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RECENT CASES AFFECTING CRIMINAL LAW & PROCEDURE
(October 19, 1993 - May 17, 1994)

North Carolina Supreme Court

Arrest, Search, and Confessions

(1) Defendant Did Not Assert Right To Counsel Under *Miranda*
(2) Defendant's Sixth Amendment Right To Counsel Attached At First Appearance, Not Arrest

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). (1) On May 31, 1990, the defendant was in custody at a police department as a murder suspect. He had not yet been given *Miranda* warnings or interrogated. About fifteen minutes before being taken to the magistrate's office for service of arrest warrants charging him with murder and other offenses, the defendant asked officer Batchelor if he had to get an attorney (defendant's inquiry was not in response to questions by the officer). Batchelor told the defendant that the question of a lawyer had to be his decision and asked the defendant if he could afford to hire an attorney. Defendant said he could not, and Batchelor then told him that the court would appoint an attorney to represent him if he asked for one. About an hour later, Batchelor and another officer properly gave the defendant *Miranda* warnings and obtained a waiver, and obtained a statement. Officers obtained another statement on June 3, 1990. The defendant had a first appearance in district court on June 4, 1990, which was within 96 hours of his arrest on May 31, 1990—as required under G.S. 15A-601(c). (1) Distinguishing State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992), the court ruled that defendant did not assert his Fifth Amendment right to counsel when he asked officer Batchelor if he had to get an attorney. Unlike *Torres*, in this case interrogation was not impending and the defendant had not been told he would be questioned. Batchelor's responses to the defendant's question about an attorney constituted narrow clarification, and the defendant did not ask for an attorney afterwards. Moreover, Batchelor did not attempt to dissuade the defendant from exercising his right to an attorney. Based on the entire context in which the defendant's inquiry was made, defendant did not assert his right to counsel. (2) The court, following State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979), State v. Nations, 319 N.C. 318, 354 S.E.2d 510 (1987), and State v. Tucker, 331 N.C. 12, 414 S.E.2d 548 (1992), ruled that the defendant's Sixth Amendment right to counsel did not attach when defendant was arrested. It did not attach until the defendant's first appearance in district court. Therefore, defendant did not have a Sixth Amendment right to counsel during interrogations on May 31, 1990 and June 3, 1990.

Defendant Did Not Assert Right To Counsel Under *Miranda*

State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (5 November 1993). A fire occurred at a home in which the fifteen-year-old defendant and her grandparents lived. Both grandparents died as a

result of the fire. Assuming that the defendant was in custody when she was given *Miranda* and juvenile warnings in the sheriff's office hours after the fire, the court ruled—distinguishing State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992)—that the defendant did not assert her Fifth Amendment right to counsel when she asked an officer (during his recitation of the warnings) if she needed a lawyer. Her inquiry constituted an ambiguous or equivocal invocation of her right to counsel. The officer's response—that he could not advise her whether she needed a lawyer or not, but he was merely advising her about her right to a lawyer—was a proper narrow response to clarify her intent. Immediately thereafter, her specific affirmative waiver of her rights (including whether she wished to answer questions without a lawyer, parents, guardian, or custodian present) demonstrated that she had not invoked her right to counsel when she asked the officer if she needed a lawyer.

Evidence That Defendant Was Advised Of *Miranda* Rights Was Admissible In This Case

State v. Carter, 335 N.C. 422, 440 S.E.2d 268 (28 January 1994). A detective was permitted to testify that in the police department's interrogation room he advised the defendant of his *Miranda* rights and the defendant indicated he understood those rights. The court ruled that the testimony (1) did not violate Doyle v. Ohio, 426 U.S. 610 (1976) because no evidence was introduced showing that the defendant exercised his right to remain silent; and (2) was relevant in this case because defense counsel consistently throughout the trial had attacked the professionalism of the investigating officers, and the testimony tended to refute the characterization of the officers' conduct as unprofessional.

(1) Exigent Circumstances Supported Warrantless Entry Of House To Arrest Defendant
(2) Wife May Consent To Search Of Premises Shared With Her Husband

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994). (1) Officers arrived at the murder scene and discovered the victim's body, the subject of a brutal stabbing, lying in a common area of an apartment complex. An eyewitness to the murder identified the defendant as the killer. Another witness informed the officers that he had seen the defendant running toward the defendant's apartment shortly after the murder. The officers went to the defendant's nearby apartment and discovered fresh blood on the doorknob of the back door. The officers knocked loudly on the defendant's door and identified themselves as officers, but received no response. They then entered the apartment. The court ruled that officers had exigent circumstances to enter the defendant's home—without consent or an arrest warrant—to arrest the defendant. (2) Overruling State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965) and other cases, the court ruled that a wife may consent to a search of the premises she shares with her husband.

(1) Defendant Did Not Have Standing To Contest Search Of Murder Victim's Car
(2) Defendant Properly Waived *Miranda* Rights Despite Possible Language Differences

State v. Mlo, 335 N.C. 353, 440 S.E.2d 98 (28 January 1994). The defendant was convicted of first-degree murder. (1) The defendant sought to suppress evidence obtained from a search of the murder victim's car. The court ruled that the defendant's unsubstantiated and self-serving statements that the victim had loaned his car to him were insufficient to satisfy his burden of

showing a legitimate possessory interest in the car; thus, the defendant did not have standing to contest the search of the car. There was evidence from the victim's best friend that he had never known the victim to loan his car to anyone. (2) The detective anticipated potential language difficulties in questioning the defendant, and believing that the defendant spoke Vietnamese, he obtained a Vietnamese interpreter. However, the defendant, a native of Vietnam's Montagnard region, spoke Dega as well as some English and Vietnamese. On those occasions when the interpreter assisted the defendant, the defendant was able to continue the interview in English, giving logical responses to the questions asked. During the interview, the defendant appeared to understand the questions and responded most of the time in English without the interpreter's assistance. The court upheld the trial judge's ruling that the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights.

Criminal Offenses

Burglary Indictment Need Not Specify Felony That Defendant Intended To Commit When Breaking And Entering Dwelling

State v. Worsley, 336 N.C. 268, 443 S.E.2d 68 (6 May 1994). The court ruled, relying on State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985) (kidnapping indictment need not specify felony the defendant intended to commit at the time of the kidnapping) and overruling contrary prior cases, that an indictment for burglary need not specify the felony that the defendant intended to commit when breaking and entering the dwelling. It need only allege that the defendant intended to commit a felony. The court noted that a defendant who needs further factual information may make a motion for a bill of particulars under G.S. 15A-925.

Evidence Was Sufficient To Establish Serious Personal Mental Injury For First-Degree Rape Conviction

State v. Baker, 336 N.C. 58, 441 S.E.2d 551 (8 April 1994), *reversing*, 109 N.C. App. 557, 428 S.E.2d 216 (1993). The defendant was convicted of first-degree rape. Evidence showed that in the months after the rape, the victim suffered from depression and loss of appetite, quit her job because she could not handle dealing with the public, moved out of mobile home in which she was raped, contacted a rape crisis center for counseling, had nightmares, could not sleep, and was unable to care for her baby for nine months (the child's grandmother cared for the child during that time). At the time of the trial, one year after the rape, the victim's nerves were still bad, she was depressed, and she still had trouble sleeping. The court ruled, relying on *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585 (1990), and *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990), that this evidence was sufficient to support serious personal mental injury to support the first-degree rape conviction. The court rejected the defendant's argument that the state—to establish serious personal mental injury—must prove that the defendant committed acts not present in every forcible rape that caused the mental injury. What is required is that the injury extend for some appreciable time beyond the events surrounding the rape itself and that it is a mental injury beyond that normally experienced in every forcible rape.

Evidence Was Sufficient To Support First-Degree Burglary Conviction

State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (28 January 1994). Evidence of a breaking through the back door of a residence was sufficiently proved by circumstantial evidence and habit and custom. A witness testified that everyone used the back door to the residence. The murder victim's wife testified that when she left the residence, the victim was sitting at the end of the table in the dining room with his back to the door (there was no storm door). Although she did not say that she closed the door when she left, it was reasonable to infer that, on a stormy day, the victim would not be sitting at the table with the door completely open. In addition, the wife testified that when she returned home, she got her house key out because she was expecting the door to be closed and locked as usual. The court ruled that jury could determine whether it was satisfied beyond a reasonable doubt that the door was at least partially closed to require the defendant to use some force to enter the residence.

Evidence Was Sufficient To Support Two Separate Conspiracy Convictions

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). Evidence showed that defendant and others agreed to commit a murder several weeks before the murders took place. Thus, the offense of conspiracy to commit murder had been completed. However, defendant had not then agreed to commit first-degree burglary. That agreement was not made until the night of the murders. Therefore, the evidence was sufficient to support convictions of both conspiracy to commit murder and conspiracy to commit burglary.

