RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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NORTH CAROLINA SUPREME COURT

Criminal Offenses

Court Considers Restraint of Two Victims During Armed Robbery and Reverses One Kidnapping Conviction and Upholds Another Kidnapping Conviction

State v. Beatty, 347 N.C. 555, 495 S.E.2d 367 (6 February 1998), *affirming in part and reversing in part*, 126 N.C. App. 225, 491 S.E.2d 564 (1997). The defendant and others committed an armed robbery at a restaurant. One robber put a gun to victim A's head and stood beside him during the robbery. An unarmed robber put duct tape around victim B's wrists, forced him to lie on the floor, and kicked him in the back twice. The defendant was convicted of two charges of second-degree kidnapping (one involving victim A and another involving victim B). The court noted that in State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338(1978), it had ruled that a defendant cannot be convicted of kidnapping when the only evidence of restraint is that which is an "inherent, inevitable feature" of another felony such as armed robbery. (Note: The court in this case appeared to interpret the *Fulcher* ruling as resting solely on statutory interpretation and no longer on the additional ground that the Double Jeopardy Clause required such a ruling.) The court also noted that the key question is whether the jury could reasonably find that the necessary restraint for kidnapping exposed the victim to greater danger than that inherent in the armed robbery itself.

The court reversed the kidnapping conviction involving victim A. The only evidence of the restraint of this victim was the threatened use of a firearm. The victim did not move during the robbery, and the robbers did not injure him in any way. The restraint was an essential element of armed robbery, and the restraint did not expose the victim to a danger greater than that required to complete the armed robbery. The court upheld the kidnapping conviction involving victim B. Because the binding and kicking of the victim were not an inherent, inevitable part of the robbery, these forms of restraint exposed the victim to a danger greater than that required to complete the armed robbery. Also, the victim's helplessness and vulnerability was increased beyond what was necessary to enable the defendant and his accomplices to rob the restaurant.

"Serious Personal Injury" Element of First-Degree Rape Includes Injury That Results in Death

State v. Richmond, 347 N.C. 412, 495 S.E.2d 677 (6 February 1998). The defendant was convicted of first-degree felony murder based on first-degree rape. The court rejected the defendant's argument, based on statements in prior appellate cases, that the "serious personal injury" element of first-degree rape is not satisfied by evidence that the victim died as a result of

the rape. The court disavowed contrary statements in State v. Boone, 307 N.C. 198, 297 S.E.2d 585 (1982) and State v. Thomas, 332 N.C. 544, 423 S.E.2d 75 (1992).

Arrest, Search, and Confessions

(1) Officer Did Not Violate Defendant's Fifth Amendment Right to Counsel When There Was Break in Custody Between Assertion of Right to Counsel and Later Interrogation
(2) Officer's Interrogation of Defendant Did Not Violate Sixth Amendment Right to Counsel Because That Right Is Offense Specific

State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (8 May 1998). [Note: This case involved the trial and conviction of the defendant for a murder committed in High Point.] On May 29, 1990, the defendant requested counsel during custodial interrogation by an Asheville detective, who was questioning him about a murder committed in Asheville. When the interrogation concluded, he was arrested on an outstanding warrant for a motor vehicle violation and for misdemeanor larceny of the Asheville murder victim's pocketbook. He was not, however, arrested or charged for the Asheville murder. He was represented by an attorney in Asheville district court for these charges and released on bond on June 7, 1990. The defendant was later arrested in High Point on July 20, 1990 for a South Carolina murder. He was properly given *Miranda* warnings and confessed to murders in South Carolina, New York, Asheville, and High Point. (1) The defendant argued on appeal that the interrogation about the High Point murder violated his Fifth Amendment right to counsel. The court ruled, relying on a statement in McNeil v. Wisconsin, 501 U.S. 171, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991), that the rule prohibiting reinitiation of interrogation after a defendant's assertion of the right to counsel during custodial interrogation does not apply when there has been a break in custody (in this case, the defendant was released from custody on June 7, 1990, and was not arrested again until July 20, 1990). (2) The defendant argued on appeal that the interrogation violated his Sixth Amendment right to counsel. The court rejected this argument because the Sixth Amendment right to counsel is offense specific, and adversary judicial proceedings had not begun for the High Point murder at the time of the interrogation. [See discussion in Farb, *Arrest, Search, and Investigation in North Carolina*, pages 218-20 (2d ed. 1992).] The defendant also argued on appeal that, despite the offense-specific requirement, his Sixth Amendment right to counsel had begun for the Asheville charges and they were inextricably intertwined with the High Point murder. While the court recognized that some cases had recognized the principle of inextricably-intertwined cases triggering the Sixth Amendment right to counsel, the High Point murder and the Asheville charges were not such a case. In fact, the High Point murder had not even been committed when the Asheville charges had been brought.

(1) Defendant Was in Custody under *Miranda*, Based on Facts in This Case
(2) Defendant Clearly Requested Counsel under *Miranda*, and Officer Violated Right to Counsel by Failing to Stop Interrogation

State v. Jackson, 348 N.C. 52, 497 S.E.2d 409 (3 April 1998). Two detectives went to the defendant's workplace and, after telling him he was not under arrest, requested that he accompany them to the sheriff's office to answer some questions. The defendant agreed. He was told at the sheriff's office that he was a suspect in the murder of Karen Styles. He denied

involvement. He was given *Miranda* rights and was again told he was not under arrest. He consented to a search of his person and to have fingerprints and blood and hair samples taken. He was again told he was not under arrest. After the defendant had been questioned for about three hours, the sheriff entered the interrogation room and asked the defendant, "What did you do with the rifle that Karen Styles was shot with?" The defendant replied, "I think I need a lawyer present." (A detective's handwritten notes, taken during the interview, read, "2:04 P.M. on 12-20-94, wants a lawyer present.") In response to the defendant's statement, the sheriff told the defendant that he did not want the defendant to answer any more questions, but he wanted to tell him something. The sheriff then stated, "Son, I know you bought the rifle and the duct tape at K-Mart on the 28th of October. I know you were in Bent Creek on the day she was killed, and that's fine, but you need help." The defendant then began crying and stated, "But I didn't mean to kill nobody. I didn't." He continued crying, "I'm sorry; I didn't mean to kill her." (1) The court ruled that the defendant was in custody under *Miranda* when he inquired about an attorney. The court stated that a reasonable person in the defendant's position who had been interrogated for about three hours and thought the sheriff believed that he had committed murder would have believed that the sheriff intended to hold him to be prosecuted for murder. (2) The court ruled, distinguishing Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994) (defendant's statement during custodial interrogation, "Maybe I should talk to a lawyer," was not an assertion of the right to counsel), that the defendant in this case asserted the right to counsel. The court stated that the "use of the word '[m]aybe' by the defendant in *Davis* connotes uncertainty. There was no uncertainty by the defendant in this case. When he said, 'I think I need a lawyer present,' he told the officers what he thought. He thought he needed a lawyer. This was not an unambiguous statement. The interrogation should have stopped at that time." The court also stated that the detective's handwritten notes (see above), although not binding on the court, were an indication of how a reasonable officer conducting an interrogation would have interpreted the defendant's statement. The court ruled that the defendant's statements should have been suppressed because they resulted from interrogation that was conducted after he asserted the right to counsel.

