alcohol abuse, he suffered from organic impairment of brain functioning and from a loss of brain tissue that impaired his ability to think, plan, or reflect, could assist jury in determining a fact at issue—whether defendant had premeditated and deliberated. Expert's testimony that defendant was unable to form specific intent to kill at time of shootings could assist jury in determining whether defendant intended to kill victims when he shot them. The court ruled that trial judge erred in not admitting this testimony.

Defense Question Of Psychiatric Expert Should Have Been Allowed

State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993). Defendant offered defense of insanity to murder charges. State's psychiatric expert testified on direct examination that the defendant at the time of the killings knew the nature and quality of his acts and the difference between right and wrong. On cross-examination, the trial judge sustained the state's objection to the defendant's question of the expert, "Is it your opinion that at the time [the defendant] committed these crimes, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired?" The court ruled that trial judge erred in not allowing this question of the expert, because such evidence has "some tendency" to prove the defendant was insane.

Murder Victim's Statements Admissible Under Rule 803(3)

State v. Walker, 332 N.C. 520, 422 S.E.2d 716 (1992). Friends and family of the murder victim testified about statements by the victim indicating that the defendant had hit, grabbed, kicked, shaken, and shoved her, causing the injuries they observed. The court ruled that these hearsay statements were admissible under the state-of-mind exception, Rule 803(3). They tended to show the nature of the victim's relationship with defendant and the impact of defendant's behavior on the victim's state of mind before the murder (particularly relevant in this case because the main issue was whether the victim was murdered or had committed suicide). Also, the victim's explanation of the origin of her cuts and bruises tended to disprove the nonabusive relationship defendant had described. See also State v. Holder, 331 N.C. 462, 418 S.E.2d 197 (1992); State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990); State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

(1) Pathologist Properly Used Terms "Torture" and "Sexual Assault" In Describing Injuries
(2) Cowboy Boots Used To Stomp Victim May Be Deadly Weapon
(3) State's Character Evidence Was Admissible Under Rule 404(a)(2)

State v. Jennings, 333 N.C. 579, 430 S.E.2d 188 (1993). (1) Expert pathologist properly used terms "torture" and "sexual assault" in describing pattern of injuries committed on body of murder victim, based on the facts in this case. (2) Cowboy boots used to stomp murder victim may properly by found by jury to be a deadly weapon. (3) Evidence of defendant's character from nurse's testimony—he was a nice patient, did not cause any problems or exhibit dangerous behavior, and did not act like he did not know what was going on—was admissible under Rule 404(a)(2) to rebut prior evidence elicited by defendant on cross-examination of state's witnesses that attempted to show victim suffered from dementia and was dangerous to himself.

Evidence Admissible To Explain Evidence Offered By Other Party

State v. Jeffries, 333 N.C. 501, 428 S.E.2d 150 (1993). State's evidence showed that defendant and George Robinson acted in concert to commit crimes. Detective testified that Robinson was arrested for the crimes. Trial judge would not let defendant elicit testimony, on cross-examination

of detective, that charges against Robinson were dismissed. The court ruled that trial judge erred; court stated that assuming evidence that defendant attempted to introduce would have been inadmissible if offered originally, it became admissible when the detective testified on this subject (when party introduces evidence favorable to its case, other party has right to introduce evidence to explain or rebut such evidence, although latter evidence would be inadmissible had it been offered initially). For a case on the admissibility of evidence that the state instituted and then dismissed charges against a person other than the defendant, see State v. Williams, 90 N.C. App. 614 (1988).

No Foundation Requirement For Present Recollection Refreshed, Rule 612

State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992). A witness is not required to state that he or she cannot sufficiently recall a matter before using a writing or object to refresh recollection under Rule 612. The rule simply requires that an adverse party is entitled (under certain conditions) to production of the writing or object that a witness uses to refresh memory. Court determined that witness used notes during his testimony to refresh recollection; witness's testimony was not a mere recitation of his notes (and thus was not, in effect, past recollection recorded).

Medical Evidence Of Penetration Relevant Even Though Not Mentioned By Child Victim

State v. Baker, 333 N.C. 325, 426 S.E.2d 73 (1993). Defendant was charged with taking indecent liberties with a minor, who testified about the defendant's rubbing her private parts with his hand on the outside of her panties. A pediatrician testified that a physical examination of the minor's vaginal opening showed evidence that she had been penetrated. Reversing the Court of Appeals [106 N.C. App. 687, 418 S.E.2d 288 (1992)], the court ruled that the evidence was relevant under Rule 404(b); the fact that evidence of penetration would also support the uncharged offense of rape or sexual offense does not adversely affect its relevance to the indecent liberties charge.

Miscellaneous

Defendant Has Constitutional Right To *Ex Parte* Hearing When Giving Evidence To Support Appointment Of Mental Health Expert

State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993). When indigent defendant timely moves for appointment of psychiatric or psychological expert, the hearing on the motion must be conducted *ex parte* if the defendant requests. See also State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993) (similar ruling).

Defendant's Challenge For Cause Of Prospective Juror Should Have Been Allowed

State v. Cunningham, 333 N.C. 744, 429 S.E.2d 718 (1993). Court, after examining in detail questioning and responses of prospective juror, determined that defendant's challenge for cause should have been allowed: juror demonstrated either confusion about, or a fundamental

misunderstanding of, the principles of the presumption of innocence or a simple reluctance to apply those principles should the defense fail to present evidence of defendant's innocence.