Evidence Was Sufficient to Support Embezzlement Conviction

State v. Johnson, 335 N.C. 509, 439 S.E.2d 722 (28 January 1994), *reversing*, 108 N.C. App. 550, 424 S.E.2d 165 (1993). Evidence showed that the defendant, an attorney, represented McCoy for her claim for damages incurred in an automobile accident. The defendant (or someone in his office) settled the claim with the insurance company, without the McCoy's knowledge, in the amount of $20,000. The company delivered a check in that amount to the defendant's office, where McCoy's signature was forged on the check, and the money was deposited in the defendant's personal account. McCoy's signature was also forged on the release to the insurance company. The court ruled that there was sufficient evidence to convict the defendant of embezzlement. The defendant came into possession of the check lawfully so far as McCoy was concerned and then wrongly converted it to his own use. The court noted that the defendant may have been guilty of obtaining property by a false pretense as to the insurance company, but he was the agent of McCoy and in lawful possession of the check as her agent. When he converted it to his own use, he was guilty of embezzlement.

Evidence Was Insufficient For Voluntary Intoxication Instruction In First-Degree Murder Case

State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (28 January 1994). The defendant was convicted of first-degree murder and other offenses. The trial judge denied the defendant's request for an instruction on voluntary intoxication as a defense to charges requiring specific intent. The court

upheld the trial judge's denial. The defendant had offered evidence that he had consumed eight to twelve beers beginning about 7:30 P.M. the evening of the murder. His expert testified that the defendant's pattern of drinking that many beers a day could have caused an "accumulative impairment of mental functions," he would have been acutely intoxicated at the time of the murder, and his capacity to plan and have good judgment would have been adversely affected. The court stated that although the evidence in the case suggests that the defendant was intoxicated to some degree, it did not meet the standard to require an instruction set out in State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Mandatory Presumption On Finding Of Firearm In Robbery Case Was Proper

State v. Williams, 335 N.C. 518, 438 S.E.2d 727 (28 January 1994), *affirming*, 108 N.C. App. 295, 423 S.E.2d 333 (1992). The defendant was convicted of two separate robberies. In one robbery, the victim testified that the defendant pulled from his pocket an object that looked like a pistol and demanded money, although the object was wrapped so it couldn't be seen. The victim believed it was a real gun. In the other robbery, the victim testified that the defendant had his right hand in his jacket pocket, was pointing it at her while demanding money from the cash register, and said he was going to shoot her. The defendant offered an alibi defense and also testified that he did not own a gun and did not "mess with guns." The court ruled that the trial judge properly instructed the jury in both cases about the mandatory presumption that the object was a firearm or other dangerous weapon, as set out in State v. Joyner, 312 N.C. 779, 324 S.E.2d 841 (1985). The court rejected the defendant's argument that his testimony was substantial evidence tending to show that he did not possess a firearm when the robberies occurred (if the defendant had presented such evidence, the mandatory presumption instruction is not given; only a permissive inference instruction is given).

Judge Erred In Failing To Submit Lesser Offense Of Armed Robbery, Based On Facts In Case

State v. Smith, 335 N.C. 162, 435 S.E.2d 770 (5 November 1993). The defendant was convicted of armed robbery. Supreme Court affirmed, per curiam, opinion of Court of Appeals, 110 N.C. App. 119, 429 S.E.2d 425 (1993) that the trial judge erred in failing to submit the lesser offense of assault with a deadly weapon when judge instructed the jury on the voluntary intoxication defense to armed robbery (specifically, the issue whether the defendant's voluntary intoxication negated the armed robbery element that requires proof of the defendant's specific intent to permanently deprive owner of the use of his property).

Separate Convictions For Armed Robbery And Larceny Of Firearm Were Proper, Based On Facts In This Case

State v. Barton, 335 N.C. 741, 441 S.E.2d 306 (4 March 1994). The defendant and his accomplices shot and killed the victim, took his wallet from his body, and fled the scene in the victim's car. They later removed the victim's firearm from the car's glove compartment. Distinguishing State v. Adams, 331 N.C. 317, 416 S.E.2d 380 (1992) (improper to sentence defendant for larceny of firearm and felonious larceny pursuant to breaking or entering, based on

a single taking of a firearm), the court ruled that both convictions were proper, since the armed robbery of the victim—resulting in the taking of his wallet and car—and the later larceny of the victim's firearm from his car constituted separate takings.

Evidence Was Insufficient To Support Conviction For Maintaining Vehicle For Illegally Keeping Drugs

State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (8 April 1994), *reversing*, 104 N.C. App. 514, 410 S.E.2d 211 (1991). The defendant was convicted of unlawfully, willfully, and knowingly maintaining a vehicle for illegally keeping drugs under G.S. 90-108(a)(7); the date of the offense was 6 September 1989. The evidence showed that on 6 September 1989 the defendant had bags of marijuana in his pocket before he got out of a vehicle to enter a convenience store. The next day, 7 September 1989, the defendant was arrested for possession of marijuana and a marijuana cigarette was found during a search of his vehicle. The state also presented evidence of the presence of drugs and drug paraphernalia at the defendant's home. The court ruled that G.S. 90-108(a)(7) does not prohibit the mere temporary possession of marijuana within a vehicle. The focus of the inquiry is on the *use*, not the contents, of the vehicle. Although the contents of a vehicle are clearly relevant in determining its use, its contents are not dispositive when, in this case, they do not establish that the use of the vehicle was a prohibited one. The court stated that when "the State has merely shown that the defendant had two bags of marijuana while in his car, that his car contained a marijuana cigarette the following day, and that his home contained marijuana and drug paraphernalia, the State has not shown that the vehicle was used for selling or keeping a controlled substance." The court, on the other hand, favorably noted and summarized cases in which defendants were properly convicted of violations of G.S. 90-108(a)(7): *State v.* Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985); State v. Allen, 102 N.C. App. 598, 403 S.E.2d 907 (1991); State v. Thorpe, 94 N.C. App. 270, 380 S.E.2d 777 (1989); and State v. Rich, 87 N.C. App. 380, 361 S.E.2d 321 (1987).

Inconsistent Verdicts Allowed At Same Trial—Conviction Of Aider And Abettor But Acquittal Of Principal

State v. Reid, 335 N.C. 647, 440 S.E.2d 776 (4 March 1994). The defendant was convicted of felonious assault based on acting in concert with the principal, co-defendant Adams, who was found not guilty. The court ruled, relying on the rationale of United States Supreme Court rulings [e.g., United States v. Powell, 469 U.S. 57 (1984)], that inconsistent jury verdicts in the same trial are permissible.

Evidence

(1) Defendant Properly Barred From Introducing Accomplice's Statement Under Rule 804(b)(3)
(2) State May Cross-Examine State-Paid Defense Expert About Witness Fee

State v. Brown, 335 N.C. 477, 439 S.E.2d 589 (28 January 1994). (1) The defendant was convicted of first-degree murder in which his accomplice did the actual shooting of the victim.

The accomplice's initial statements to law enforcement indicated that he had acted alone when committing the murder. His later statements to law enforcement implicated the defendant as being involved in the murder. (The defendant confessed to his involvement in the murders.) The defendant called the accomplice (who was to be tried later for the murder) as a witness at the defendant's trial. The accomplice invoked his Fifth Amendment privilege not to testify. The defendant then moved under Rule 804(b)(3) (statement against interest) to introduce into evidence the accomplice's initial statements that he acted alone when committing the murder. The trial judge denied the motion, ruling that the statements bore insufficient indications of trustworthiness. The court reviewed the accomplice's initial statements, noted how they conflicted with other evidence and the fact that the defendant had confessed his involvement and his fingerprints has been found at the murder scene, and upheld the trial judge's ruling. The court also rejected the defendant's argument that failure to admit this evidence violated his constitutional rights under Chambers v. Mississippi, 410 U.S. 284 (1973), since that ruling requires that the proffered evidence bear persuasive assurances of trustworthiness. (2) The court ruled that the prosecutor was properly permitted to impeach the defense expert witness concerning his witness fee, and rejected the defendant's argument that the cross-examination was improper because the expert witness was court-appointed and paid with state funds.

Evidence Of Other Arsenic Poisonings Was Admissible Under Rule 404(b)

State v. Moore, 335 N.C. 567, 440 S.E.2d 797 (4 March 1994). The defendant was convicted of first-degree murder in the arsenic poisoning death of her male friend. The court ruled that the trial judge properly admitted under Rule 404(b) (to prove motive, *modus operandi*, opportunity, intent, and identity) evidence of the arsenic poisoning death of her first husband and the near-fatal arsenic poisoning of her current husband. The court relied on State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

Jurors' Affidavits Revealing Their Misunderstanding About Parole Eligibility Were Inadmissible Under Rule 606(b)

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). The court ruled that the trial judge properly refused under Rule 606(b) to consider with a motion for appropriate relief jurors' affidavits indicating their misunderstanding about parole eligibility for a defendant sentenced to life imprisonment for first-degree murder. Their discussions were "internal influences" (i.e., coming from the jurors themselves) that could not be considered. See also State v. Quesinberry, 325 N.C. 125, 381 S.E.2d 681 (1991).