(1) Officer Did Not Have Reasonable Suspicion to Frisk Defendant
(2) Defendant Did Not Consent to Search of His Body

State v. Pearson, 348 N.C. 272, 498 S.E.2d 599 (8 May 1998), *reversing*, 125 N.C. App. 676, 482 S.E.2d 16 (1997). Officer A stopped a car on an interstate highway that had been drifting back and forth within its lane and traveling below the speed limit. The defendant was the driver of the car, and there was a female passenger. Officer A asked the defendant to leave the vehicle and come to the patrol car. Officer A noticed that the defendant had a slight odor of alcohol about him, acted nervous and had a rapid heart rate while in the patrol car. Officer A determined, however, that the defendant was tired, not impaired by alcohol. The defendant said that he and his fiancée had left the Charlotte area the day before and had spent the night at his parents' home in Virginia. Officer A then talked to the passenger, who was seated in the defendant's car. She said that the couple had spent the previous night in New York visiting the defendant's parents. Officer A did not see any drugs or weapons in the defendant's car. Officer A then returned to his patrol car and received the defendant's consent in writing to a search of his car. Officer B arrived and was asked by Officer A to frisk the defendant while Officer A searched the defendant's car. The officers testified at the suppression hearing that the defendant was frisked because it was

standard procedure to do so when a vehicle is searched. (1) The court ruled that this evidence was insufficient to establish reasonable suspicion to frisk the defendant. The court noted that the defendant was polite and cooperative. The officers were not aware that the defendant had a criminal record or drug background. The defendant had not made any movement or statement that would indicate that he had a weapon. Neither the defendant's nervousness nor the variance in the statements of the defendant and his fiancée were sufficient to justify the frisk. The court distinguished State v. McGirt, 122 N.C. App. 237, 468 S.E.2d 833 (1996). (2) The court ruled that the defendant did not consent to be frisked. The written consent form only authorized a search of the defendant's vehicle, not a search of his person. Also, the defendant's acquiescence when officer B told him he would frisk him was not consent, considering the circumstances of this case.

Officer Lawfully Seized Evidence in Plain View While Securing Homicide Scene

State v. Mickey, 347 N.C. 508, 495 S.E.2d 669 (6 February 1998). Officers found the body of a murder victim in a bedroom. Among items seized was a credit card on the top of a desk located eight feet from the victim's body, and several pornographic magazines addressed to someone other than the defendant (the husband of the murder victim) that were discovered under the bed after the bloodstained mattress and the box springs were properly seized and removed. The defendant did not challenge the officers' authority to secure the murder scene or to seize evidence related to the murder, such as the victim's body and the bloodstained mattress. However, the defendant challenged the seizure of the credit card and pornographic magazines. The court ruled, distinguishing Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), that these items were properly seized because they were in plain view and were evidence of the murder. The court noted that it would have been immediately apparent to the officers that these items—bearing names other than the victim's or defendant's—could be evidence of the murder, because they were likely to reveal the identity of the killer or of a material witness.

Miscellaneous

Defendant Is Not Automatically Entitled to Evidentiary Hearing on Motion for Appropriate Relief Simply Because Defendant Has Asserted Violation of Federal Constitutional Rights

State v. McHone, 348 N.C. 254, 499 S.E.2d 761 (8 May 1998). This case involved an interpretation of alleged conflicting language in G.S. 15A-1420(c)(1) (party entitled to hearing unless court determines motion is without merit) and G.S. 15A-1420(c)(7) (if motion alleges violation of United States Constitution, defendant is entitled to have trial court make conclusions of law and state reasons before denying motion). The court ruled that when a motion for appropriate relief presents only questions of law, including questions of federal constitutional law, the trial judge must determine the motion without an evidentiary hearing. The court stated that if the trial judge can determine from the motion and any supporting or opposing information that the motion is without merit, it may deny the motion without any hearing either on questions of fact or questions of law, including constitutional questions. Therefore, it does not automatically follow that because a defendant asserts violations of the defendant's federal

constitutional rights, that the defendant is entitled to present evidence or to a hearing on questions of fact or law. The court also stated that when a motion for appropriate relief presents only a question of constitutional law and it is clear to the trial judge that the defendant is not entitled to prevail, the motion is "without merit" under G.S. 15A-1420(c)(1) and may be dismissed by the trial judge without a hearing. Likewise, when the facts are disputed but the trial judge determines that the defendant is not entitled to relief even based on the defendant's assertion of facts, the trial judge may determine that the motion is "without merit" and deny it without a hearing on questions of law or fact.

(1) Juvenile Transfer Order Entered By District Court Judge Is Final Order that May Be Immediately Appealed By Juvenile to North Carolina Court Of Appeals
(2) Superior Court Judge Has Authority to Review Validity of Indictments Against Juvenile Whose Case Has Been Transferred from District Court
(3) Juvenile's Rights under G.S. 7A-609 Apply Not Only to Determination of Probable Cause, But Also to District Court's Consideration and Decision to Transfer Jurisdiction to Superior Court
(4) Court Clarifies Standard of Review of a Trial Judge's Ruling to Allow or Deny Motion to Continue; No Error in Denying Motion to Continue in District Court
(5) Superior Court Judge Erred in Dismissing Indictments

State v. T.D.R., 347 N.C. 489, 495 S.E.2d 700 (6 February 1998), *reversing*, 125 N.C. App. 209, 483 S.E.2d 193 (26 March 1997). The defendant was alleged in juvenile petitions to have committed two felonies when he was fifteen years old. He waived his right to present evidence and stipulated that probable cause existed. He then requested a two-week continuance so he could undergo mental health evaluations to be offered as evidence on whether his cases should be transferred to superior court for trial as an adult. The district court judge denied the continuance, took evidence on the transfer issue, and transferred jurisdiction to the superior court. The defendant was indicted for the felonies. The defendant filed a motion to dismiss the indictments in superior court. A superior court judge ruled that the district court judge violated the defendant's due process rights by its refusal to hear the juvenile's evidence concerning the transfer issue. The judge dismissed the indictments and remanded jurisdiction to the district court for a new transfer hearing. (1) The court ruled that under G.S. 7A-666(2), a juvenile transfer order entered by a district court judge is a final order that may be immediately appealed by the juvenile to the North Carolina Court of Appeals; to the extent that In re Green, 118 N.C. App. 336, 453 S.E.2d 191 (1995) was to the contrary, it was overruled. Although the superior court obtains jurisdiction over the case for trial and related matters on entry of a transfer order, it does not have authority to conduct appellate review of the district court transfer order. (2) The court ruled that the superior court had the authority, on the defendant's motion, to review the indictments against the defendant and to dismiss them under G.S. 15A-954(a)(4) if the defendant's rights were "flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." Indictments against a juvenile in superior court are subject to the same review as indictments against an adult. (3) The court ruled that a juvenile's rights under G.S. 7A-609 (right to hearing, to present evidence, and so forth) apply not only to the determination of probable cause, but also to the district court's consideration and decision to transfer jurisdiction to superior court. (4) The court clarified prior case law on the standard of review of a trial judge's ruling to allow or to

deny a continuance motion. A motion to continue is ordinarily addressed to the trial judge's sound discretion. The ruling will not be overturned by an appellate court unless it is "manifestly unsupported by reason, which is to say it is so arbitrary that it could not have been the result of a reasoned decision." However, if the motion to continue is based on a constitutional right, the trial judge's ruling presents a question of law that is fully reviewable on appeal. The court examined the evidence in this case and ruled that the district court did not abuse its discretion or commit any constitutional error in denying the defendant's motion to continue the transfer hearing. (5) The court ruled that the superior court judge erred in dismissing the indictments against the defendant: (i) the district court judge's denial of the defendant's motion to continue was not error; (ii) the district court judge had not improperly denied the defendant's right to present evidence; (iii) the defendant had proper notice that the issue of transfer to superior court would be considered at the probable cause hearing; and (iv) the superior court judge erred in finding that there was no competent expert evidence before the district court judge concerning the availability of rehabilitative services for the defendant as a juvenile.

(1) Trial Judge's Prohibition on Use of Term "Moral Certainty" During Jury Argument on Reasonable Doubt Was Not Abuse of Discretion, Based on Facts in this Case
(2) State's Jury Argument Did Not Improperly Ask Jurors to Put Themselves in Victim's Place

State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (8 May 1998). (1) Defense counsel during jury argument attempted to explain the meaning of proof beyond a reasonable doubt by referring to State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964) and by telling the jurors that they have a reasonable doubt if they are not satisfied to a "moral certainty" of the defendant's guilt. The state objected to this argument and the trial judge sustained the objection. The judge informed defense counsel that any references to "moral certainty" concerning reasonable doubt could not be disassociated from the evidence. The court distinguished case law [see, for example, State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (1994)] upholding the use of "moral certainty" by noting that the case law involved jury instructions, not jury argument. The court ruled that the trial judge, having instructed defense counsel on the use of the term, did not abuse his discretion in sustaining the state's objection. (2) In the guilt/innocence phase of this first-degree murder trial, the state during jury argument said in essence: could the jurors imagine how the murder victim felt as she lost her bodily functions as she was being choked to death by the defendant? The court ruled that this argument did not improperly ask jurors to put themselves in the victim's place. Instead, the argument properly asked the jury to imagine the fear and emotions of the victim; the court cited State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996).