No Prima Facie Case Of State's Racial Discrimination In Exercising Peremptory Jury Challenges

State v. Beach, 333 N.C. 733, 430 S.E.2d 248 (1993). Court, after setting out all of state's and defendant's challenges for cause and peremptory challenges, affirmed trial judge's ruling that (white) defendant failed to show a *Batson* prima facie case of racial discrimination in state's exercise of peremptory challenges (although, of thirteen black jurors who were not challenged for cause, state exercised peremptory challenges to nine or seventy percent).

Defendant Didn't Want Second-Degree Murder Submitted To Jury—No Relief On Appeal

State v. Williams, 333 N.C. 719, 430 S.E.2d 888 (1993). Defendant is not entitled to relief on appeal based on argument that second-degree murder should have been submitted to jury when defendant at charge conference specifically requested that such offense not be submitted.

(1) State Not Bound By Defendant's Exculpatory Statement It Introduced In This Case (2) Motion For Appropriate Relief In Trial Division During Ten-Day Appeal Period

State v. Rannels, 333 N.C. 644, 430 S.E.2d 254 (1993). (1) Based on the facts in this case, court ruled that state was not bound by defendant's exculpatory statement it introduced in the state's case in chief, because there was other state's evidence tending to contradict the statement and that would permit jury reasonably to conclude that the defendant was guilty. See also State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975). (2) Judgments against defendant were entered on 22 August 1989 and his notice of appeal was also entered on that date. Defendant filed motion for appropriate relief on 30 August 1989 within the ten-day appeal period. The court ruled, based on G.S. 15A-1448, that motion is properly before trial division, not appellate division.

District Court Judge Censured For Finding Defendants Guilty Of Reckless Driving At Impaired Driving Trials

In re Martin, 333 N.C. 242, 424 S.E.2d 118 (1993). Supreme court censured district court judge who found defendants guilty of reckless driving during impaired-driving trials, when judge knew that such actions were inappropriate (reckless driving is not a lesser-included offense of impaired driving). Court noted that judge's actions did not result merely from errors of judgment or law; judges may not be disciplined for these kinds of errors. Instead, judge was being disciplined because he purported to exercise jurisdiction when he knew that none existed.

Kidnapping: Defendant's Releasing Victim In Safe Place Must Be Voluntary

State v. Heatwole, 333 N.C. 156, 423 S.E.2d 735 (1992). Defendant let hostage out of house while it was surrounded by law enforcement officers. The court ruled that releasing kidnap victim when kidnapper is aware he or she is cornered and outnumbered by officers is not voluntary;

sending victim out into focal point of officers' weapons is not a safe place under first-degree kidnapping.

Conspiracy Conviction Upheld Although Co-Conspirator's Charges Dismissed By State

State v. Gibson, 333 N.C. 29, 424 S.E.2d 95 (1992). Defendant was convicted of conspiracy to commit murder and armed robbery. Conspiracy charges against co-defendant were dismissed by state under a plea agreement. Court upheld the conviction by ruling that a conspiracy conviction must be set aside only when all but one of the conspirators has received an acquittal.

Defense Lawyer's Argument Didn't Concede Defendant's Guilt Without His Consent

State v. Greene, 332 N.C. 565, 422 S.E.2d 730 (1992). Court reviews defense lawyer's jury argument in murder case and determines that it did not violate the ruling in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985) (*Harbison* ruled that defense lawyer, without defendant's consent, improperly argued that jury should find defendant guilty of involuntary manslaughter). The court stated that jury argument in this case was that defendant was innocent of all charges, but if he was to be found guilty of any charge, it should be involuntary manslaughter (because the evidence came closer to proving that crime than the more serious homicide offenses).

Denial Of Funds for Psychiatric Expert Upheld

State v. Hood, 332 N.C. 611, 422 S.E.2d 679 (1992). When the only information to support motion for appointment of psychiatric expert to assist defense was a court-ordered competency evaluation report (which affirmatively showed that defendant's mental state would *not* be a factor), trial judge properly denied the motion; court follows State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990).

Resentencing After Appellate Remand Under Fair Sentencing Act

State v. Hemby, 333 N.C. 331, 426 S.E.2d 77 (1993). When convictions with equal presumptive sentences are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to impose a sentence, nothing else appearing in the record, the sentence—for purposes of appellate review—will be considered [considering G.S. 15A-1340.4(a)] equally attributable to each conviction. Thus, if a trial judge consolidates three Class H felonies and imposes a three-year sentence, one year is attributable to each Class H felony. If the appellate court reverses one of the Class H felonies and remands for resentencing, then the maximum punishment on resentencing for the two remaining felonies is two years (since a defendant cannot receive a longer sentence on resentencing under G.S. 15A-1335).

North Carolina Court of Appeals

Arrest, Search, and Interrogation Issues

Reasonable Suspicion for Investigatory Stop Was Properly Based on Information From Another Officer

State v. Battle, 109 N.C. App. 367, 427 S.E.2d 156 (1993). Officer Harmon responded to disturbance call at washerette and saw defendant seated behind steering wheel of red Pontiac. Officer noticed odor of alcohol on defendant's breath (defendant also performed physical tests poorly) and officer told defendant not to drive vehicle since he believed defendant was impaired by alcohol. Officer left washerette and radioed officer Beekin to be on lookout for this Pontiac (and gave Beekin the license plate number). Officer Beekin later saw Pontiac leave washerette, followed it for four blocks (and did not see anything unusual about its operation), and then stopped it. The court ruled that officer Harmon, before he communicated request to be on the lookout for the Pontiac, had reasonable suspicion that defendant, impaired by alcohol, would leave the parking lot operating the vehicle. Although officer Beekin did not personally have information to establish reasonable suspicion and had not been told that information by officer Harmon, officer Beekin validly stopped the Pontiac based on Harmon's request, which was based on reasonable suspicion.