Capital Case Issues

(1) Attempted Rape Conviction Was Violent Felony Conviction Under G.S. 15A-2000(e)(3)
(2) No *Case* Error When Prosecutor Accepted Plea To Felony Murder Theory Only
(3) No Error In Peremptory Instruction On Nonstatutory Mitigating Factor
(4) Defendant Has No Right To Allocution In Capital Sentencing Hearing

State v. Green, 336 N.C. 142, 443 S.E.2d 14 (6 May 1994). (1) The defendant was convicted by a general court martial of attempted rape. Court ruled that attempted rape is defined as a *violent* crime by military case law and therefore qualifies as a prior violent felony conviction under G.S. 15A-2000(e)(3) without the necessity to show that the defendant used violence in committing the offense. (2) The prosecutor did not violate the ruling in State v. Case, 330 N.C. 161, 410 S.E.2d 57 (1991) (prosecutor erred in not presenting all statutory aggravating circumstances in a capital sentencing hearing) by allowing the defendant to plead guilty to first-degree murder under the felony murder theory only, even though there was evidence of first-degree murder by premeditation and deliberation as well, since the total number of available aggravating circumstances would not have been different if the state had obtained a conviction of first-degree murder based on both theories. (3) The trial judge did not err in refusing the defendant's request to give the peremptory instruction in N.C.P.I. 150.11 (October 1991) for nonstatutory mitigating factors, because that instruction is only appropriate for statutory mitigating factors. Although a peremptory instruction on a nonstatutory mitigating circumstance may direct the jurors that the evidence supports the factual existence of the circumstance, each juror—before "finding" the circumstance—must also consider the circumstance to have mitigating value. (4) The court ruled that a defendant does not have common law, statutory, or constitutional right to allocution at a capital sentencing hearing. The court stated that the "defendant has no right to testify without being subjected to cross-examination or to make unsworn statements of fact during [jury] argument or otherwise." The court also stated that "the only [remnant] of the common law right of allocution remaining in capital cases is the right to present strictly legal arguments to the presiding judge as to why no judgment should be entered."

(1) Evidence Sufficient Under G.S. 15A-2000(e)(11) ("Other Violent Crimes" Aggravating Factor)
(2) Sentencing For Other Convictions Is Irrelevant In Death Penalty Recommendation
(3) Pattern Jury Instruction On *McKoy* Issue Is Constitutional

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (28 January 1994). The defendant was convicted of first-degree murder for kidnapping, sexually assaulting, and murdering a female jogger (victim A) on 24 September 1989. (1) The state offered evidence under G.S. 15A-2000(e)(11) that on 29 September 1989 the defendant kidnapped, raped, sodomized, and robbed another female jogger (victim B), who managed to escape. Relying on State v. Cummings, 332 N.C. 487, 422 S.E.2d 692 (1992), the court ruled that this evidence was sufficient under this aggravating factor, when the defendant's motivation and *modus operandi* were the same, the crimes were committed in close temporal proximity, and the defendant believed that both victims were members of an associated group (female joggers from a local university). (2) Trial judge properly excluded defendant's proffered evidence at capital sentencing hearing that trial judge would sentence

defendant (after sentencing hearing) for kidnapping of victim A and for non-capital crimes against victim B. Such evidence was irrelevant in deciding whether the defendant should be sentenced to death. (3) The court ruled that the pattern jury instructions on the jury's consideration of mitigating circumstances in Issues Two, Three, and Four complied with McKoy v. North Carolina, 494 U.S. 433 (1990).

Error To Submit Both Burglary and Pecuniary Gain As Aggravating Circumstances

State v. Howell, 335 N.C. 457, 439 S.E.2d 116 (28 January 1994). Relying on State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), court ruled that judge erred in submitting both aggravating circumstances—murder was committed for pecuniary gain [G.S. 15A-2000(e)(6) and murder was committed while defendant was committing burglary [G.S. 15A-2000(e)(5)]—when these aggravating circumstances were supported by the same evidence. In this case, pecuniary gain was the motive for committing the burglary.

Proper To Submit Both Aggravating Circumstances G.S. 15A-2000(e)(4) and -2000(e)(5)

State v. Sanderson, 336 N.C. 1, 442 S.E.2d 33 (8 April 1994). Distinguishing State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), court ruled that trial judge properly submitted (and jury could properly find) separate aggravating circumstances G.S. 15A-2000(e)(4) (murder was committed for the purpose of avoiding lawful arrest), and G.S. 15A-2000(e)(5) (murder was committed while the defendant was engaged in a kidnapping), because these circumstances were supported by different evidence.

Especially Heinous, Atrocious, Or Cruel Was Proper Aggravating Circumstance In First-Degree Murder By Poisoning

State v. Moore, 335 N.C. 567, 440 S.E.2d 797 (4 March 1994). The defendant was convicted of first-degree murder by poisoning, and the evidence showed that victim suffered severely over a ten-month period. The court ruled that the aggravating circumstance of especially heinous, atrocious, or cruel was properly found and rejected defendant's argument to extend State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) (underlying felony may not be an aggravating circumstance when defendant is convicted only on felony-murder theory) to this case. The court noted that neither the fact that the poison is administered in small doses over extended periods of time nor the type of poison—slow or fast acting—are elements of the offense.

(1) Removal Of Prospective Jurors For Cause And Denial Of Rehabilitation Were Proper (2) Proper To Not Submit No Significant History Of Prior Criminal Activity

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). (1) The court examined the trial judge's removal for cause of three prospective jurors and determined that they were properly removed under Wainwright v. Witt, 469 U.S. 412 (1985) because their views against the death penalty would have substantially impaired their duties as juror. The court also examined the trial judge's denial of defendant's opportunity to rehabilitate two other prospective jurors and finds no error, distinguishing State v. Brogden, 334 N.C. 39, 430 S.E.2d 905 (1993). (2) The trial judge

properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] when neither the state nor the defendant presented any evidence about the defendant's criminal history—whether he had any or no criminal history. Court follows State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989) and Delo v. Lashley, 507 U.S. 272, 113 S.Ct. 1222, 122 L.Ed.2d. 620 (1993).

Proper Not To Submit No Significant History Of Prior Criminal Activity

State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (6 May 1994). The trial judge properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] based on the following evidence: The defendant was using illegal drugs for several weeks before the murder. He had broken into a particular convenience store "six or seven times" and stole various articles. He had broken into a pawn shop and stolen several guns. He sold some of the guns and used one of them to kill the victim in this case. Members of the defendant's family testified that he had shoplifted and "hustled" as a child. The court cited State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

(1) Proper Not To Submit No Significant History Of Prior Criminal Activity
(2) Error Not To Submit Mitigating Factor About Defendant's Adjustment To Prison Life

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). (1) The trial judge properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] based on the following evidence: The defendant had been involved in criminal activity since his adolescence. (The defendant was 31 years old at the time of the sentencing hearing.) He had been a drug user since age thirteen and he sometimes made up to $4,000 to $5,000 a week selling drugs. He made his living selling drugs; he had been seen selling illegal drugs—including cocaine, marijuana, and PCP—in Maryland and two North Carolina cities. Three years before the murder in this case, he was convicted of robbery of a business and two of its employees. Evidence also showed that the defendant in the case in which he was being sentenced had come from Maryland to sell drugs and to commit a robbery. (2) The trial judge, relying on State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982), refused to submit the nonstatutory mitigating circumstance that "[i]n a structured prison environment, [the defendant] is able to conform his behavior to the rules and regulations and performs tasks he is required to perform." The court ruled that the trial judge erred in refusing to do so, based on Skipper v. South Carolina, 476 U.S. 1 (1986), decided after *Pinch*. The court overruled *Pinch* to the extent it conflicts with *Skipper*.

Defense Questions To Prospective Jurors Should Have Been Allowed Under *Morgan v. Illinois*; Court Modifies Prior Ruling In *State v. Taylor*

State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (4 March 1994). The court ruled that the trial judge in a capital case erred, under Morgan v. Illinois, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (defendant has constitutional right to ask capital case jurors if they would automatically vote for death penalty regardless of evidence of mitigating circumstances), in not permitting defense counsel to ask the following questions of prospective jurors:

> Is your support for the death penalty such that you would find it difficult to consider voting for life imprisonment for a person convicted of first degree murder?
>
> Would your belief in the death penalty make it difficult for you to follow the law and consider life imprisonment for first degree murder?

The court noted that even though defense counsel did not use the words "automatically" or "always," the gist of the questions was to determine whether the juror was willing to consider a life sentence in appropriate circumstances or would automatically vote for the death penalty.

The court, however, upheld the trial judge's refusal to allow the following question:

> Do you feel that the death penalty is the appropriate penalty for someone convicted of first degree murder?

The court noted that this question was overly broad and asked about a legislative policy. The court also ruled that in light of *Morgan v. Illinois* and the ruling in this case, the first three questions considered inappropriate in State v. Taylor, 304 N.C. 249, 283 S.E.2d 761(1981) are now proper questions. These questions were:

> Mr. Warwick, if the State convinced you beyond a reasonable doubt that the defendant was guilty of premeditated murder and you had returned that verdict guilty, do you think then that you would feel that the death penalty was the only appropriate punishment?
>
> Mr. Warwick, if you had sat on the jury and had returned a verdict of guilty of first degree murder, would you then presume that the penalty should be death?
>
> At the first stage of the trial and because of that you voted guilty for first degree murder, then do you think that you could at that time consider a life sentence or would your feelings about the death penalty be so strong that you couldn't consider a life sentence?