Because Trial Judge Properly Ruled that Defendant Failed to Make Prima Facie Showing of Racial Discrimination, Court Need Not Examine Validity of Race-Neutral Reasons Offered by Prosecutor

State v. Smith, 347 N.C. 453, 496 S.E.2d 357 (6 February 1998). The defendant asserted during jury selection that he was black and the state had peremptorily challenged one black prospective juror. The court upheld the trial judge's ruling that this evidence was insufficient to establish a prima facie case of racial discrimination under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Although the state had offered race-neutral reasons for exercising

this peremptory challenge, the court rejected the defendant's argument that when the state does so, the prima facie case inquiry becomes moot under State v. Cummings, 346 N.C. 291, 488 S.E.2d 550 (1997). The court noted that although it had examined in *Cummings* the state-offered race-neutral reasons after the trial judge had not found a prima facie showing of intentional discrimination, it was not required to do so.

Private Attorney, Hired by District Attorney to Bring Civil Nuisance Action Under G.S. 19-2.1, May Not Bring *Quantum Meruit* Action Against State for Payment of Attorney's Legal Services

Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 (3 April 1998), *reversing*, 126 N.C. App. 241, 485 S.E.2d 61 (20 May 1997). The court ruled that a private attorney, hired by a district attorney to bring a civil nuisance action under G.S. 19-2.1, may not bring a *quantum meruit* action against the state for payment of the attorney's legal services. The doctrine of sovereign immunity bars recovery in a *quantum meruit* action based on a contract implied in law against the State of North Carolina. [Note: The reversal of the court of appeals on the issue discussed above does not affect the other ruling of the court of appeals that the private attorney may not bring an action against the district attorney in either his official or private capacity.]

Capital Case Issues

G.S. 15A-1415(f) Does Not Exempt State's Work Product from Discovery by Capitally-Sentenced Defendant Making Motion for Appropriate Relief

State v. Bates, 348 N.C. 29, 497 S.E.2d 276 (3 April 1998). The defendant was convicted of first-degree murder and sentenced to death. The defendant filed a motion for appropriate relief and requested discovery of all the state's investigative and prosecution files under G.S. 15A-1415(f) ("to the extent allowed by law," state must provide to capitally-sentenced defendant filing motion for appropriate relief complete files of all law enforcement and prosecutorial agencies). The court rejected the state's argument that the qualifying language in the statute, "to the extent allowed by law," shielded from discovery the work product of prosecutors and their agents. The court noted that the statute provides that if the state reasonably believes that allowing inspection of part of a file would not be in the interest of justice, the state may submit that part to the judge to determine if it is subject to discovery. The court also rejected the state's argument that service of the motion for discovery on the district attorney alone was insufficient to obtain discovery from the pertinent investigative files of various law enforcement agencies who were involved in the case. The court stated that while it may be advisable, in some circumstances, to serve each law enforcement agency, there is no statutory requirement to do so and the state did not present any compelling reason to justify individual service in this case.

Trial Judge Does Not Have Authority to Prohibit State from Seeking Death Penalty as Sanction for Failing to Timely Schedule Rule 24 Hearing

State v. Rorie, 348 N.C. 266, 500 S.E.2d 77 (8 May 1998). The court ruled that a trial judge does not have the authority to prohibit the state from seeking the death penalty for first-degree murder as a sanction for the state's failure to timely schedule a Rule 24 hearing. The court noted that repeated violations of Rule 24 manifesting a willful disregard for the fair and expeditious prosecution of capital cases may result in contempt under G.S. 5A-11(7) or other disciplinary action.

Proper to Submit Aggravating Circumstance G.S. 15A-2000(e)(2) (Previously Convicted of Capital Felony) Even Though Conviction Occurred After Date of Murder for Which Defendant Is Being Sentenced, As Long As Murder Resulting in that Conviction Occurred Before that Date

State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (8 May 1998). Relying on similar rulings [State v. Burke, 343 N.C. 129, 469 S.E.2d 901 (1996); State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996)] involving aggravating circumstance G.S. 15A-2000(e)(3) (previously convicted of violent felony), the court ruled that it was proper to submit aggravating circumstance G.S. 15A-2000(e)(2) (previously convicted of capital felony), even though the conviction occurred after the date of the murder for which the defendant is being sentenced. The submission of this aggravating circumstance is proper as long as the murder resulting in the conviction is committed before date of the murder for which the defendant is being sentenced, even though the conviction occurs after that date.

(1) Prosecutor's Jury Argument in Capital Sentencing Hearing about Comfortable Life in Prison Was Proper
(2) Proper to Submit Both G.S. 15A-2000(e)(5) (Murder Committed While Defendant Engaged in Arson) and G.S. 15A-2000(e)(10) (Using Weapon Normally Hazardous to Lives of More Than One Person), Although They Both Relied on Same Evidence

State v. Smith, 347 N.C. 453, 496 S.E.2d 357 (6 February 1998). (1) The prosecutor argued to the jury in a capital sentencing hearing that if the defendant was sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television. The court upheld this argument, citing State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995), noting that the state's argument emphasized the state's position that the defendant deserved the death penalty rather than a comfortable life in prison. (2) The defendant was convicted of first-degree murder in which he set fire to an apartment building by lighting kerosene, killing one person and seriously injuring others. Distinguishing State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987), the court ruled that the aggravating circumstances (e)(5) (murder committed while defendant engaged in arson) and (e)(10) (using weapon normally hazardous to lives of more than one person) were both properly submitted to the jury because they addressed different aspects of the defendant's murder, although they both relied on the same evidence. Aggravating circumstance (e)(5) addresses the fact that the defendant committed murder while engaging in another felony, arson. Aggravating circumstance (e)(10) addresses a distinct aspect of the defendant's character—he not only intended to kill a particular person

when setting fire to the apartment building, but he also disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night.

Judge Did Not Err in Failing to Give Peremptory Instruction for Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (5 December 1997). The court ruled that, based on the following evidence, the trial judge did not err in failing to give a peremptory instruction for mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The defendant was being sentenced for convictions of murders committed on January 20, 1995. The defendant was convicted (1) in 1982 of hit-and-run involving property damage and driving under the influence; (2) in 1983 of driving while license suspended; and (3) in 1986 of driving under the influence. Also, the defendant had a long history of purchasing and using illegal drugs.

Judge Erred in Failing to Submit Mitigating Circumstance G.S. 15A-2000(f)(7) (Defendant's Age at Time of Murder)

State v. Zuniga, 348 N.C. 214, 498 S.E.2d 611 (8 May 1998). The court ruled, relying on State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994), that the trial judge erred in failing to submit statutory mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age at time of murder). The defendant was twenty-seven-years old at the time of the murder. However, a mental health expert testified that the defendant had an IQ of 56, signifying an intellectual age of 7.4 years, a history of mild to moderate mental retardation, and moderate organic brain syndrome. Another mental health expert testified that the defendant had an IQ of 64, suffered from mild mental retardation, and had chronic brain damage. Both experts said that the defendant was mentally impaired at the time of the murder. [Note: A judge has the duty to submit a statutory mitigating circumstance even when the defendant does not request its submission, as occurred in this case.]

(1) Judge Properly Denied Defendant's Impermissible Stakeout Question to Prospective Jurors
(2) Polling Jurors on Death Penalty Recommendation Was Properly Done

State v. Richmond, 347 N.C. 412, 495 S.E.2d 677 (6 February 1998). (1) The trial judge did not allow the defendant to ask prospective jurors that if they knew that the defendant had previously been convicted of first-degree murder, would they still be able to consider mitigating circumstances and impose a life sentence. The court, relying on State v. Robinson, 339 N.C. 263, 451 S.E.2d 196 (1994), ruled that the question was an impermissible stakeout question; that is, the question sought to discover in advance what a prospective juror's decision would be under a certain state of evidence. The court also stated that a stakeout question is not made proper simply because it is predicated on a set of facts that is cast as uncontroverted rather than hypothetical The court distinguished State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996) (state was properly allowed to ask prospective juror if he could follow the law by considering the death penalty for an accessory who did not actually pull the trigger), by noting that the court in that case concluded that the trial judge did not abuse his discretion by allowing the state to inquire about the prospective jurors' ability to follow the law, when that inquiry neither indoctrinated the

jurors about unproven facts nor committed them to a decision before they were instructed on the law. The court also distinguished Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (defendant is entitled to ask prospective jurors if they would impose the death penalty automatically without regard to mitigating circumstances), by noting that *Morgan* does not entitle a defendant to ask stakeout questions. (2) In polling the jurors on their recommendations of three death sentences, the clerk asked each juror if each death sentence was his or her recommendation. Following each juror's affirmative responses for each of the three death sentences, the clerk then failed to ask some of the jurors the additional question, "Do you still assent thereto?" The court ruled that the polling of the jury was properly done, because the first question satisfies the requirements of G.S. 15A-2000(b).