(1) Reasonable Suspicion Existed To Stop Vehicle
(2) Probable Cause Existed To Search Entire Vehicle

State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993). (1) Reasonable suspicion existed to stop vehicle based on following facts: trained drug officer saw defendant driving slowly into neighborhood known for its violence and drugs; defendant then engaged two different groups of people in conversation from car and went inside house personally known to officer because he had made drug arrests there; defendant then returned to car after few minutes and lit cigarette which he shared with two passengers until cigarette was gone and car was filled with smoke; based on his training, officer believed cigarette was marijuana cigarette; defendant then placed plastic bag in trunk of car and returned back into house alone for about thirty seconds; when defendant returned to car, he carefully concealed object underneath driver's seat. (2) After officer stopped car, officer opened passenger door to question passenger, and he saw two needles and syringes in small compartment on car door; officer then arrested passenger for possession of drug paraphernalia. The court ruled that officer then had probable cause to search rest of car for more contraband, including area underneath driver's seat, based on United States v. Ross, 456 U.S. 798, 102 S. Ct. 2157, 72 L.Ed.2d 572 (1982) and State v. Martin, 97 N.C. App. 19, 387 S.E.2d 211 (1990).

Officer's Smelling Of "White Liquor" Established Probable Cause To Search Vehicle

State v. Corpening, 109 N.C. App. 586, 427 S.E.2d 892 (1993). Deputy sheriff responded to report that defendant's van had caught fire (fire had been extinguished and wrecker had been called before deputy arrived) and was off highway in lot of old store. Deputy, who had been officer for thirteen years and had smelled "white liquor" many times, detected odor of that

substance coming from van. The court ruled: (1) deputy's detection of odor was sufficient to establish probable cause to search van (in addition, defendant acted very nervous and had placed cardboard over burned-out window); and (2) warrantless search of van was proper, based on State v. Isleib, 319 N.C. 634, 356 S.E.2d 573 (1987).

Warrantless Search Of Film Canisters Not Justified By Plain View Doctrine

State v. Sapatch, 108 N.C. App. 321, 423 S.E.2d 510 (1992). Officer entered store to conduct administrative ABC inspection and saw violation being committed (alcohol consumption after 1:30 a.m.). Officer approached defendant-owner, who was sitting behind counter with an open container of beer. As the officer reached for the beer, he saw two film canisters on a shelf. He opened them and discovered rock cocaine. The court ruled that opening the canisters was not justified as an administrative inspection search and was not justified under the plain view doctrine because the officer did not have probable cause to believe that the canisters contained evidence of a crime, based on the facts of this case.

Probable Cause Existed To Issue Search Warrant For Home

State v. Witherspoon, 110 N.C. App. 413, 429 S.E.2d 783 (1993). The court ruled that search warrant for defendant's home was based on probable cause when (1) concerned citizen told officers that he had been in defendant's home within past 30 days and had seen about 100 marijuana plants growing in crawl space under home with use of light system with automatic timers; concerned citizen had spoken with defendant often about his growing these plants, and concerned citizen had used marijuana and had seen it growing in the past; (2) officers corroborated concerned citizen's information about the kind of car defendant drove and parked in his driveway to house, and officers also checked power company's records that showed that defendant had been paying power bill for house in past six months. Court also rejected defendant's argument that information was stale because concerned citizen had seen marijuana plants within last 30 days, relying on several cases, including State v. Beam, 325 N.C. 217, 381 S.E.2d 327 (1989).

Probable Cause Existed To Arrest Defendant For Obstructing Officer

State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484(1992). Officer had probable cause to arrest defendant (who was stopped for speeding) for obstructing officer when (i) defendant was standing near officer, who was attempting to use his car radio to check the vehicle's registration, and defendant was speaking in loud and hostile manner, (ii) defendant refused to return to his car after the officer requested three times that he do so, and (iii) officer warned defendant that he would arrest him for obstructing an officer, but defendant did not desist.

Miranda* Warnings Required Before Questioning By Social Worker, But Later Confession to Officer Was Admissible under *Oregon v. Elstad

State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147 (1993). Defendant was arrested for federal charge of child abduction and was committed to the county jail. A social worker in the county

child protective services unit identified herself to the defendant and told the defendant that she was conducting an investigation of alleged sexual abuse and neglect of a boy with whom the female defendant had had a relationship. Defendant confessed to the social worker. Two days later, a detective talked with the defendant in the jail after giving her *Miranda* warnings and obtaining a proper waiver. Defendant again confessed. Based on evidence that the social worker was working with the sheriff's department on the case before interviewing the defendant in jail, the court ruled that the social worker was an agent of the state and thus was required to give *Miranda* warnings before her interview with the defendant. [Note, however, that the court did not discuss Illinois v. Perkins, 110 S. Ct. 2394, 110 L.Ed.2d 243 (1990), which ruled that when a person does not know that he or she is talking to a government agent, there is no reason to assume the possibility of coercion, which is the underlying principle of the *Miranda* decision; thus *Miranda* warnings are not required. If the defendant did not know that the social worker was a government agent, then *Illinois v. Perkins* did not require the social worker to give *Miranda* warnings.] Court upheld the admissibility of the defendant's confession to the detective because the confession to the social worker was not coerced; see Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285, 84 L.Ed.2d 222 (1985) and State v. Barlow, 330 N.C. 133, 409 S.E.2d 906 (1991).