Error To Bar Defense Counsel's Argument About Severity Of Punishment At Guilt Stage

State v. Smith, 335 N.C. 539, 438 S.E.2d 719 (28 January 1994). The court ruled that the trial judge improperly barred defense counsel during the guilt stage of a first-degree murder trial from arguing to the jury about the severity of the punishment for first-degree murder and that the defendant was not guilty. The argument in effect properly encouraged the jury to carefully consider the case because of the severity of the punishment. The argument did not improperly question the appropriateness of the punishment or suggest that the defendant should be acquitted because of the severity of the punishment.

Error To Bar Defense Counsel From Making More Than One Argument At Capital Sentencing Hearing

State v. Barton, 335 N.C. 696, 441 S.E.2d 295 (4 March 1994). The court ruled that the trial judge erred in limiting each counsel for the defendant to one argument at the end of the defendant's capital sentencing hearing. Under G.S. 84-14, defense counsel may make as many arguments as they want. See State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986); State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986). [Note, however, that at a capital sentencing hearing, defense counsel do not have the right to make opening and closing arguments. State v. Wilson, 313 N.C. 516, 330 S.E.2d 450 (1985).]

Reasonable Doubt Instruction

Reasonable Doubt Instructions Were Not Error

State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (28 January 1994). The trial judge gave the following instruction on reasonable doubt:

> The State must prove to you that the [d]efendant is guilty beyond a reasonable doubt. Of course a reasonable doubt of a [d]efendant's guilt also might arise from a lack or insufficiency of the evidence. However, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. Proof beyond a reasonable doubt means that you must be fully satisfied, entirely convinced or satisfied to a moral certainty of the [d]efendant's guilt.

The court stated that although the instruction use the term "moral certainty," it was unlike the improper jury instructions in *Cage v. Louisiana*, 498 U.S. 39 (1990) and *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), because it did not define reasonable doubt with terms such as "grave uncertainty," "actual substantial doubt," "honest, substantial misgiving," or other terms that suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. The court ruled that the instruction did not violate the *Cage* ruling.

State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (28 January 1994). The trial judge gave the following instruction on reasonable doubt:

> A reasonable doubt, members of the jury, means just that, a reasonable doubt. It is not a mere possible, fanciful or academic doubt, nor is it proof beyond a shadow of a doubt nor proof beyond all doubts, for there are few things in human existence that are beyond all doubt.
>
> Nor [is it] a doubt suggested by the ingenuity of counsel or by your own mental ingenuity, not warranted by the testimony, nor is it a doubt born of a merciful inclination or disposition to permit—to permit the defendant to escape the penalty of the law. Nor is it a doubt suggested or prompted by sympathy for the defendant or those with whom he may be connected.

> A reasonable doubt is a sane, rational doubt, an honest—honest, substantial misgiving, one based on reason and common sense, fairly arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence, as the case may be.
>
> Proof beyond a reasonable doubt is such proof that fully satisfies or entirely convinces you of the defendant's guilt.

Following the ruling in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), the court ruled that this instruction did not violate the ruling in Cage v. Louisiana, 498 U.S. 39 (1990).

State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (4 March 1994). The trial judge's instruction defined reasonable doubt as "an honest substantial misgiving based on the jury's reason and common sense and reasonably arising out of some or all of the evidence that has been presented or the lack or insufficiency of that evidence." The instruction did not use the terms "grave uncertainty," "actual substantial doubt," or "moral certainty." Following the ruling in State v. Hudson, 331 N.C. 122, 415 S.E.2d 732 (1992), the court ruled that this instruction did not violate the ruling in Cage v. Louisiana, 498 U.S. 39 (1990).

Discovery

Judge May Require State-Paid Defense Expert To Prepare And Furnish Written Report To State If Defendant Intends To Call Expert As Witness At Trial

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (28 January 1994). The court ruled that the reciprocal discovery statute [G.S. 15A-905(b)] authorizes a judge to require a state-paid defense expert (in this case, a psychologist who testified as an expert for the defendant) to prepare and to furnish the state—in advance of the witness' testimony—a written report of the expert's examination of the defendant, when the defendant intends to call the expert as a witness at trial.

Compare this ruling with State v. White, 331 N.C. 604, 419 S.E.2d 557 (1992), when the court ruled that the trial judge erred, when granting the defendant's motion for state-paid experts, in requiring the experts to prepare written reports and provide them to the state by a certain date, and, if they did not, they would not be permitted to testify and would not be paid for their services. The court noted that the trial court's order was not limited, as required by G.S. 15A-905(b), to disclosure of reports intended to be introduced at trial or reports relating to the testimony of an expert whom the defendant intended to call as a witness at trial.

Miscellaneous

Joinder Of Defendants For Trial Was Error, Based On Facts In This Case

State v. Pickens, 335 N.C. 717, 440 S.E.2d 552 (4 March 1994). Defendants Pickens and Arrington were tried jointly for murder of a nine-year-old child who was killed by a bullet fired into an apartment from the outside. There was conflicting testimony about various altercations and shootings inside and outside various apartments in the apartment complex where the child

was killed. Both defendants presented evidence that challenged the credibility of each other's witnesses. The court ruled that, based on the facts of this case, the trial judge erred in denying the defendants' motions to sever their trials from each other. Their defenses were antagonistic and the joint trial deprived them of a fair trial. Each defendant contended that it was the other defendant who fired the shots that killed the child and that they were not acting in concert (the court noted the paucity of evidence that the defendants were acting in concert).

No Assertion Of *Batson* Error On Appeal When Failure To Raise Issue At Trial

State v. Adams, 335 N.C. 401, 439 S.E.2d 760 (28 January 1994). The court ruled that a defendant who fails at trial to raise error under Batson v. Kentucky, 476 U.S. 79 (1986) (prosecutor may not exercise peremptory challenges of jurors in racially discriminatory manner) is barred from raising the issue on appeal. The court distinguished State v. Robbins, 319 N.C. 465, 356 S.E.2d 465 (1987) and State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989), which permitted defendants to raise the *Batson* issue on appeal without objections at their trials, because the trials in those cases occurred before *Batson* had been decided.

Prosecutor's Use Of Peremptory Challenges Did Not Violate *Batson* Ruling

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (6 May 1994). The court examined several peremptory challenges of black prospective jurors by the prosecutor in this case and ruled that they did not violate the ruling in Batson v. Kentucky, 476 U.S. 79 (1986) (prosecutor may not exercise peremptory challenges of jurors in racially discriminatory manner).

Trial Judge May Not Bar Defense From Asking Question Of Prospective Juror Already Asked By Judge

State v. Conner, 335 N.C. 618, 440 S.E.2d 826 (4 March 1994). Trial judge erred, in violation of G.S. 15A-1214(c), in prohibiting defense counsel from asking questions of prospective jurors that had already been asked by the trial judge.

Trial Judge's Anti-Deadlock Instruction Was Erroneous

State v. Buckom, 335 N.C. 765, 440 S.E.2d 274 (4 March 1994). The court affirmed, per curiam and without opinion, the Court of Appeals opinion in this case at 111 N.C. App. 240, 431 S.E.2d 776 (1993). The Court of Appeals opinion ruled that the trial judge's instruction to jurors—who had indicated that they were deadlocked—was erroneous because it stated that the main purpose in trying to reconcile their differences with further deliberations was to avoid the expense of a retrial.

Authority To Impose Sentence Even After Specific Date For Sentencing Has Passed

State v. Absher, 335 N.C. 155, 436 S.E.2d 365 (5 November 1993), *reversing*, 108 N.C. App. 356, 424 S.E.2d 464 (1992). The defendant was convicted of impaired driving in superior court on May 18, 1989 and the trial judge continued prayer for judgment (for sentencing) for thirty

days. A sentence was not imposed within thirty days; it was imposed on October 27, 1989. The court ruled that as long as prayer for judgment is not continued for an unreasonable period and the defendant is not prejudiced (neither of which occurred in this case), the trial judge does not lose jurisdiction to impose a sentence. Court noted, with approval, a similar ruling in State v. Degree, 110 N.C. App. 638, 430 S.E.2d 491 (1993) and disapproved language in State v. Gooding, 194 N.C. 271, 139 S.E. 436 (1927) that is inconsistent with the ruling in this case.

No Retroactive Application Of Abrogation of "Year And A Day" Rule For Murder

State v. Robinson, 335 N.C. 146, 436 S.E.2d 125 (5 November 1993), *reversing*, 110 N.C. App. 284, 492 S.E.2d 357 (1993). The defendant assaulted his wife on October 18, 1988, and she remained comatose until her death on May 30, 1991. Before her death, the Supreme Court on May 22, 1991 in State v. Vance, 328 N.C. 613, 403 S.E.2d 495 (1991) had abolished, prospectively only, the common law "year and a day" rule for murder. The court ruled that the prosecution for murder is effectively barred, because retroactivity focuses on what defenses were available to the defendant when the murderous assault occurred, not when the victim died. Therefore, retroactive application of the abrogation of the "year and a day" rule would deprive the defendant of federal due process and the *Vance* ruling.