Trial Judge Did Not Err During Capital Sentencing Hearing in Granting State's Motion for Mistrial Over Defendant's Objection, When Manifest Necessity Supported Mistrial Based on Juror Misconduct During Deliberations

State v. Sanders, 347 N.C. 587, 496 S.E.2d 568 (6 March 1998). The court ruled that the trial judge did not err during a capital sentencing hearing in granting the state's motion for a mistrial over the defendant's objection, when manifest necessity supported the mistrial based on juror misconduct during deliberations. Among other facts supporting the mistrial: twice after being sent out to deliberate, the jurors sent back a statement that revealed they were not deliberating as the judge had instructed, but were discussing improper matters such as parole eligibility, a juror's investigation outside the jury room, evidence at a previous trial, and whether one juror believed in the death penalty.

NORTH CAROLINA COURT OF APPEALS

Criminal Offenses

(1) Each Act of Embezzlement Constitutes Separate Offense, But State Has Discretion to Charge Only One Offense
(2) When Offense Began When Fair Sentencing Act Was Effective and Ended When Structured Sentencing Act Was Effective, Defendant Must Be Sentenced under Structured Sentencing Act

State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (19 May 1998). The defendant was charged with one count of embezzlement for a series of acts of embezzlement that were committed over a period of time when the Fair Sentencing Act (FSA) was effective (acts committed before October 1, 1994) and when the Structured Sentencing Act (SSA) was effective (acts committed on or after October 1, 1994). (1) The court ruled, relying on statements in State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993) and State v. Thompson, 50 N.C. App. 484, 274 S.E.2d 381 (1981), that each act of embezzlement constitutes a separate offense which may be charged separately, but the state has the discretion to charge one embezzlement. [Note, however, that the court did not discuss G.S. 15A-924(a)(2), which requires that a criminal pleading must contain a separate count for each offense charged, and G.S. 15A-924(b), which provides that if a count charges more than one offense, a defendant by timely motion may require the state to elect and state a single offense alleged in the count on which the state will

proceed to trial. In addition, the court did not discuss the state constitutional requirement that a verdict be unanimous; a charge submitted to the jury that contains more than one offense implicates that requirement—see State v. Lyons, 330 N.C. 298, 412 S.E.2d 308 (1991).] (2) Because there was one indictment alleging acts of embezzlement committed both under FSA and SSA, the trial judge was required to sentence the defendant under SSA; the court's ruling relied on federal cases applying new federal sentencing guidelines when an offense began before the guidelines became effective but concluded after the guidelines became effective.

No Contest Plea Entered On or After July 1, 1975, Is Conviction under Habitual Felon Law

State v. Jackson, 128 N.C. App. 626, 495 S.E.2d 916 (17 February 1998). The court ruled, relying on State v. Outlaw, 326 N.C. 467, 390 S.E.2d 336 (1990), State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 (1990) and other cases, that a no contest plea entered on or after July 1, 1975 (at least if such a plea was entered in a North Carolina state court), is a conviction under the habitual felon law.

Trial Judge Erred in Submitting Felonious Restraint as Lesser-Included Offense of First-Degree Kidnapping Indictment, When Indictment Did Not Allege Felonious Restraint Elements of Transporting Victim by Motor Vehicle; Error May Be Asserted by Defendant on Appeal Even Though Defendant Requested Felonious Restraint Instruction at Trial

State v. Wilson, 128 N.C. App. 688, 497 S.E.2d 416 (3 March 1998). The defendant was indicted for first-degree kidnapping. The trial judge, on the defendant's request, submitted the lesser offenses of second-degree kidnapping, felonious restraint, and false imprisonment. (Note: G.S. 14-43.3 provides that felonious restraint is a lesser-included offense of kidnapping.) The jury found the defendant guilty of felonious restraint. On appeal, the defendant argued that the first-degree kidnapping indictment was insufficient to support the felonious restraint conviction because the indictment did not allege the felonious restraint elements of transporting the victim by motor vehicle. The court ruled that the invited error doctrine did not bar the defendant from raising this issue, because a challenge to an indictment may be made for the first time on appeal. The court also ruled that when a lesser offense has an essential element not alleged in an indictment charging the greater offense, a defendant may not be convicted of the lesser offense [absent a legislatively-authorized short-form indictment; see, for example, G.S. 15-144.1(b)]. Thus the trial judge erred in submitting felonious restraint, because the first-degree kidnapping indictment did not allege the felonious restraint elements of transporting the victim by motor vehicle.

(1) Evidence Was Sufficient to Support Indecent Liberties Conviction
(2) Trial Judge Erred in Indecent Liberties Trial in Failing to Give Jury Instructions on Mistake of Fact, Automatism, and Diminished Capacity, Based on Facts in This Case

State v. Connell, 127 N.C. App. 685, 493 S.E.2d 292 (18 November 1997). The defendant was convicted of indecent liberties with an eight-year-old girl. The evidence at trial showed that during the night the girl got into a bed in which her mother and the defendant, a male, were apparently sleeping. The girl was between her mother and the defendant, facing the defendant. The girl testified that as she was falling asleep, the defendant put his hand in her underwear and

was "rubbing on me and stuff." There was no direct testimony that the defendant awoke when the girl entered the room or that the defendant was awake at any time. A social services worker testified about what the girl told her. The girl said the defendant touched her "on the wrong spot" and he put his finger in her vagina. The girl also told her that the defendant, when confronted by the mother, told her mother that he thought that he was touching the mother rather than the girl. (1) The court noted that the court in State v. Childress, 321 N.C. 226, 362 S.E.2d 263 (1987), rejected the view that an inference cannot be based on an inference. The court stated that, based on the defendant's touching of the victim and his exculpatory comment to the girl's mother, the jury could infer that the defendant was both awake and that his purpose was to satisfy his sexual desires. The court ruled that the evidence was sufficient to support the defendant's indecent liberties conviction. (2) The court ruled that because the state presented only circumstantial evidence that the defendant was awake (the girl's statement to the social worker) and intended to touch the child instead of the mother, the trial judge erred in failing to instruct on the defense of mistake of fact, based on the defendant's statement that he thought he was touching the girl's mother. The court also ruled that the trial judge erred in failing to instruct on the defenses of automatism and diminished capacity, based on the evidence that the defendant was asleep at the time of the alleged offense.

Evidence Was Sufficient to Support Indecent Liberties Conviction

State v. Creech, 128 N.C. App. 592, 495 S.E.2d 753 (17 February 1998). The defendant, a forty-seven-year-old male, was convicted of taking indecent liberties with fifteen-year-old male victims A and B. The defendant argued on appeal that the evidence was insufficient as to victim B. The evidence showed that the defendant massaged victim A while the defendant was wearing only underwear and the victim only his shorts, and also the defendant performed fellatio on victim A. Thereafter, victim A massaged the defendant. The defendant gave money to victim A and asked him to send others who might be willing to give the defendant a massage for money. Later, victim B gave the defendant four or five massages over a period of months. The defendant first massaged victim B and then victim B massaged the defendant, while the defendant was wearing only underwear and the victim only his shorts. The defendant paid the victim for these massages. Evidence of similar conduct was introduced by other victims. The court ruled that the evidence was sufficient to support the defendant's conviction of indecent liberties with victim B; the jury could infer that the defendant committed these acts for the purpose of arousing or gratifying his sexual desire.