Questioning Of Defendant in Hospital Did Not Violate *Miranda*

State v. Garcia-Lorenzo, 110 N.C. App. 319, 430 S.E.2d 290 (1993). Defendant was involved in vehicular accident with bystanders, ran off road, and was injured. Officers transported defendant to hospital (officers and doctors had to restrain him because he was violent with them). Because officer wanted to know whether to look for other victims from accident, officer and then doctor asked defendant whether he was alone in the car. Defendant responded "No, alone" several times. Court affirmed trial judge's conclusions of law that this questioning was not impermissible because (1) it was within the public safety exception to *Miranda*, recognized in New York v. Quarles, 467 U.S. 649 (1984), because officers were concerned that someone else may have been injured and lying undiscovered at the scene, and (2) defendant was not subjected to *interrogation* as defined in Rhode Island v. Innis, 446 U.S. 291 (1980).

No Fifth Amendment Assertion Of Right To Counsel When Not In Custody

State v. Willis, 109 N.C. App. 184, 426 S.E.2d 471 (1993). The defendant may not assert a Fifth Amendment violation when he requested counsel during an interview with law enforcement officers, because he was not in custody when he requested counsel.

Criminal Offenses

Off-Duty Officers Were Officers Under Assault Statute

State v. Lightner, 108 N.C. App. 349, 423 S.E.2d 827 (1992). Uniformed Charlotte police officers were working off-duty for restaurant. When they arrested unruly customer (defendant), defendant resisted arrest and assaulted officers. The court ruled, relying on State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992), that defendant was properly convicted of violating now-repealed G.S. 14-33(b)(4), assault on law enforcement officer.

Conviction For Perjury Before Investigative Grand Jury Is Upheld

State v. Basden, 110 N.C. App. 449, 429 S.E.2d 740 (1993). State tried defendant for committing perjury when he testified during a drug trafficking investigative grand jury. (1) Court rejected defendant's argument that he could not be convicted of perjury because he qualified his responses to questions asked during the grand jury proceedings by using terms such as "I don't think so" or "I don't recall saying that." (2) Court examined facts in this case and determined that defendant's false statements were material (noting that materiality of false testimony is question of law for court rather than fact for jury). Defendant's responses were an attempt to influence grand jury's investigation into extent of county's drug problem, including but not limited to rendering of indictments. Court noted that materiality of any line of inquiry pursued by grand jury must be broadly construed. It is not necessary that defendant's false statements actually impeded the grand jury investigation, only that answers were capable of influencing grand jury on an issue before it, including collateral matters.

Secret Videotaping Of Minor Undressing Constitutes Indecent Liberties Offense

State v. McClees, 108 N.C. App. 648, 424 S.E.2d 687 (1993). Defendant's secret videotaping of minor while she changed clothes at defendant's request constituted indecent liberties offense, even though defendant was not in the room with the minor while she undressed.

Constructive Possession Of Illegal Drugs

State v. Neal, 109 N.C. App. 684, 428 S.E.2d 287 (1993). Officers executing search warrant saw (when approaching apartment to be searched) light shining in bathroom that illuminated heads of two males—one short and one taller. As officers entered apartment, shorter man (defendant Neal) ran from bathroom toward bedroom and taller man (defendant Taylor) was found in bathroom. Tayor was standing over toilet in crouched position, flushing toilet. Bagged cocaine was found on top of toilet. Based on these and other facts, court ruled that evidence of constructive possession was sufficient to support convictions of both Neal and Taylor.

Insufficient Evidence To Support Conviction For Possession Of Diazepam (Valium), Schedule IV

State v. Tuggle, 109 N.C. App. 235, 426 S.E.2d 724 (1993). Evidence was insufficient to support conviction of valium (diazepam), Schedule IV, when evidence showed that officers found white plastic bottle containing 78 (5 milligram) tablets of valium in pocket of coat located in defendant's master bedroom. Court noted that state did not show that the tablets were not issued pursuant to a prescription (the bottle was not submitted as exhibit on appeal) or that the quantity of valium possessed by defendant was larger than amounts normally prescribed.

Acquittal Of Principal Requires Acquittal Of Accessory

State v. Suites, 109 N.C. App. 373, 427 S.E.2d 318 (1993). Defendant pled guilty, pursuant to plea bargain in which she promised to testify against principal in exchange for twelve-year prison sentence, to second-degree murder based on theory of being an accessory before the fact (for which a defendant is punished as a principal, G.S. 14-5.2). The principal was found not guilty of murder. Defendant then moved to set aside her guilty plea at her sentencing hearing. The court ruled that defendant asserted fair and just reason for setting aside guilty plea, since acquittal of principal required as a matter of law that her plea be set aside.

Indictment Alleging Date Of Offense Over Two-Year Period Was Not Improper

State v. McKinney, 110 N.C. App. 365, 430 S.E.2d 300 (1993). Based on the facts in this case, court ruled that indictment for rape of child that alleged date of offense as "July, 1985 thru July, 1987" did not violate defendant's statutory or constitutional rights.