Police Department's Improper Release Of Car Does Not Result In Dismissal Of Charge

State v. Mlo, 335 N.C. 353, 440 S.E.2d 98 (28 January 1994). The murder victim's car, in which stains were found that were consistent with the victim's blood type, was released by the police department to the victim's estate without a court order or the district attorney's authorization; this release violated G.S. 15-11.1(a). Relying on Arizona v. Youngblood, 488 U.S. 51 (1988), the court ruled that the charge against the defendant should not be dismissed based on the improper release. The police did not act in bad faith in releasing the car, and the value of any tests the defendant wished to conduct on the car was marginally exculpatory at best.

North Carolina Court of Appeals

Arrest, Search, and Confessions

(1) Stop Of Vehicle For License Check Was Proper
(2) Officer Had Authority To Frisk Driver
(3) Patting Bulge In Pocket Was Proper Frisk
(4) Case Remanded To Trial Court For "Plain Feel" Issue

State v. Sanders, 112 N.C. App. 477, 435 S.E.2d 842 (2 November 1993). Two State Highway Patrol officers set up a driver's license check at a ramp off a highway. They did not post signs warning the public that a license check was being conducted. The officers checked every car that approached the check point unless they were busy writing citations. The defendant entered the ramp and as he approached the check point, he stopped his car 150 feet from one of the troopers. The defendant then drove up to the check point, stopped the car, and rolled down his window. In response to the trooper's request for driver's license and registration, defendant said that he did

not have the registration or any identification, and he was not the owner of the car. The passenger in the car also failed to produced any identification. The trooper asked the defendant to get out of the car. As he stepped out of the car, the trooper saw a bulge about the size of two fists in the right pocket of the defendant's jacket. The trooper then told the defendant to face the car and place his hands on the car so he could pat him down for weapons. As the defendant was doing so, the trooper saw plastic protruding from the right pocket. While frisking the defendant, the trooper touched the bulge and noted that it felt like "hard flour dough." The trooper removed the plastic bag from the defendant's pocket. It contained three smaller bags with cocaine inside.
(1) Distinguishing Delaware v. Prouse, 440 U.S. 648 (1979), the court ruled that the stop of defendant's vehicle for the license check was constitutional. The court noted that the troopers followed guidelines of their agency in selecting the location and time for the license check and detained every car that passed through (except for those that came through while they were issuing citations). (2) Following State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), the court ruled that the trooper—based on the facts described above, his testimony that people driving stolen cars often provide officers with false names and insist they have no identification, and his seeing the bulge in the defendant' pocket—had reason to believe that the defendant was armed and dangerous and therefore could frisk him. (3) The court also ruled, based on Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), that the trooper acting properly in conducting the frisk by feeling the packet in the bulge in the jacket to determine if it was a weapon. (4) The court remanded the case to the trial court to determine, in light of *Dickerson* (decided after this case was heard in the trial court), whether it was immediately apparent to the trooper—when he determined that the bulge was not a weapon, but felt like "hard flour dough"—that what he felt was illegal drugs. ["Immediately apparent" means that there is probable cause to believe the object was illegal to possess; see discussion in Farb, *Arrest, Search, and Investigation in North Carolina*, p. 112 at n. 31 (2d. ed. 1992) and *State v. Wilson*, discussed below.]

Officer Had Probable Cause To Search Defendant's Pocket For Crack Cocaine

State v. Whitted, 112 N.C. App. 640 436 S.E.2d 275 (16 November 1993). A car parked in front of a residence fled at a high rate of speed after the driver saw a marked patrol car. The area from which the car fled was known for frequent drug sales, especially crack cocaine. People commonly pulled over to the curbside, after being flagged down, and purchased drugs. This area had been under surveillance for thirty days, and several arrests had been made based on drug sales at the residence from which the car had fled. After officers stopped the car, they went on each side of the car to investigate. The defendant was sitting in the front passenger seat, and an officer saw that the defendant kept his hand by his front pants pocket and "kept pushing something down." The defendant did not move his hand when the officer asked him to do so, and the officer then frisked the defendant for weapons. During the frisk, the officer felt a "pebble" (i.e., a hard substance) in the defendant's pocket that he believed, based on his experience and knowledge of the circumstances, was crack cocaine. He removed the object and discovered that it was crack cocaine. The court ruled, based on all the circumstances in this case including the suspicious behavior and flight from the officers, that the officer had probable cause to search the defendant after the officer felt the pebble in the defendant's pocket. [Although the court does not discuss Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), its ruling is consistent with the *Dickerson* ruling.]

Officer's Search Of Defendant's Pocket During Frisk Was Unconstitutional

State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (7 December 1993), *affirmed per curiam without opinion*, 336 N.C. 601, 444 S.E.2d 223 (17 June 1994). While Officer Johnson was arresting a driver for impaired driving, Officer Gregory (while securing the car) asked the defendant, a passenger, to get out. Officer Gregory noticed a strong odor of alcohol about the defendant, who also was acting "giddy." The officer believed, based on the facts in this case, that the defendant was under the influence of alcohol and a controlled substance. He told the defendant he was going to pat him down for weapons. During the pat down, the officer noticed that there was a cylindrical-shaped rolled-up plastic bag in his front pocket. The officer asked him what it was, and the defendant started laughing and pulled out some money. However, the officer could still see the long cylindrical bulge he had in his pocket. He asked the defendant what it was. The defendant then stuck his hand in his pocket and tried to palm what he had. The officer asked him what he was trying to hide, and the defendant rolled open his hand and showed the officer a white plastic bag with a white powdery substance in it. The officer believed that the substance was cocaine and then arrested him for possession of cocaine. The court ruled that Officer Gregory was justified in conducting a limited pat down of the defendant to determine whether the defendant was armed, but once he concluded that there was no weapon, he could not continue to search "or question" the defendant to determine whether the bag contained illegal drugs. (That part of the court's ruling in quotation marks in the preceding sentence does not appear consistent with prevailing federal constitutional law.) The court ruled that the search exceeded the scope of the frisk under Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), because it was not immediately apparent that the item in the defendant's pocket was an illegal substance.

The dissenting opinion stated that the facts in this case are distinguishable from the facts in *Dickerson*. Unlike *Dickerson*, the officer in this case did not continue to manipulate the defendant's pocket once he determined that the object in the defendant's pocket was not a weapon. Instead, the defendant in this case delivered the object to the officer, based on the officer's request and without any compulsion or coercion. Thus, there was no additional search after the officer conducted the pat down.

(1) Officers Had Reasonable Suspicion To Stop And Frisk Defendant
(2) Frisk Was Proper Because It Was Immediately Apparent Lump In Pocket Was Crack Cocaine

State v. Wilson, 112 N.C. App. 777, 437 S.E.2d 387 (7 December 1993). A police department received an anonymous phone call that several people were selling drugs in the breezeway of Building 1304 in the Hunter Oaks Apartments. The caller did not provide any names or descriptions of the alleged drug dealers. Two officers familiar with the area knew that if a police car entered the parking lot at one end of the breezeway that the suspects would run out of the other end. They devised a plan where a police car would enter the parking lot and officers would position themselves so they could stop anyone who ran out of the back of the breezeway. An officer stopped the defendant as he ran out of the back of the breezeway and conducted a frisk. During the frisk the officer felt a lump in the left breast pocket of the defendant's jacket and immediately believed that it was crack cocaine. The officer then asked the defendant if his coat

had an inside pocket. The defendant did not respond verbally, but instead opened his jacket so the inside pocket was visible. The officer saw and removed a small plastic bag that contained crack cocaine. (1) Distinguishing State v. Fleming, 106 N.C. App. 165, 415 S.E.2d 782 (1992), the court ruled that the officer had authority to stop and frisk the defendant, based on the anonymous phone call, the flight of the defendant and others when the police car pulled into the parking lot, and the officer's experience that weapons were frequently involved in drug transactions. (2) Distinguishing Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), the court noted that the officer in this case—unlike the officer in *Dickerson*—did not need to manipulate the item in the defendant's pocket to determine that it was cocaine; he immediately believed it was crack cocaine. The court ruled that the requirement in *Dickerson* that it must be "immediately apparent" to the officer that the item is illegal means that the officer must have *probable cause* to believe that the item is illegal. [See discussion in Farb, *Arrest, Search, and Investigation in North Carolina*, p. 112 at n. 31 (2d. ed. 1992).] The court also ruled that the officer's tactile senses, based on his experience and the facts in this case, gave him probable cause to believe that the item was crack cocaine. Thus, the officer did not exceed the scope of a frisk under the *Dickerson* ruling.