(1) Indictments Alleging Commission of Sex Offenses with Minor Over Period of Time Were Valid
(2) Trial Judge Erred in Not Allowing Defendant To Ask Prospective Jurors If They Thought Children Were More Likely To Tell the Truth When They Alleged Sexual Abuse

State v. Hatfield, 128 N.C. App. 294, 495 S.E.2d 163 (6 January 1998). The defendant was indicted for several sex offenses with his minor stepdaughter. (1) The indictments alleged a period of time for the commission of these offenses. The trial judge denied the defendant's motion to dismiss the indictments because they were impermissibly vague in alleging the period of time. The defendant wanted to present an alibi defense, and to do so he was forced to attempt

to explain where he was during the entire summer. The court, citing State v. Oliver, 85 N.C. App. 1, 354 S.E.2d 64 (1987), upheld the trial judge's ruling. The court also stated, citing State v. Ramey, 318 N.C. 457, 349 S.E.2d 566 (1986), that a witness's vagueness about the date of an offense does not necessarily render an indictment fatally defective. (2) The court ruled, citing State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988) and other cases, that the trial judge erred in not allowing the defendant to ask prospective jurors if they thought children were more likely to tell the truth when they alleged sexual abuse. This question was a proper inquiry into the prospective jurors' sympathies toward a molested child, and was indistinguishable from a question found proper in *McKoy* (prosecutor asked prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense).

Defendant's Threatened Use of Firearm, Even Though Firearm Was Not Seen by Victim, Was Sufficient Evidence to Support Armed Robbery Conviction

State v. Lee, 128 N.C. App. 506, 495 S.E.2d 373 (3 February 1998). The defendant broke into the victim's apartment at night, covered her head with a pillow, told her that he would shoot her if she resisted, and took money from her apartment. At one point during the robbery, the defendant said, "Where did I drop my gun?" The victim never actually saw a firearm. The court, relying on State v. Williams, 335 N.C. 518, 438 S.E.2d 727 (1994), upheld the defendant's armed robbery conviction. The court stated that the state must only prove that the defendant represented that he had a firearm, and the circumstances led the victim reasonably to believe that the defendant had a firearm and might use it.

(1) Trial Judge's Ordering Trial of Calendared Offenses with Non-Calendared Offenses, When All Offenses Were Transactionally-Related under G.S. 15A-926(a), Did Not Prejudice Defendant
(2) Sufficient Evidence to Support Kidnapping Offenses that Occurred During Armed Robbery

State v. Thompson, 129 N.C. App. 13, 497 S.E.2d 126 (17 March 1998). (1) The court noted that the trial judge had the authority to order the trial of calendared offenses with non-calendared offenses, when all the offenses were transactionally-related under G.S. 15A-926(a). The court pointed to the language in G.S. 7A-49.3 that no case on the calendar may be called for trial before the day fixed by the calendar, except by consent or "by order of the court." The court ruled that the judge's order did not prejudice the defendant. It did not affect the defendant's trial strategy. Almost the same evidence was necessary to prove all the offenses. (2) The defendant forced two people at gunpoint from the front of a store to a room in the back and then robbed them of their personal property. Relying on State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985), the court ruled that the defendant's removal of these two people was not an inherent and integral part of the armed robbery, and therefore there was sufficient evidence to support the two kidnapping convictions. It was not necessary to move the victims there to commit the armed robbery.

Victim Was Not Released in Safe Place When He Struggled to Get Free from Defendant in Victim's Own House, and Thus Evidence Supported First-Degree Kidnapping Conviction

State v. Raynor, 128 N.C. App. 244, 495 S.E.2d 176 (6 January 1998). After robbing the victim in his own house, the defendant and his accomplice attempted to tie him up with electrical cords. After the victim wrestled a gun from the accomplice, the defendant and his accomplice fled from the house. The court ruled that this evidence was sufficient to prove that the victim was not released in a safe place to support a first-degree kidnapping conviction. The court noted that a defendant must willfully act to ensure that a victim is released in a safe place, which did not occur in this case.

Throwing Gasoline in Victim's Face, Considered with Evidence of Nearby Pack of Matches, Was Sufficient Evidence to Support Convictions of G.S. 14-49(a) (Injury by Using Explosive or Incendiary Device) and G.S. 14- 87 (Attempted Armed Robbery)

State v. Cockerham, 129 N.C. App. 221, 497 S.E.2d 831 (7 April 1998). The defendant entered a grocery store and threw gasoline in the employee's face, burning his eyes and irritating his cheeks and throat. The defendant began beating the employee, who grabbed a gun and started shooting at the defendant. The defendant fled the store. The employee testified at trial that he fired at the defendant because he was afraid and wanted to prevent the defendant from throwing a match on him. Evidence showed that there was a pack of matches on the floor of the store near the doorway. The court ruled that this evidence was sufficient to support a conviction of G.S. 14-49(a) (injury by using explosive or incendiary device). The evidence of the pack of matches on the floor indicated "some probability" (quoting from definition of "explosive or incendiary device" in G.S. 14-50.1) that the defendant intended to use the gasoline doused on the employee as an explosive or incendiary device. The court also ruled that the evidence was sufficient to support a conviction of G.S. 14-87 (attempted armed robbery) because the gasoline was used, with evidence of the nearby matches, in a manner to have endangered the employee's life.

Shank Made by Attaching Razor Blade to Ballpoint Pen Was Deadly Weapon as Matter of Law When Used to Stab Person

State v. Allred, 129 N.C. App. 232, 498 S.E.2d 204 (7 April 1998). The court ruled that a shank made by attaching a razor blade to a ballpoint pen was a deadly weapon as a matter of law when it was used to stab a person.

DWI Prosecution and Later DMV License Revocation for Willful Refusal to Take Chemical Test Does Not Violate Double Jeopardy

Ferguson v. Killens, 129 N.C. App. 131, 497 S.E.2d 722 (7 April 1998). The court ruled that a DWI prosecution and a later Division of Motor Vehicles' license revocation for willful refusal to take a chemical test does not violate double jeopardy. Without deciding the "dubious proposition" (court's words) that a license revocation is punishment, the court ruled that a DWI prosecution and the DMV license revocation each contain an element that the other does not contain, and therefore under United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993), there cannot be a double jeopardy violation.

School Suspension for Theft of School Property Was Not Punishment under Double Jeopardy Clause to Bar Later Prosecution for that Theft

In re Phillips, 128 N.C. App. 732, 497 S.E.2d 292 (3 March 1998). The court ruled, relying on State v. Davis, 126 N.C. App. 415, 485 S.E.2d 329 (1997), that a school suspension for theft of school property was not punishment under the Double Jeopardy Clause to bar a later prosecution for that theft.

Evidence

Evidence of Defendant's Similar Shootings of Other Women Was Properly Admitted Under Rule 404(b), Based on Facts in This Case

State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (2 December 1997). The defendant was on trial for a felonious assault of a female victim. The state was permitted, in cross-examining the defendant about his prior convictions, to ask details of the convictions that were beyond the scope of Rule 609—questions about the names of other women he had been convicted of shooting, his relationship with these women, and the type of weapons he had used. The court, noting the similarities between the assault being tried and the prior assaults on other women, ruled that the trial judge properly permitted the cross-examination under Rule 404(b) to show that the defendant had a history of shooting women with whom he had had prior relationships.

Defendant's Statement Should Have Been Admitted as Excited Utterance under Rule 803(2), Based on Facts in This Case

State v. Riley, 128 N.C. App. 265, 495 S.E.2d 181 (6 January 1998). The defendant was on trial for the murder of victim A and the felonious assault of victim B. The defendant's evidence, supporting a defense of self-defense, showed that the defendant had just seen his brother fall to the floor bleeding after being hit on the head with a chair by victim B. Later, the defendant was wrestling with victim B when the defendant said to the defense witness that the defendant was going to let victim B go because victim B had a gun. The court ruled that the defendant's statement to the defense witness was admissible as an excited utterance under Rule 803(2). The events surrounding the statement were "sufficiently startling" to suspend reflective thought, and the defendant's statement occurred while he was under the stress of these events. The court also noted that Rule 803(2) does not require the declarant to testify for the hearsay statement to be admissible. Thus the trial judge erroneously ruled that the statement would not be admissible unless the defendant testified.