(1) Mother Guilty Of Rape As Aider And Abettor When She Didn't Attempt To Prevent Rape
(2) Mother Properly Convicted Of Indecent Liberties Even Though She Didn't Touch Son

State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993). (1) Defendant, mother of son who was victim of statutory rape by an adult woman, was properly convicted of aiding and abetting the rape when the defendant did not take any reasonable steps to prevent the rape. See also State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982). Defendant was in bed with her son when the adult woman had intercourse with him, and there was no danger to defendant that would have prevented her from stopping the rape. (2) Defendant was properly convicted of indecent liberties with son even though she did not touch her son, when (i) she engaged in anal intercourse with another in her son's presence; (ii) she engaged in vaginal intercourse with another in her son's presence; and (iii) she watched her son engage in vaginal intercourse with an adult woman.

Storage Shed Is "Outhouse" Under Burning Offense In G.S. 14-62

State v. Woods, 109 N.C. App. 360, 427 S.E.2d 145 (1993). Storage building within curtilage of dwelling is an "outhouse" under burning offense in G.S. 14-62. The court stated "[w]e hold that all privies are outhouses but not all outhouses are privies."

Parked Mobile Travel Trailer Was Dwelling For Burglary Offense

State v. Taylor, 109 N.C. App. 692, 428 S.E.2d 273 (1993). Parked mobile travel trailer, used by victim as living quarters, was a dwelling for burglary offense.

(1) Sufficient Evidence Of Kidnapping For Purpose Of Terrorizing Victim
(2) No Need To Submit Lesser Offense Of False Imprisonment In This Case

State v. Surrett, 109 N.C. App. 344, 427 S.E.2d 124 (1993). (1) Defendant grabbed victim in parking lot, pushed her into his car, and drove down street. Victim struggled with defendant as he was driving car (he told her to "lay down and be quiet") and escaped from moving car by climbing out of window. Victim was in car for about one minute. The court ruled that evidence was sufficient to support conviction of kidnapping for purpose of terrorizing victim. (2) Trial judge instructed on lesser offense of felonious restraint but not false imprisonment. The court ruled that judge acted correctly, noting that mere contention that jury might accept state's evidence in part and reject it in part is insufficient to require submission of lesser offense. See also State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

Solicitation To Commit Murder Based On Future Condition

State v. Davis, 110 N.C. App. 272, 429 S.E.2d 403 (1993). Defendant asked undercover SBI agent to kill state's witness when defendant's criminal case was set for trial, and gave agent $50 advance of the $2,000 agent was to be paid. The court ruled that evidence was sufficient to convict defendant of solicitation, because it was clear at conclusion of his meeting with agent that defendant had specific intent at that time that state's witness would be killed on defendant's placing future phone call to agent.

(1) Blood Was Properly Taken From Unconscious Defendant
(2) Defendant's Act Was Proximate Cause Of Death, Despite Victim Being Removed From Life Support

State v. Garcia-Lorenzo, 110 N.C. App. 319, 430 S.E.2d 290 (1993). Defendant's vehicle hit bystander, who was critically injured. Defendant was injured as well. (1) Defendant was violent with officers and doctors at hospital. Doctors decided for medical reasons to sedate the defendant. Blood for alcohol testing was withdrawn from the defendant while he was sedated. The court ruled that none of defendant's constitutional or statutory rights were violated by taking his blood while he was sedated (e.g., court rejected defendant's argument that he was not advised of his rights, including the right to refuse a blood alcohol test while he was conscious). (2) Victim could not breath on his own and the attachment between his head and upper spinal column had been disrupted; victim was in permanent vegetative state. Family decided to remove ventilatory support of breathing machine; victim died twenty minutes later. The court ruled that defendant's act of hitting victim with his car was a proximate cause of the victim's death. Court noted that brain death statute [G.S. 90-323] recognizes that brain death is not sole criterion in determining whether person is dead.

Evidence

Questions Under Rule 608(b) About Witness's Truthfulness

State v. Burton, 108 N.C. App. 219, 423 S.E.2d 484 (1992). Defendant was being tried for assaulting officers while discharging duties. Questions of officer on cross-examination by defendant about (i) whether a number of complaints had been filed against the officer, and (ii) whether the officer had been disciplined about alleged incidents of misconduct, were improper under Rule 608(b) because they were not probative of truthfulness or untruthfulness. Defendant's question of officer on cross-examination if the officer had been dismissed from police department for lying to superior officers about the incident was proper under Rule 608(b), since it was related to officer's truthfulness.

State's Opinion Testimony Was Inadmissible At Child Rape Trial

State v. Hutchens, 110 N.C. App. 435, 429 S.E.2d 755 (1993). Defendant was prosecuted for rape and indecent liberties with daughter. (1) Family counselor, who had not been qualified as an expert, described the victim's emotional state, which the court stated were essentially the characteristics of sexually-abused children. The court ruled that this testimony was error, because such testimony may only be given by expert. (2) The court ruled that testimony of expert on characteristics of sexually-abused children was erroneously admitted as substantive evidence, when it was admissible only to assist jury in understanding behavior patterns of sexually-abused children, under State v. Hall, 330 N.C. 808, 412 S.E.2d 883 (1992) and State v. Kennedy, 320 N.C. 20, 357 S.E.2d 359 (1987).

DNA Evidence Was Admissible

State v. Bruno, 108 N.C. App. 401, 424 S.E.2d 440 (1993). When unfair prejudice is not clear and there is conflicting expert testimony about interpretation of DNA evidence or when two experts have reached different results based on their independent analyses of the DNA, the jury determines the credibility of the experts and the weight to give their testimony (that is, the DNA evidence is not to be excluded as a matter of law). FBI procedures in this case were not so unreliable that the judge should have excluded DNA evidence from the jury's consideration.