Officers Were Not Required To Give Notice Of Their Authority And Purpose When Entering House To Arrest Suspect They Were Pursuing, When Suspect Was Aware Of Their Identities And Purpose

Lee v. Greene, 114 N.C. App. 580, 442 S.E.2d 547 (3 May 1994). An officer arrested the suspect's husband in the driveway of the home of the suspect and her husband. Because the suspect blocked the front door of the officer's car in which the husband was sitting, the officers (another officer had arrived by then) decided to arrest her for obstructing and delaying the arrest of her husband. When the suspect began moving toward her house, they ran after her. As she entered her house and was closing the door, the officers grabbed the door and entered the house. The court ruled that the officers, under these circumstances, were not required to give notice of their authority and purpose under G.S. 15A-401(e). The suspect knew the officers' identities and their reason for being at her house. Moreover, the officers were about to arrest the suspect as she entered her house and attempted to close the door. Under these circumstances, compliance with G.S. 15A-401(e) was not required.

Plain View Seizure Of Nude Photographs During Drug Search Warrant Was Proper

State v. Cummings, 113 N.C. App. 368, 438 S.E.2d 453 (18 January 1994). Officers executing a search warrant for drugs, drug records, etc. discovered and seized 94 photographs of various nude women. Court ruled that seizure was proper under plain view justification because photographs could have been evidence of an obscenity offense.

(1) Defendant's Statements After Asserting Right To Counsel Under *Miranda* Were Admissible
(2) Confession Obtained After Statutory Violations Was Admissible

State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (19 October 1993). The defendant was arrested for breaking and entering and larceny about 1:05 P.M. and taken to the police department. He waived his *Miranda* rights and talked to officers for a while and then asserted his right to counsel. The officers stopped the interrogation and left the defendant in the interrogation room until about 7:00 P.M., when they obtained a search warrant for his apartment. The officers took the defendant with them to execute the search warrant. The defendant and an officer had a general conversation there, including the defendant responding to the defendant's request for a cigarette (trial judge found that conversation was not calculated to induce defendant to make incriminating statements, and defendant made none). The defendant's live-in girlfriend became upset during the officers' questioning of her about which items in the apartment were hers. The defendant decided then to initiate a conversation with the officers so they would not bother her about these items. The defendant then showed the officers which items were stolen. When the officers took him back to the police station, the defendant was advised of his *Miranda* rights, waived those rights, and confessed. (1) The court ruled, following Rhode Island v. Innis, 446 U.S. 291 (1980), that officers should not have known that their actions (taking the defendant for execution of the search warrant, the reaction of his girlfriend to the officers' questioning, the defendant's reaction, etc.) would elicit an incriminating response. (2) The trial judge had ruled that officers violated G.S. 15A-501(2) (taking the defendant to magistrate without unnecessary delay) and G.S. 15A-501(5) (advising the defendant without unnecessary delay of right to communicate with counsel and friends), but these violations had not proximately caused the defendant's incriminating statements. The court affirmed the trial judge's ruling, following State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978) (statutory exclusionary rule requires, at a minimum, a "but for" causal relationship between statutory violation and confession), and noting that defendant the did not argue a causal connection before the trial judge.

Mentally-Retarded Defendant Knowingly And Intelligently Waived *Miranda* Rights

State v. Brown, 112 N.C. App. 390, 436 S.E.2d 163 (2 November 1993), affirmed per curiam, 339 N.C. 606, 453 S.E.2d 165 (1995). The court ruled, following State v. Fincher, 309 N.C. 1, 305 S.E.2d 665 (1983), that a mentally retarded fifteen-year-old defendant knowingly and intelligently waived his *Miranda* and juvenile rights.

Criminal Offenses

(1) Error Not To Give Proffered Jury Instruction On Effect Of Reconciliation On Malice Element
(2) Error Not To Submit Involuntary Manslaughter

State v. Tidwell, 112 N.C. App. 770, 436 S.E.2d 922 (7 December 1993). The defendant was convicted of second-degree murder for killing her husband. (1) The court ruled, based on State v. Horn, 116 N.C. 1037, 21 S.E. 694 (1895), that the trial judge erred in not submitting the

defendant's proffered jury instruction that malice—which could be inferred from prior threats by the defendant—may be rebutted by evidence of a later reconciliation between the defendant and her husband. (2) The court ruled that the trial judge erred in not submitting involuntary manslaughter when there was evidence that the killing was unintentional and occurred when the defendant attempted to prevent the victim from committing suicide.

Evidence Was Sufficient For Conviction Of Offering Bribe To Law Enforcement Officer

State v. Hair, 114 N.C. App. 464, 442 S.E.2d 163 (19 April 1994). The defendant was convicted of offering a bribe to a county alcohol beverage control (ABC) officer in violation of G.S. 14-218. The defendant offered money to the officer with a request that the officer arrest or stop a particular person for driving while impaired (the person owed a gambling debt to the defendant, and the defendant wanted the officer to undertake the stop or arrest for DWI to pressure the person to pay the debt). The court rejected the defendant's argument that influencing the officer in the performance of *official duty*—an element of bribery—includes only when an officer has the duty to arrest for DWI. The court, noting State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953), ruled that official duty includes any authorized action. The evidence was sufficient for this element in this case because the county ABC officer had the authority to arrest for DWI. The court also ruled that the defendant's *corrupt intent*—an element of bribery—means a wrongful design to acquire some pecuniary profit or other advantage. The court rejected the defendant's argument that he did not have corrupt intent because he did not request the officer to make an illegal arrest or detention. Evidence of corrupt intent was sufficient in this case because the defendant offered a bribe to the officer for the defendant's own personal gain—harassing someone to pay a gambling debt to the defendant.

Evidence Supported Only One Conspiracy Conviction

State v. Griffin, 112 N.C. App. 838, 437 S.E.2d 390 (7 December 1993). Evidence supported only one conspiracy conviction to provide a prison inmate with a controlled substance, although there were four separate deliveries to the prison over a one-month period. Relying on State v. Rozier, 69 N.C. App. 38, 316 S.E.2d 893 (1984), the court ruled that the state's evidence failed to show four separate agreements between the defendant and the named coconspirators. Instead, there was a single conspiracy that consisted of a series of separate offenses of providing prison inmates with controlled substances.

Insufficient Evidence Of Nighttime For Burglary Conviction

State v. Barnett, 113 N.C. App. 69, 437 S.E.2d 711 (21 December 1993). Court ruled that the following evidence in a first-degree burglary prosecution was insufficient to prove that the breaking and entering had occurred during nighttime ["when it is so dark that a man's face cannot be identified except by artificial light or moonlight," State v. Smith, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)]: (1) evidence showed that someone broke into the home between 10:00 P.M. (when the victim went to bed) on 3 April 1982 and 6:30 A.M. (when the victim arose) on 4 April 1992; (2) the victim's dog barked at some time between 2:00 A.M. and 3:00 P.M. on 4 April 1992, but she did not arise to see why her dog was barking; (3) the state did not present

evidence of the light outside when the victim arose, but court of appeals takes judicial notice from U.S. Naval Observatory records that twilight began at 5:41 A.M. and the sun rose at 6:07 A.M. on 4 April 1992; and (4) the defendant went to a convenience store around 8:00 A.M. on 4 April 1992 and attempted to sell the victim's pocketbook. No one saw the defendant enter the victim's home. Court noted that the breaking and entering could have occurred at any time until 6:30 A.M., which was after nighttime had ended.

Insufficient Evidence Of Common Law Obstructing Justice And Violation Of G.S. 14-230

State v. Eastman, 113 N.C. App. 347, 438 S.E.2d 460 (18 January 1994). (1) The court ruled that the defendant was not an officer of the state under G.S. 14-230 (failure to discharge duties) and therefore could not be convicted of a violation of that statute. The defendant was the director of cottage life at the Governor Morehead School for the Blind and did not exercise the sovereign power of the state in the course of his employment. There also was no evidence that the defendant's position was created by state, constitution, or delegation of state authority. (2) The court reversed defendant's conviction of common law obstruction of justice because there was insufficient evidence that he intended to conceal or destroy evidence of a sexual abuse investigation at the Governor Morehead School.

Evidence Was Sufficient To Prove Child Sexual Assaults During Time Periods Alleged In Indictments

State v. Burton, 114 N.C. App. 610, 442 S.E.2d 384 (3 May 1994). In 1991, three women reported to the sheriff's department that their stepfather had sexually molested them in the 1970s. Charges were later brought in indictments that an offense allegedly occurred either during a month in a particular year (for example, March 1977) or during a time period (for example, between September 1975 and May 1976). The court reviews the evidence relating to each indictment and ruled that a fatal variance did not exist between the evidence and the indictments, relying on the ruling in State v. Everett, 328 N.C. 72, 399 S.E.2d 305 (1991); the court stated that judicial tolerance of variances between the dates alleged and proved are particularly applicable to child sex abuse allegations occurring years ago. The court additionally noted that the defendant was not prejudiced since his defense was based on his denial of the charges rather than an alibi for the time periods set out in the indictments.