(1) State's Witness' Testimony About Deceased Mother's Statements Were Admissible under Rule 803(1) (Present Sense Impression)
(2) Defense Witness' Testimony About Statements of Two State's Witnesses to that Defense Witness Was Admissible to Show Their Bias Against Defendant

State v. Clark, 128 N.C. App. 87, 496 S.E.2d 604 (3 March 1998). The defendant was on trial for first-degree murder. The victim earned his living by driving residents of a rural county to their jobs. (1) A state's witness testified about statements made by the defendant's mother, who was deceased at the time of trial. The witness testified that the mother made a statement to her the day before the murder victim's body was found. The mother had just walked from her home to the witness' house next door after an encounter with the defendant. The mother's face was red and she was picking her teeth, a nervous habit when she was upset. The mother said it was the worst day of her life. The defendant had been with her and was angry that the light company had cut off his power. He was also angry that the victim had stopped giving his wife a ride to her work, and said that he was going to kill the victim. The court ruled, relying on State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990), that this testimony was admissible under Rule 803(1) (present sense impression). The mother's statements to the witness were made sufficiently close in time to her perception of the defendant's statements so that the mother's statements were made "immediately after" her encounter with the defendant. (2) Two of the defendant's sisters testified for the state about incriminating statements made by the defendant. The trial judge excluded the testimony of a defense witness who would have testified that (i) one sister told her that the defendant's family was attempting to frame him for the murder, and the other sister was involved; and (ii) the other sister told her about a summary ejectment action that she and her husband had brought against the defendant, and also asked what it would take to keep the defendant in jail (he was out on bond). The court ruled, relying on State v. Wilson, 269 N.C. 297, 152 S.E.2d 223 (1967), that the testimony of the defense witness was admissible to show that the sisters were biased against the defendant, and thus the trial judge erred in excluding this testimony.

Rule 803(3) (Statement of Declarant's Then-Existing State of Mind) Includes Declarant's Statements Relating Factual Events that Tend to Show Declarant's State of Mind When Making Statements

State v. Exum, 128 N.C. App. 647, 497 S.E.2d 98 (3 March 1998). The court, reviewing State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997) and State v. Hardy, 339 N.C. 207, 451 S.E.2d 600 (1994), noted that a declarant's statements merely relating factual events are not admissible under Rule 803(3) (statement of declarant's then-existing state of mind). However, a declarant's statements relating factual events that tend to show the declarant's state of mind when making factual statements are admissible under Rule 803(3), when the factual statements serve to demonstrate the basis for the declarant's emotions. The court examined the statements of the declarant, which were made immediately before she was murdered, and ruled that they were admissible because the factual circumstances described by the declarant served to demonstrate her fear of the defendant when she made the statements.

Sufficient Circumstantial Evidence Supported Chain of Custody to Admit Evidence at Trial

State v. Stinnett, 129 N.C. App. 192, 497 S.E.2d 696 (7 April 1998). The court rejected the defendant's argument that a plastic-encased two dollar bill lacked a proper foundation to be admitted into evidence at trial. Officer A, who arrested and searched the defendant, testified that he did not recognize the plastic-encased two dollar bill and did not remember finding it on the defendant's person. However, officer B testified that he received a white bag containing the plastic-encased two dollar bill from officer A when officer A transported the defendant to the sheriff's department. Officer C testified that the plastic-encased two dollar bill was in the white bag when he received it from officer B. The court ruled that there was sufficient circumstantial evidence to establish a chain of custody. Any arguably weak links in the chain of custody affect the weight of the evidence, not its admissibility.

Court Does Not Decide Whether Ruling in *Old Chief v. United States* Applies in North Carolina State Courts to Prosecution of Possession of Firearm by Convicted Felon; Even If It Did, Defendant Did Not Offer to Stipulate to Prior Felony Conviction and Was Not Entitled to New Trial

State v. Faison, 128 N.C. App. 745, 497 S.E.2d 111 (3 March 1998). The defendant was prosecuted for possessing a firearm by a convicted felon. In proving its case, the state presented evidence of the defendant's prior felony conviction, which is an element of the offense. On appeal, the defendant argued that his conviction should be reversed, based on Old Chief v. United States, 117 S. Ct. 644, 136 L. Ed. 2d. 574 (1997) (in a federal prosecution for possession of a firearm by a convicted felon, the trial court abused its discretion under federal Rule 403 in refusing the defendant's offer to stipulate to a prior felony conviction to avoid prejudicing the defendant before the jury). The court noted that the *Old Chief* ruling, which involved an interpretation of the federal rules of evidence, is not binding on North Carolina state courts, and the court declined to decide whether it would adopt that ruling. However, the court ruled that even if it were to apply the ruling to this case, the defendant was not entitled to a new trial. The defendant in this case, unlike the defendant in *Old Chief*, did not offer to stipulate at trial that he had a prior felony conviction, nor did he argue that his stipulation would make evidence of the name and nature of the prior offense for which he was convicted inadmissible under state evidence Rule 403.

Arrest, Search, and Confessions

After Vehicle Was Stopped for Speeding, Discrepancy Between Vehicle's License Tag Number Listed in Rental Agreement and Vehicle's Actual License Tag Number Provided Officer with Reasonable Suspicion to Detain Vehicle and Driver to Investigate Matter

Rousselo v. Starling, 128 N.C. App. 439, 495 S.E.2d 725 (3 February 1998). The plaintiff sued an officer for a violation of his Fourth Amendment rights. An officer stopped a vehicle for speeding at 2:10 P.M. The officer noted a discrepancy between the vehicle's license tag number (TG0355) listed in the vehicle's rental agreement and the vehicle's actual license tag number (ZLN697). The officer placed the plaintiff in his vehicle. During the next twenty minutes, the

trooper questioned the plaintiff about his background, where he was going, and so forth. The officer believed that the plaintiff was evasive and nervous. The officer called for backup at 2:34 P.M. While waiting for backup, the officer requested several record checks from the officer's agency dispatcher. The officer continued to ask questions of the plaintiff, and also asked consent to search the car, which was denied. He received verification of the plaintiff's driver's license and, at 2:42 P.M., a drug intelligence center advised the officer that it had no information about the plaintiff. The backup officers arrived at 2:50 P.M. At 3:02 P.M., the officers asked for a canine unit. At 3:04 P.M., the dispatcher called the car rental company to determine if the plaintiff had rented the vehicle. At 3:15 P.M., the car rental company informed the dispatcher that the plaintiff had rented the vehicle. The drug dog arrived about that time and alerted to the presence of drugs, but a search of the vehicle until 3:47 P.M. did not discover any drugs. At that time, the officer was informed of the information from the rental company. Shortly thereafter, the plaintiff was allowed to leave. The plaintiff argued on appeal that the officer did not have reasonable suspicion to detain him before the dog sniff. The court concluded that, based on the facts in this case, the discrepancy between the rental agreement and the vehicle's license tag furnished reasonable suspicion to detain the vehicle. In addition, the court stated that there was not a sufficient indication of the officer's lack of diligence to support the argument that the detention was too long.

Independent Source Exception Supported Admission of Evidence Seized under Search Warrant

State v. Treece, 129 N.C. App. 93, 497 S.E.2d 124 (17 March 1998). An officer entered a house without a warrant to secure it while a search warrant was obtained. Illegal drugs were later seized with a search warrant. The court noted that the affidavit for the search warrant did not contain any information gained from the officer's entry. Relying on Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984), the court ruled that the information supplying probable cause for the search warrant was obtained independently from any possible illegal entry, and thus the illegal drugs were properly seized.

Probable Cause Supported Administrative Inspection Warrant to Inspect Adult Bookstore

South Blvd. Video & News v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (21 April 1998). A zoning enforcement officer conducted an inspection of a business with an administrative inspection warrant to determine if it was an adult bookstore or adult mini motion picture theater being operated in violation of a city ordinance. The court ruled that probable cause supported the issuance of the warrant. The officer's affidavit stated that he had seen videotapes and magazines that appeared to be distinguished by their emphasis on depicting or describing sexual activities and human genitals, pubic regions, buttocks, and female breasts. In addition, merchandise such as artificial genitals and other sexual paraphernalia were displayed. There were also booths for viewing adult videotapes and movies.