Indirect Use Of Polygraph Evidence Was Improper

State v. Willis, 109 N.C. App. 184, 426 S.E.2d 471 (1993). State's witness, a polygraph examiner, testified about his interview with the defendant, including defendant's responses to three questions asked of the defendant. The examiner told the defendant that he was not giving truthful answers to those questions. The examiner gave three scenarios to the defendant about how his wife may have been killed. Defendant stated that there was little truth in all three scenarios. No evidence was placed before the jury about the witness being a polygraph examiner or that a polygraph test was administered. However, the court ruled that since the sole basis for the witness's testimony was his interpretation of the polygraph test results, it was error—under the principles of State v. Grier, 307 N.C. 628, 300 S.E.2d 351 (1983)—to permit the witness to

testify about the truth or falsity of the defendant's answers to the witness.

Child's Hearsay Statements Were Properly Admitted

State v. Rogers, 109 N.C. App. 491, 428 S.E.2d 220 (1993). Defendant was convicted of taking indecent liberties with five-year-old victim. Court rejected defendant's arguments that: (1) trial judge's finding that victim was incompetent as witness renders her out-of-court statements *per se*, or even presumptively, unreliable; and (2) finding of incompetency under standards of Rule 601(b) is inconsistent as matter of law with finding that child may nevertheless be qualified as out-of-court declarant to relate truthfully personal information and belief. Court upheld victim's various out-of-court statements as excited utterance [803(2)] (three days after assault) and medical diagnosis or treatment [803(4)] (statements to doctor, mother, and treating psychologist).

Defendant Had Right To Cross-Examine Victim About Letter Requesting Sex

State v. Guthrie, 110 N.C. App. 91, 428 S.E.2d 853 (1993). In trial of second-degree sexual offense and indecent liberties where defendant was victim's step-grandfather, state introduced several letters that victim wrote to defendant. Letters contained promises from victim inferring that she would provide sex for defendant if he would take her to school or lend her money; victim testified that defendant dictated letters to her. Defendant sought to question victim on cross-examination about letter she voluntarily wrote to school friend in which she asked friend to have sex with her (on voir dire, victim admitted to voluntarily writing letter to friend). The court ruled that judge erred in prohibiting such cross-examination. Letter is not barred by Rule 412 (rape shield), because it is not evidence of sexual behavior; it is evidence of conversation. Letter was also relevant to impeach victim's credibility (showing she voluntarily wrote at least one letter to another person that is similar to letters written to defendant provides inference that she wrote letters to defendant voluntarily).

Evidence Admissible Under Business Records Exception To Hearsay Rule

State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993). In embezzlement prosecution, state presented evidence through detective who had seized various documents from business office, including copies of checks written to business as deposits by potential purchasers of condominium units and receipts for public offering statements signed by purchaser and salesperson. Defendant objected to documents because purchasers did not testify about authenticity of purchase documents. State called salesman, who identified his signature on reservation deposit receipts and verified that he had received checks, and stated that all documents were kept in business office in course of regularly-conducted sale of condominium units and were created at time of sales transaction. The court ruled that salesman was "other qualified witness" under Rule 803(6) and evidence was properly admitted under that rule.

Murder Victim's Statements About Prior Assaults Admissible Under State-Of-Mind Exception

State v. Mixion, 110 N.C. App. 138, 429 S.E.2d 363 (1993). Hearsay evidence of statements by murder victim about defendant having committed prior assaults and threats against her and damaging her property were admissible under state-of-mind hearsay exception, Rule 803(3). Relying on State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990), court also ruled that hearsay evidence is admissible even though victim did not express fear of defendant when making hearsay statements to witnesses.

Defendant's Threatening Letters To Wife Were Not Within Marital Communications Privilege

State v. McKinnish, 110 N.C. App. 241, 429 S.E.2d 443 (1993). While in jail awaiting trial, defendant sent his wife two threatening letters attempting to get her to testify to certain facts for his alibi defense and offering material reward for her testimony. State used letters in cross-examining wife when she testified for defendant at trial. The court ruled that letters were not within marital communications privilege because (1) they contained threats against wife, and (2) they show that defendant was unable to rely on affection, confidence, and loyalty engendered by his marital relationship; rather, defendant offered material reward in attempt to persuade wife to testify in his favor.

Miscellaneous

(1) Sufficient Evidence For Vehicular Second-Degree Murder Conviction
(2) Evidence Of Prior Convictions Admissible To Prove Malice
(3) Convictions Used To Show Malice Cannot Be Used In Fair Sentencing Act Hearing

State v. McBride, 109 N.C. App. 64, 425 S.E.2d 731 (1993). (1) Sufficient evidence existed to support second-degree murder conviction when defendant, with 0.18 alcohol reading, drove his vehicle on wrong side of highway and hit another vehicle, killing an occupant. Defendant had been convicted twice of impaired driving and three times of driving while license revoked, and he was driving while his license was permanently revoked; he also lied about the ownership of his car to obtain an inspection sticker and had placed illegal tags on the car. (2) Evidence described in the preceding sentence was properly admitted at trial under Rule 404(b) to show malice. (3) Prior DWI and DWLR convictions used to prove malice for second-degree murder could not be used as aggravating factors in FSA sentencing hearing; court cited State v. Hayes, 323 N.C. 306, 372 S.E.2d 704 (1988). Court also noted that DWLR conviction that occurred at same trial of second-degree murder conviction may not be as aggravating factor.