Evidence

Defendant May Not Collaterally Attack Prior Convictions On *Boykin v. Alabama* Grounds

State v. Stafford, 114 N.C. App. 101, 440 S.E.2d 846 (15 March 1994). The defendant, charged with felony habitual impaired driving, moved to suppress prior convictions that the state sought to use in the state's case-in-chief. The defendant alleged that his guilty pleas had been entered in violation of Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea must be made voluntarily and understandingly). The court ruled that a defendant may not collaterally attack a guilty plea based on *Boykin* grounds.

[Note that since this ruling, the United States Supreme Court in Custis v. United States, 114 S.Ct. 1732, 128 L.Ed.2d. 517 (23 May 1994), ruled that a defendant does not have a federal constitutional right to collaterally attack a guilty plea based on *Boykin* grounds. Thus, the *Stafford* ruling is consistent with the *Custis* ruling.]

Criminal Charges Properly Dismissed When State Failed To Disclose Confidential Informant

State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (5 April 1994). The state's evidence at a pretrial hearing showed that on 7 March 1991, a confidential informant told an officer that he saw cocaine in the defendant's trailer home and there was a man selling it identified as Toney (defendant's first name). On 8 March 1991, the informant made a controlled buy, set up by the officer, from the same person at the trailer home. Later that day, the officer obtained a search warrant for the trailer home. The defendant was backing out of his yard when they arrived. The officers entered the trailer home and found marijuana and cocaine. The defendant testified that he gave permission to his nephew to use his trailer home for a party and was out of town from 7 March 1991 until just before the officers arrived on 8 March 1991. He said that there were no illegal drugs in his home when he left on 7 March 1991 and he did not know who was in his home during his absence. The defendant argued that the informant, if called as a witness, could testify that the defendant was not in fact the person who was selling drugs and who sold him drugs; the informant could also testify that the drugs belonged to a third party.

The trial judge found that the defendant's testimony established that the informant was a material and necessary witness for the defense to corroborate his alibi, pointed to the guilt of a third party, and showed nonexclusivity of the defendant's premises. The judge granted the defendant's motion to require the state to disclose the informant's identity. The state refused to do so, and the judge then dismissed all the charges against the defendant. The court, relying on Brady v. Maryland, 373 U.S. 83 (1963), Roviaro v. United States, 353 U.S. 53 (1957) and G.S. 15A-910(3b), upheld the trial judge's rulings that required disclosure of the informant's identity and the dismissal of all charges when the state failed to disclose.

(1) DNA Statistical Evidence Was Admissible
(2) No Confrontation Violation Although No Testimony From Person Who Did DNA Testing

State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (7 December 1993). (1) Court ruled that methodology used by FBI in determining statistical compilation of the frequency of a matching DNA "print" was sufficiently reliable so results were admissible. Mere conflicting expert testimony about FBI statistical procedures neither suggests unfair prejudice nor shows those procedures were so totally unreliable to require exclusion from evidence of the resulting compilations. (2) The state's witness who testified about DNA profile test results had supervised and monitored the lab technician who conducted the tests, and the technician took notes and photographs at each stage of the process for the witness's review. The court rejected the defendant's argument that his Sixth Amendment right to confront witnesses against him was violated because the lab technician did not testify at trial; court relied on State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984).

Defendant's Statements To Wife About Sexual Assault Were Not Within Spousal Communications Privilege

State v. Smith, 113 N.C. App. 827, 440 S.E.2d 322 (1 March 1994). The defendant was convicted of attempted first-degree rape of his stepdaughter, who was twelve years old. His wife testified for the state that sometime after the assault, the defendant confessed to her that he had assaulted the stepdaughter and then put a rifle into his mouth and asked her to pull the trigger—he told her that he could not go to heaven if he committed suicide. The wife also testified that she had threatened to leave the defendant several times and he had threatened to kill himself. The court ruled that the defendant's confession to his wife was not a marital communication induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by the relationship. Instead, the defendant's confession was driven by his own psychological motivations rather than by any confidence induced by the marital relationship.

[There appears to be an additional reason why the evidence would be admissible, although it was not discussed. G.S. 8-57.1 provides that the husband-wife privilege may not be invoked to exclude evidence about the abuse or neglect of a child under sixteen years old. This statute (as well as G.S. 7A-551) would appear to make the privilege automatically inapplicable under the facts of this case, which involved the abuse of a twelve year old.]

State's Rule 404(b) Evidence Of Similar Assault On Another Was Admissible In Murder Case

State v. Parker, 113 N.C. App. 216, 438 S.E.2d 745 (4 January 1994). The defendant was convicted of second-degree murder (killing of a female in 1991) based on circumstantial evidence. The court ruled that evidence of an assault on another female in 1986 was admissible under Rule 404(b) to prove motive and identity. The court noted that both women had rejected the defendant in his relationship with them; the defendant had kept both women under constant surveillance; threatened to kill both; threatened to commit suicide over both; ran both off the road with his vehicle; pulled weapons on both; and—in the 1986 assault—stabbed the female victim, requiring her hospitalization.

State's Rule 404(b) Evidence Of Similar Assault On Another Was Inadmissible In Murder Case

State v. Irby, 113 N.C. App. 427, 439 S.E.2d 226 (1 February 1994). The defendant was convicted of two counts of second-degree murder based on his shooting of two people who had driven a vehicle on a rural road near defendant's home on 1 December 1990. The defendant offered the defense of self-defense. The state presented Rule 404(b) evidence that on 23 December 1988 Sam Butler and others (these people were not involved in the murder case) threw some firecrackers while driving on this same rural road and had lost control of their vehicle and had a flat tire after hearing two gunshots. As Butler tried to get his truck out of the ditch, he heard the sound of bullets passing over his head. The defendant later that day admitted that he had shot at someone who had thrown firecrackers in his yard. Relying on the rulings in State v. Morgan, 315 N.C. 626, 340 S.E.2d 84 (1986) and State v. Mills, 83 N.C. App. 606, 351 S.E.2d

130 (1986), the court ruled that the Rule 404(b) evidence—offered by the state to show defendant's specific intent to kill and the victims' lack of aggression—was inadmissible. The evidence did not relate to the defendant's intent or his apparent necessity to defend himself.

Evidence Of Assault On Another Was Inadmissible Under Rule 404(b) And Rule 608(b)

State v. Brooks, 113 N.C. App. 451, 439 S.E.2d 234 (1 February 1994). The defendant was convicted of second-degree murder in shooting stepdaughter's boyfriend. The court ruled that the trial judge erred in permitting the state to cross-examine the defendant about various acts of violence he allegedly committed against his wife. The evidence was not admissible under Rule 608(b) because it was not probative of truthfulness or untruthfulness. The evidence was not admissible under Rule 404(b) because his prior acts of violence toward his wife were not relevant concerning his motive, opportunity, intent, etc. in his shooting of his stepdaughter's boyfriend.

State's Rule 404(b) Evidence Of Similar Sexual Assaults On Stepsister Was Admissible Despite Length Of Time Between Prior Assaults And Current Offense

State v. Jacob, 113 N.C. App. 605, 439 S.E.2d 812 (15 February 1994). The defendant was convicted of two counts of statutory rape of his daughter when she was ten years old. The victim did not report the crimes until her older stepsister had revealed that she had been sexually assaulted by the defendant when she was nine years old. These assaults had occurred several years apart, with the stepsister being assaulted first (the sister and stepsister were not living together when the assaults occurred). The court ruled that trial judge properly admitted under Rule 404(b) the testimony of the stepsister, who was twenty-two years old at the time of trial (thus, the assaults had occurred thirteen years ago). The defendant had a common plan and scheme to molest his minor prepubescent daughters by initiating and instructing them in sexual intercourse, and this plan and scheme continued from the time of the assaults on the stepsister to the time of the assaults on the daughter. Also, the defendant committed these sexual assaults in a similar manner. The court noted that the remoteness in time of the sexual assaults on the stepsister—thirteen years from the time of trial—was explained by the defendant's divorce from her mother; thus, he no longer had access to her for most of those thirteen years.

State's Use Of Defendant's Testimony At Rule 412 *In Camera* Hearing Was Proper

State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (19 October 1993). The defendant testified at an *in camera* hearing under Rule 412 (rape and sex offense evidence shield rule) that the victim had led him to believe that she was a virgin, until moments before they had intercourse when she revealed she had been raped by a former boyfriend. Later, on direct examination in the presence of the jury, the defendant testified about the contents of a letter written more than two weeks before the offense being tried—the letter revealed that the victim had informed the defendant of the earlier rape long before the night of the offense. On cross-examination, the state used the *in camera* transcript to question the defendant about his belief that the victim was a virgin on the date of the offense since she had previously told him she had been raped. The court ruled that state had properly been (1) provided with a transcript of the *in camera* hearing, and

(2) permitted to cross-examine the defendant about his prior inconsistent statements at the *in camera* hearing and to use the transcript during the cross-examination.

Rape Victim's Prior Sexual Behavior Was Inadmissible Under Rule 412(b)(3)

State v. Mustafa, 113 N.C. App. 240, 437 S.E.2d 906 (4 January 1994). The defendant was charged with rape and other sex offenses that allegedly occurred in a van. The defendant's defense was consent. The court ruled that the rape victim's prior ongoing sexual relationship with a boyfriend since the 1970s was not a pattern of sexual behavior closely resembling the sexual assaults being tried, and therefore the evidence was inadmissible under Rule 412(b)(3).