(1) Officer's Remark to Defendant After He Asserted Right to Counsel Was Not Interrogation under *Miranda*
(2) Defendant Reinitiated Communication with Officers After Invoking Right to Counsel

State v. Jordan, 128 N.C. App. 469, 495 S.E.2d 732 (3 February 1998). After several hours of interrogation, the defendant indicated he might need an attorney. An officer stopped the interrogation, left the interview room, and informed his sergeant, who asked the defendant if he needed a lawyer. The defendant responded, "Yes, I've told them the truth." The sergeant replied, "No, you did not, that's bullshit, you're lying, and you're going to jail for murder." The officers left the defendant alone for twenty minutes while an officer located the proper booking forms. Sometime during the booking process the defendant stated, "I told you I had something else to say if I was going to be charged." The officers then left him alone, conferred among themselves, and concluded that he was attempting to initiate further conversation. They then re-approached him, verified that he wanted to speak with them without a lawyer, and elicited incriminating statements from him. (1) The court ruled that the sergeant's remarks to the defendant after he asserted his right to counsel were not interrogation or the functional equivalent of interrogation. The exchange was very brief and was not reasonably likely to evoke an incriminating response; see Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Also, the twenty minutes while the defendant was left alone was not reasonably likely to evoke an incriminating response. (2) The court ruled that the defendant's statement, "I told you I had something else to say if I was going to be charged," was a reinitiation of communication after his prior assertion of the right to counsel. Therefore, the officers did not violate his *Miranda* rights by re-approaching him and eliciting incriminating statements.

(1) Express Waiver of Juvenile Interrogation Rights Is Not Required
(2) Juvenile Properly Waived Interrogation Rights Despite Low IQ

State v. Flowers, 128 N.C. App. 697, 497 S.E.2d 94 (3 March 1998). When the mother of the defendant, who was thirteen years old, learned that the police were looking for him, she brought him to the police department. Before asking any questions, an officer read the defendant his juvenile rights in the mother's presence. After each right was read, the officer asked the defendant and his mother if they understood, and they answered "yes" each time. The defendant did not make any affirmative statement whether he would agree to talk with officers or whether he wanted a lawyer to be present. The officer interrogated the defendant in his mother's presence for about two hours. (1) The defendant argued that he never expressly waived his right to remain silent and right to counsel. The court, citing North Carolina v. Butler, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), noted that an express waiver of *Miranda* rights is not required and ruled that a juvenile need not make an express waiver of juvenile rights. (2) The defendant argued that he lacked the capacity to understand his rights because of his youth and low mental ability (a psychologist testified that the defendant was mildly retarded with a full scale IQ of 56 and a verbal IQ of 48). The court discussed the evidence presented at the suppression hearing and upheld the trial judge's findings that the defendant knowingly, intelligently, and voluntarily waived his rights. The court stated, citing State v. Fincher, 309 N.C. 1, 459 S.E.2d 501 (1995), that a defendant's youth or subnormal mental capacity does not necessarily make him incapable of waiving his rights knowingly and voluntarily.

Assistant School Principal Was Not Required to Give *Miranda* Warnings When Questioning Student About Theft of School Property

In re Phillips, 128 N.C. App. 732, 497 S.E.2d 292 (3 March 1998). An assistant school principal questioned a student about school property that had been stolen. No law enforcement officer was involved with the questioning. The court ruled that the assistant principal was not required to give *Miranda* warnings before questioning the student.

Officer Is Not Required to Advise Juvenile, Before Conducting Custodial Interrogation, that Juvenile Could Be Tried As Adult

State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811 (20 January 1998). The court rejected defendant's argument that an officer is required to advise a juvenile, before conducting custodial interrogation, that the juvenile could be tried as an adult for the offense being investigated. The court declined to follow rulings from other state courts that require an officer to advise the juvenile in that manner.

Defendant's Privilege Against Compelled Self-Incrimination Was Not Violated by Requiring Her to Stand Before Jury and Repeat Words Used by Armed Robber for Voice Identification by State's Witness

State v. Thompson, 129 N.C. App. 13, 497 S.E.2d 126 (17 March 1998). The court ruled, relying on State v. Locklear, 117 N.C. App. 255, 450 S.E.2d 516 (1994), that the defendant's privilege against compelled self-incrimination was not violated when the trial judge required her to stand before the jury and repeat words used by the armed robber, so the state's witness could make a voice identification. The judge gave a limiting instruction that the jury should consider the voice exemplar as a sample by which the state's witness could test her recollection of the voice she heard during the robbery.

Sentencing

In Determining Points for Prior Record Level under Structured Sentencing, Conviction in District Court Is Date Judgment Was Entered, Not Date Case Was Remanded From Superior Court After Withdrawal of Notice of Appeal

State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (6 January 1998). On August 9, 1990, the defendant was convicted of communicating threats in district court and gave notice of appeal for trial de novo in superior court. On November 5, 1990, the defendant was convicted of misdemeanor breaking or entering and gave notice of appeal for trial de novo in superior court. On November 6, 1990, he withdrew his notice of appeal for the communicating threats conviction, and the case was apparently remanded to district court for compliance with the judgment on November 8, 1990. On November 8, 1990, the defendant withdraw his notice of appeal for the misdemeanor breaking or entering conviction. When sentencing the defendant for a felony in superior court, the trial judge assigned one point for each of the misdemeanor convictions. The defendant argued on appeal that only one point should be assigned for these two convictions, because both of them occurred during the same session of district court

(November 8, 1990); see G.S. 15A-1340.14(d). The court rejected the defendant's argument. The court ruled that the date of a conviction for a misdemeanor appealed for trial de novo—and later remanded or the appeal withdrawn—is the date of the entry of judgment in district court. Thus the two misdemeanor convictions in this case did not occur during the same session of district court, and the trial judge correctly assigned one point for each of the convictions.

Miscellaneous

Trial Judge Did Not Err in Denying Defendant's Peremptory Challenges Because They Were Racially Discriminatory under *Batson*

State v. Cofield, 129 N.C. App. 268, 498 S.E.2d 823 (21 April 1998). During jury selection the state accepted a jury of six black and six white jurors and passed them to the defendant. The defendant peremptorily challenged four white prospective jurors on behalf of the defendant, who was black. The state challenged the exercise of these challenges as racially discriminatory under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992). The court ruled that the trial judge did not err, based on facts of the jury selection process in this case, in ruling that a prima facie case had been established. The defendant then offered reasons for the challenges, which were not related to the race of the four white jurors. The court ruled that the trial judge erred in ruling that the defendant had failed to offer race-neutral reasons for the challenges. See generally Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995). However, the court ruled that the trial judge did not err, based on the evidence before the judge, that the defendant's explanations for the challenges were merely pretextual excuses for purposeful racial discrimination.

(1) Racially-Discrimination Challenge to Jury Pool Based Solely on Statistical Disparity Was Insufficient
(2) State Showed Race-Neutral Reasons for Peremptory Challenge under *Batson*

State v. Corpening, 129 N.C. App. 60, 497 S.E.2d 303 (17 March 1998). (1) The court upheld the trial judge's denial of the defendant's motion to challenge the jury pool, which was based solely on the statistical disparity between the county's black population (5.5 percent) and the percentage of the jury pool that was black (2 percent). The court, citing State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977), ruled that statistical disparity alone is insufficient to prove that underrepresentation is a product of systematic exclusion of a minority group. (2) The court upheld a trial judge's ruling under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), that the prosecutor offered a race-neutral reason for exercising a peremptory challenge: the prospective juror indicated prior contact with the defendant and two members of the defendant's family, both of whom were listed as potential defense witnesses (and the juror's mother attended church with one of them). Also, a relative of the prospective juror had been a defendant in a murder case.

Trial Judge Did Not Err in Allowing Prosecutor to Exercise Peremptory Challenges to Exclude Prospective Black Jurors from Serving on Jury

State v. Caporasso, 128 N.C. App. 236, 495 S.E.2d 157 (6 January 1998). The court ruled that the trial judge not err in allowing the prosecutor to exercise peremptory challenges to exclude two prospective black jurors from serving on the jury. The prosecutor excluded one juror because she seemed bored with the proceedings and exhibited a general lack of attention, and excluded another juror because of his young age and lack of maturity. The court's ruling relied on State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994), State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988), and State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

Evidence Supported Judge's Finding that Guilty Plea Was Voluntarily and Understandingly Made Even Though Defendant Was Not Informed of Specific Constitutional Rights He Was Waiving by Pleading Guilty

State v. Dammons, 128 N.C. App. 16, 493 S.E.2d 480 (2 December 1997). The court, citing Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) and Boykin v. Alabama, 395 U.S. 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), ruled that the evidence of the guilty plea hearing supported the trial judge's finding that the defendant's guilty plea was freely, voluntarily, and understandingly made, even though the defendant was not informed of the specific constitutional rights that he was waiving by pleading guilty.