(1) Superior Court Judge May Issue Writ Of Certiorari To Review District Court Judge's Ruling
(2) Defendant's Plea To One Offense (Left Of Center) When Another Offense (Death By Vehicle Based On Left Of Center) Was Pending Didn't Bar State's Prosecution Of Remaining Offense

State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993). On 1 May 1990, defendant was involved in automobile accident with another vehicle in which operator of that vehicle died. Defendant was charged the same day with the infraction of driving left of center and in a separate criminal summons with misdemeanor death by vehicle, based on left-of-center violation. On 18 May 1990, defendant pled responsible before magistrate for left-of-center infraction. On 30 May 1990 in district court, defendant moved to dismiss misdemeanor death by vehicle charge on double jeopardy grounds. District court judge granted motion to dismiss. State's notice of appeal to superior court of dismissal was not perfected properly, because it failed to allege grounds for the appeal. However, state filed in superior court a petition for writ of certiorari, requesting review of district court's dismissal of charge. Superior court judge granted writ and reinstated charge. (1) The court ruled that superior court judge had authority to grant writ under Rule 19 of General Rules of Practice for the Superior and District Courts. (2) Court, rejecting state's argument to contrary, rules that infraction is an "offense" with double jeopardy clause. However, court also rules that plea to left-of-center infraction did not bar prosecution of remaining pending charge of misdemeanor death by vehicle, based on ruling in Ohio v. Johnson, 467 U.S. 493 (1984) (defendant's plea of guilty over prosecutor's objection to one count of multi-count indictment did not bar state's prosecution of greater offense in indictment). Although result of court's ruling appears to be correct, court did not discuss the ruling in Grady v. Corbin, 495 U.S. 508 (1990) [defendant's plea to traffic violations barred later prosecution of vehicular homicide which had essential element the traffic violations to which defendant pled guilty; note that *Grady v. Corbin* was later overruled by the United States Supreme Court in United States v. Dixon, 509 U.S. 688 (1993)]. The court distinguished State v. Griffin, 51 N.C. App. 564, 277 S.E.2d 77 (1981) (defendant was involved in accident with another vehicle, was charged with failing to yield right-of-way, and pled guilty that same day; later, driver of other vehicle died from injuries received in accident; defendant was then charged with death by vehicle; court upheld dismissal of that charge on double jeopardy grounds) on ground that both charges were not filed simultaneously in *Griffin* and death by vehicle charge was not pending when defendant pled guilty to failure to yield right of way. However, the *Griffin* ruling appeared incorrect in any event, because double jeopardy principles do not apply when a defendant pleads guilty to a lesser offense when the greater offense could not be charged (e.g., because the victim had not died yet); see Diaz v. United States, 223 U.S. 442 (1912) and Garrett v. United States, 471 U.S. 773 (1985).

Indictment Need Not Allege That Defendant Aided And Abetted Offense

State v. Ainsworth, 109 N.C. App. 136, 426 S.E.2d 410 (1993). Court rejected defendant's contention that first-degree rape indictment was insufficient because it failed to charge her with aiding and abetting. See also State v. Ferree, 54 N.C. App. 183, 282 S.E.2d 587 (1981).

Defendant's Right To Discovery Of Tests And Data Of Chemist Analyzing Cocaine

State v. Cunningham, 108 N.C. App. 185, 423 S.E.2d 802 (1992). Before drug trial, state provided defendant with laboratory report that described the item submitted for analysis (off-white hard material), the type of analysis requested (analyze for controlled substances), results of analysis (cocaine base-Schedule II, weight 0.4 grams) and disposition of the evidence (unconsumed portion of evidence retained for pick-up). Trial judge denied defendant's motion under G.S. 15A-903(e) to discover all testing procedures and data derived as a result of the chemist's tests: form used by chemist to indicate various tests performed on the substance and result of each graph depicting an infrared scan of the substance. The court ruled that defendant was entitled to discovery of these items under G.S. 15A-903(e) and North Carolina Constitution; a criminal defendant is entitled to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures used by chemists to reach such conclusions.

Joinder Issues

State v. Wilson, 108 N.C. App. 575, 424 S.E.2d 454 (1993). (1) Joinder of the following three offenses was proper against defendant Wilson: (i) house break-in on 10 December 1988 in which .22 caliber rifle was taken; (ii) armed robbery of husband and wife in home on 17 December 1988 in which stolen .22 caliber rifle was used; and (iii) armed robbery of bar on 22 December 1988 in which stolen .22 caliber rifle was used. Court noted that offenses occurred within two-week period; two offenses occurred when perpetrators wore both ski masks and gloves, and state's accomplice-witness and defendant participated in all three offenses. (2) Defendant Clark, charged only with 22 December 1992 offense, was improperly joined for trial with Wilson. Clark was prejudiced and deprived of fair trial because jury considered evidence of these two other charges for which Clark was not involved.

Miscellaneous

Written Findings Are Not Required In Setting Secured Bond

State v. O'Neal, 108 N.C. App. 661, 424 S.E.2d 680 (1993). Judicial official is not required to make written findings in setting secured bond, except as provided in G.S. 15A-535(a) (written reasons required only if required by senior resident superior court judge).