DWI Issues

Collateral Estoppel Did Not Bar Evidence Of Willful Refusal In DWI Prosecution

State v. O'Rourke, 114 N.C. App. 435, 442 S.E.2d 137 (19 April 1994). The defendant was arrested for DWI and refused to take the Breathalyzer test. The defendant, notified by the Division of Motor Vehicles that his driver's license would be revoked, requested a revocation hearing before DMV to contest the revocation. After the hearing, DMV rescinded the revocation. The court ruled that, assuming DMV rescinded the revocation on the ground that the defendant did not willfully refuse to take the Breathalyzer test, the doctrine of collateral estoppel does not bar the state from introducing evidence of his refusal to take the Breathalyzer test in the defendant's criminal trial. Privity did not exist between the state actor in the criminal prosecution—the district attorney—and the state actor in the revocation hearing—the Commissioner of Motor Vehicles.

(1) Officer Has No Duty To Inform DWI Suspect Of Right To Pre-Arrest Chemical Test
(2) Attending Alcoholics Anonymous Meeting Valid Condition Of Special Probation

State v. McGill, 114 N.C. App. 479, 442 S.E.2d 166 (19 April 1994). The defendant was convicted of DWI. The court ruled: (1) an officer has no duty to inform a DWI suspect of his right to a pre-arrest chemical (breath or blood) test under G.S. 20-16.2(i); and (2) the trial judge did not err in requiring as a special condition of probation that the defendant attend Alcoholics Anonymous meeting during the period of his supervised probation and requiring the defendant to provide his probation officer with verification of his attendance. The court rejected the defendant's argument that the trial judge erred because an assessing agency did not recommend under G.S. 20-179(m) that the defendant participate in a treatment program. The court stated that Alcoholic Anonymous is not a treatment program and thus not subject to the statute.

Miscellaneous

No Double Jeopardy Or Other Violation When Sentencing Based On Second Habitual Felon Indictment

State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (18 January 1994). The defendant was found guilty of a felony drug offense but the trial judge granted the defendant's motion to dismiss the habitual felon indictment for failing to allege the underlying felony with particularity. The trial judge continued the sentencing hearing to allow the state to obtain a new habitual felon indictment. The state obtained a new habitual felon indictment and the defendant was sentenced as an habitual felon for the felony drug offense. The court ruled (1) the trial judge did not abuse his discretion in continuing the sentencing hearing; (2) the second habitual felon indictment was proper because until a judgment was entered on the felony drug offense, there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach; and (3) there was no double jeopardy violation in sentencing defendant under the second habitual felon indictment.

Error To Find Two Statutory Aggravating Factors Based On Same Evidence

State v. Futrell, 112 N.C. App. 651, 436 S.E.2d 884 (7 December 1993). Court ruled, relying on *State v. Kyle*, 333 N.C. 687, 430 S.E.2d 412 (1993), that trial judge erred—when sentencing for second-degree rape—in finding as two statutory aggravating factors that (1) defendant was armed with a deadly weapon, and (2) defendant used a deadly weapon. The trial judge erroneously used the same evidence to prove these two aggravating factors.

(1) Position Of Trust Is An Impermissible Aggravating Factor For Incest Conviction, But Permissible For Indecent Liberties Conviction
(2) Error When Trial Judge Instructed On Alternative Theories And Insufficient Evidence To Support One Of The Theories

State v. Hughes, 114 N.C. App. 742, 443 S.E.2d 76 (17 May 1994). (1) The court ruled that the statutory aggravating factor of the defendant taking advantage of a position of trust or confidence to commit the offense [G.S. 15A-1340.4(a)(1)(n)] may not be used for an incest conviction because it uses evidence necessary to prove an element of the offense (in this case, the parent-child relationship). [Consider the impact of the later North Carolina Supreme Court ruling in State v. Farlow, 336 N.C. 534, 444 S.E.2d 913 (17 June 1994) on this ruling.] This factor may be used, however, for an indecent liberties conviction; State v. Caldwell, 85 N.C. App. 713, 355 S.E.2d 813 (1987). (2) In first-degree sexual offense instruction, trial judge instructed that jury could convict based on fellatio or digital penetration of genital opening. However, there was no evidence supporting digital penetration. Since the record did not reveal which theory or theories the jury relied in reaching its verdict, a new trial must be ordered.

Trial Judge Is Not Required To Inform Defendant Of Parole Eligibility At Guilty Plea Hearing

State v. Daniels, 114 N.C. App. 501, 442 S.E.2d 161 (19 April 1994). The court ruled that a trial judge at a guilty plea hearing is not required to inform a defendant of parole eligibility as a consequence of the defendant's plea. Therefore, the trial judge did not err, when accepting the defendant's plea of guilty to armed robbery, in failing to inform the defendant that he would have to serve seven years before being eligible for parole.

Defense Request For Jury Poll Was Too Late

State v. Ballew, 113 N.C. App. 674, 440 S.E.2d 565 (1 March 1994). After the jury had returned its verdicts, the trial judge had instructed them that they were free to discuss the case if they wished, and all jurors had returned to the jury assembly room, the defendant requested that the jury be polled. The court ruled that the trial judge properly refused to poll the jury, because the jurors had "dispersed" under G.S. 15A-1238 (on motion after verdict and before jury has dispersed, jury must be polled), and therefore the defendant's request was too late. After leaving the courtroom, the jury had become susceptible to extraneous influences.

Reasonable Doubt Instruction Was Constitutional

State v. Long, 113 N.C. App. 765, 440 S.E.2d 576 (1 March 1994). The court ruled, based on the ruling in State v. Patterson, 335 N.C. 437, 439 S.E.2d 578 (28 January 1994), that the following instruction on reasonable doubt did not violate the ruling in Cage v. Louisiana, 498 U.S. 39 (1990):

> Now, a reasonable doubt is not a vain, imaginary, or fanciful doubt, but it's a sane and rational doubt. It's a doubt based on common sense. When it is said that you, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt it is meant that you must be fully satisfied, or entirely satisfied, or satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing the evidence or lack of evidence the minds of the jury are left in such a condition that you cannot say you have an abiding faith to a moral certainty in the defendant's guilt then you have a reasonable doubt, otherwise not.

Amount Of Restitution Ordered Was Error

State v. Hayes, 113 N.C. App. 172, 437 S.E.2d 717 (21 December 1993). The defendant was convicted of five counts of embezzling about $208,900.00. The trial judge ordered the defendant, as a condition of probation, to pay restitution in payments of over $3,000.00 monthly over a five-year probationary period. The court ruled that the trial judge erred because he failed to consider the defendant's financial resources [see G.S. 15A-1343(d)] in ordering restitution, since the defendant had $800.00 in monthly income, paid about $350.00 monthly for child support, had recently completed bankruptcy proceedings, etc.

Defendant's Name In Judgment For Prior Conviction In Habitual Felon Hearing Was Sufficiently Similar To Name In Indictment To Constitute Prima Facie Evidence Under G.S. 14-7.1

State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 (2 November 1993). The court ruled, following State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990), that the name "Michael Hodge" in a court judgment for a prior conviction was sufficiently similar to "William Michael Hodge" in an habitual felon indictment to constitute prima facie evidence under G.S. 14-7.4 that the named defendant was the same as the defendant being tried in the habitual felon hearing.

Juvenile Petition May Not Be Amended To Charge Different Offense, Even With Juvenile's Consent

In re Davis, 114 N.C. App. 253, 441 S.E.2d 696 (5 April 1994). Juvenile petition charged juvenile with setting fire to a public building (G.S. 14-59). At the end of the state's evidence, the juvenile's attorney agreed with the state to proceed on the charge of setting fire to personal property (G.S. 14-66), which is not a lesser-included offense of G.S. 14-59. The juvenile was adjudicated delinquent of committing G.S. 14-66. The court ruled that the trial judge erred in permitting the petition to be effectively amended to charge the juvenile with a different offense (G.S. 7A-627 permits amendment if it does not change the nature of the offense charged). The court also ruled that the trial court's jurisdiction over G.S. 14-66 could not be conferred by consent.

Voluntary Dismissal Of Criminal Charge Without Reason Is Prima Facie Evidence Of Absence Of Probable Cause In Malicious Prosecution Civil Lawsuit

Best v. Duke University, 112 N.C. App. 548, 436 S.E.2d 395 (16 November 1993). Plaintiff civilly sued Duke University for malicious prosecution, based on a criminal charge brought against him by university police. The court ruled that the state's voluntary dismissal of the criminal charge without an explanation was prima facie evidence of the absence of probable cause, which is an element of the tort of malicious prosecution. In addition, malice—another element of the tort—may be inferred from proof that the civil defendant lacked probable cause in initiating the criminal charge. The court also ruled that the trial judge properly denied Duke University's motion for a directed verdict and judgment notwithstanding the verdict.