Requirement under G.S. 15A-761 That Trial Must Begin Within 180 Days After Prisoner's Notice to District Attorney Mandates Actual Notice to District Attorney

State v. Treece, 129 N.C. App. 93, 497 S.E.2d 124 (17 March 1998). The court ruled that the requirement under G.S. 15A-761 that a trial must begin within 180 days after a prisoner's notice to a district attorney mandates actual notice to the district attorney (for example, the 180-period does not begin when the prisoner mails the notice or when the district attorney should have received the mailed notice).

Defendant Failed to Show Good Cause for Appointment of Counsel for Habitual Felon Hearing After He Had Represented Himself At Trial of Substantive Offenses

State v. Jackson, 128 N.C. App. 626, 495 S.E.2d 916 (17 February 1998). The defendant was charged with several offenses and being a habitual felon. Just before trial, the defendant's appointed counsel, at the defendant's request, filed a motion to withdraw from the case. The defendant requested permission to proceed pro se, which the trial judge permitted after making the appropriate inquiries of the defendant. After the defendant was convicted, but before the beginning of the habitual felon hearing, the defendant requested appointed counsel. The trial judge denied the request. Relying on State v. Clark, 33 N.C. App. 628, 235 S.E.2d 884 (1977), the court ruled that a waiver of counsel or decision to proceed pro se continues until the end of a trial, including a habitual felon hearing, unless the defendant shows good cause for a change. Because the defendant did not make such a showing, the trial judge did not err in denying the defendant's request for appointed counsel.

Trial Judge Did Not Abuse Discretion in Excusing for Cause Prospective Juror Who Was Defense Counsel's Brother-In-Law

State v. Exum, 128 N.C. App. 647, 497 S.E.2d 98 (3 March 1998). The court ruled that the trial judge did not abuse his discretion in excusing for cause a prospective juror who was the defense counsel's brother-in-law.

(1) Judge Did Not Err in Failing to Declare Proposed Defense Witness as Material Witness under G.S. 15A-803
(2) Expunction of Conviction Does Not Require Destruction of District Attorney Office's Investigative Files

State v. Jacobs, 128 N.C. App. 559, 495 S.E.2d 757 (17 February 1998). (1) The trial judge did not err in failing to declare a proposed defense witness as a material witness under G.S. 15A-803, based on the facts in this case. The witness' proposed testimony would have been merely cumulative and thus not material to the determination of the defendant's guilt or innocence. (2) G.S. 15A-146 does not require the destruction of a district attorney office's investigative files when an expunction is ordered.

(1) Judge Did Not Err in Ordering Defendant's Department of Correction Probation and Parole Records to be Given to State As Well As Defendant
(2) Judge Erred in Ordering Defendant's Mental Health Experts to Prepare and Give Reports to State When Defendant Had Not Requested Discovery from State
(3) Judge Did Not Err in Ordering Defendant to Undergo Mental Examination by State Expert to Rebut Proposed Defense Testimony on Diminished Capacity Defense

State v. Clark, 128 N.C. App. 87, 493 S.E.2d 770 (16 December 1997). The defendant was tried for first-degree murder. (1) The defendant made a motion for copies of his Department of Correction parole and probation records. The judge granted the motion and also granted the state's request for the records. The court rejected the defendant's argument that the judge had no authority under G.S. 15A-905(a) to provide the records to the state because there was no evidence that the defendant intended to use those records at trial. The court ruled that the judge's furnishing of the records to the state was not made under G.S. 15A-905(a) because the records were in the Department of Correction's control, not in the "possession, custody, or control of the State" as provided in G.S. 15A-903(d)—the court cited State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979) (quoted phrase includes prosecutor and those working in conjunction with prosecutor or office). (2) The court ruled, distinguishing State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (1994), that the trial judge erred in ordering the defendant's mental health experts to prepare and to give reports to the state. Unlike *Bacon*, the defendant in this case had not requested discovery from the state under G.S. 15A-903(e), so the defendant had no obligation to provide reciprocal discovery under G.S. 15A-905(b). (3) The court ruled, relying on State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989), that the trial judge did not err in ordering the defendant to undergo a mental examination by a state mental health expert to rebut the defendant's proposed mental health expert testimony on the diminished capacity defense.

State Complied With Constitutional Discovery Obligations

State v. Johnson, 128 N.C. App. 361, 496 S.E.2d 805 (20 January 1998). (1) A state's witness testified that she was shown two sets of six photographs by a law enforcement officer. The

officer testified he only created one photographic lineup. The state, after unsuccessfully attempting to locate the alleged second photo lineup, reviewed its files and contacted the officer to confirm there were no reports missing from the officer's file. The state ultimately was unable to discover a second photo lineup. The court ruled that the state's effort to learn of the existence of the alleged second photo lineup complied with the requirements imposed by Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), and the trial judge properly denied the defendant's motion to compel discovery. (2) The defendant argued that the state failed to provide him with information before trial about a state witness' conviction of assault on a female and incarceration for a probation violation, and the failure prejudiced his ability to properly cross-examine the witness. The state indicated that before trial it had reviewed the witness' record and the computer did not show this information; it only learned of the information when a prosecutor spoke with the witness shortly before trial. The court noted that the state elicited this information from the witness on direct examination, and the defendant had the opportunity to cross-examine the witness as well. There was no reasonable probability that had this information been disclosed to the defendant earlier, the result of the trial would have been different. Thus the state did not violate the defendant's constitutional rights.

(1) Definition of "Adult Mini Motion Picture Theater" Is Not Unconstitutionally Vague
(2) Evidence Supported Finding that "Preponderance" of Motion Pictures Were Related to Sexual Activities

Fantasy World, Inc. v. Greensboro Board of Adjustment, 128 N.C. App. 703, 496 S.E.2d 825 (3 March 1998). A Greensboro ordinance regulating adult entertainment businesses defined "adult mini motion picture theater" identically to the definition in G.S. 14-202.10(6), which requires that a "preponderance" of motion pictures be related to sexual activities. (1) The court ruled, relying on Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), that the use of the word "preponderance" is reasonably specific and sufficiently precise to be readily understood, and thus the ordinance was not unconstitutionally vague on it face. (2) The court examined the evidence before the Board of Adjustment and ruled that it was sufficient to prove that a preponderance of the motion pictures were related to sexual activities, considering the number of adult-oriented videos versus G-rated videos and the manner in which each was displayed. The court noted the dictionary definition of "preponderance" as "superiority in weight." See also South Blvd. Video & News v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (21 April 1998) (similar ruling).

County Ordinance Regulating Distance Between Buildings Containing Adult or Sexually-Oriented Businesses Is Preempted by G.S. 14-202.11 (But Later-Enacted Legislation Has Effectively Reversed this Ruling)

Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (5 May 1998). A county ordinance prohibited a building operating a adult or sexually-oriented business from being located within 1,000 feet of another such building. G.S. 14-202.11 prohibits the location of more than one "adult establishment" within the same building. The court ruled that the ordinance was preempted by G.S. 14-202.11. [Note: Later-enacted legislation, S.L. 1998-46 (S 452), has effectively reversed this ruling; it amended G.S. 14-202.11 to provide that the statute does not preempt local government regulation.]

Term "Publications" Used in Definition of "Adult Bookstore" Includes Videotapes

South Blvd. Video & News v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (21 April 1998). The court ruled that the term "publications" used in the definition of "adult bookstore" in G.S. 14-202.10 includes videotapes.

County Animal Noise Ordinance Is Not Unconstitutionally Vague

State v. Taylor, 128 N.C. App. 616, 495 S.E.2d 413 (17 February 1998). The court ruled that the following Martin County animal noise ordinance was not unconstitutionally vague: "It shall be unlawful for any person to own, keep, or have within the county an animal that habitually or repeatedly makes excessive noises that tend to annoy, disturb, or frighten its citizens."