(1) District Court Judge May Not Enter "Not Guilty" Verdict After Setting Aside "Guilty" Verdict, Based On Facts In This Case
(2) District Court Judge May Set Aside Sentence and Resentence Defendant If Motion For Appropriate Relief Is Made Within Ten Days Of Sentencing

State v. Morgan, 108 N.C. App. 673, 425 S.E.2d 1 (1993). (1) Defendant was convicted of DWI and appealed to superior court for trial de novo. Two days later, the district court judge set aside his verdict of "guilty" of DWI as contrary to the weight of the evidence and entered a "not guilty" verdict for that charge. The court ruled that judge had authority to set aside verdict, but judge did not have authority to enter "not guilty" verdict, based on these facts. Court remanded case for

new trial. (2) When motion for appropriate relief is made within ten days of sentencing under G.S. 15A-1414(b)(4) that asserts that evidence does not support the sentence, trial judge has discretion to resentence the defendant if the judge finds that the evidence does not support the sentence.

Defendant Did Not Have Fair And Just Reason To Withdraw Guilty Plea

State v. Marshburn, 109 N.C. App. 105, 425 S.E.2d 715 (1993). Defendant was charged on 11 April 1990 with accessory after fact of murder and was appointed lawyer the next day. On 11 October 1990, defendant entered guilty plea in exchange for his testimony against those charged with murder. Prayer for judgment was continued for this purpose. Defendant testified, and state later prayed judgment on 3 June 1991. At sentencing hearing, defendant moved to withdraw guilty plea because (1) when he entered guilty plea, he did not know whether he was guilty or not guilty; and (2) he believed that his plea would not count as a conviction in pending federal drug case (when in fact it was so considered). Applying principles from State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990) and State v. Meyer, 330 N.C. 738, 412 S.E.2d 339 (1992), court ruled that defendant did not have "fair and just" reason for withdrawing plea: defendant did not assert his innocence and his misunderstanding about whether his plea would count in defendant's sentencing for federal drug case was irrelevant. The court ruled that defendant must show that misunderstanding must relate to *direct consequences* of his plea, not about the effect of his plea on some collateral matter.

No Implied Acquittal Of Greater Offense When Mistrial Due To Hung Jury

State v. Williams, 110 N.C. App. 306, 429 S.E.2d 413 (1993). Defendant at first trial was tried for assault with deadly weapon with intent to kill inflicting serious injury and mistrial was declared because jury could not reach unanimous verdict. The court ruled that even if jury at first trial had unanimously decided defendant was not guilty of that offense and had deadlocked on a lesser offense, defendant could still be tried for the greater offense, based on ruling in *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982).

Wrong Statutory Reference In Indictment Does Not Invalidate Indictment

State v. Jones, 110 N.C. App. 289, 429 S.E.2d 410 (1993). Wrong statutory reference to crime charged in indictment does not invalidate indictment.

Harmless Error Analysis Inapplicable To Ineffective Assistance Of Counsel Violation

State v. May, 110 N.C. App. 268, 429 S.E.2d 360 (1993). Trial judge found that defendant's guilty plea to second-degree murder and armed robbery was based on ineffective assistance of counsel, but found violation was harmless because if defendant had gone to trial, he would have been convicted of first-degree murder. The court ruled that harmless error analysis does not apply to ineffective assistance of counsel violations, and therefore guilty plea must be set aside. Court noted that defendant may now be tried for first-degree murder (but see G.S. 15A-1335).

Sheriff's Transferring Seized Material To Social Services Department Was Not Improper

In re Beck, 109 N.C. App. 539, 428 S.E.2d 232 (1993). Sheriff's deputies, executing search warrant, seized sexual explicit materials dealing with female bondage from home of husband and wife. Criminal charges were later dismissed against husband and wife, and then sheriff's department transferred seized materials to Department of Social Services, who had instituted proceedings to terminate parental rights of husband and wife. Court rejected argument of husband and wife that sheriff's department had duty to return materials to them after criminal charges had been dismissed, and court ruled that transfer of materials to social services department was not improper. (Court noted that husband and wife did not ever request return of materials, and even if materials had been returned, social services department could have obtained them by subpoena.)

Alimony Claim Stricken When Party Asserted Privilege Against Self-Incrimination

Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993). Plaintiff-husband filed for absolute divorce against defendant-wife. Defendant filed counterclaim for alimony. Plaintiff asserted affirmative defense to counterclaim that defendant was barred from receiving alimony because defendant had committed adultery. During deposition, defendant asserted Fifth Amendment privilege against self-incrimination in response to plaintiff's question about defendant's having committed adultery. Trial court ruled that defendant thereby had waived her right to assert claim for alimony. The court ruled that although defendant had right to assert privilege against self-incrimination, by doing so she abandoned her alimony claim. Defendant must choose between shielding herself from criminal charge and abandoning claim.

Sentencing

Defense Counsel's Admission Of Prior Conviction In Motion Sufficient Evidence For Sentencing

State v. Duffy, 109 N.C. App. 595, 428 S.E.2d 695 (1993). Before trial, defense counsel filed motion *in limine* to prohibit state from offering evidence of other crimes committed by defendant, including California conviction for sexual assault. State offered motion as evidence of prior conviction in Fair Sentencing Act sentencing hearing. The court ruled that admission of prior conviction in motion was sufficient evidence to support trial court's finding of statutory aggravating factor of prior conviction punishable by more than 60 days' imprisonment.

Fair Sentencing Act Issues

Prosecutor's Statement About Amount Of Restitution Was Insufficient

State v. Buchanan, 108 N.C. App. 338, 423 S.E.2d 819 (1992). A prosecutor's statement about the amount that should be awarded as restitution is insufficient to support a judge's order or recommendation of restitution. There must be other evidence to support the amount of restitution.