

CRIMINAL LAW UPDATE

Associate Justice Phil Berger,
NC Supreme Court
Brittany Bromell, UNC School
of Government

1



FIRST APPEARANCES

S.L. 2022-6 (H 243)

2

MORE ON FIRST APPEARANCES

S.L. 2022-47 (H 607)

"For the limited purpose of conducting a first appearance and notwithstanding any other provision of law, the clerk or magistrate shall proceed under this article as a district court judge would and shall have the same authority that a district court judge would have at a first appearance."

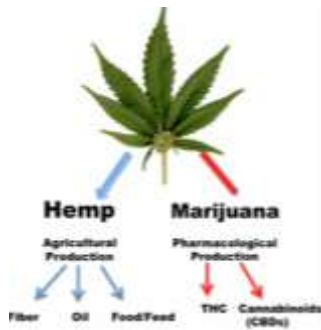
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MORE ON FIRST APPEARANCES

S.L. 2022-47 (H 607)

- Conforming change to G.S. 15A-604 to account for the inclusion of misdemeanor offenses
- Conforming change to G.S. 15A-606(a) clarifies that the scheduling of a probable cause hearing only extends to defendants charged with criminal offenses within the original jurisdiction of the superior court.

4



5

STATE V. HIGHSMITH, 2022-NC COA-560

STATE V. HIGHSMITH, 2022-NC COA-560

"The trial court found that the officer's search revealed not only marijuana, but also additional items including a digital scale, over one thousand dollars in folds of money, ammunition, and a flip cellphone. Under the totality of the circumstances: a vacuum-sealed bag of what appeared to be marijuana, hidden under the seat and found with these items, without any evidence that Defendant claimed to the officers the substance was legal hemp, the officers' suspicions were bolstered, amounting to probable cause to believe the substance at issue was in fact illicit marijuana and not hemp. The trial court therefore did not err in concluding that Defendant's Fourth Amendment rights were not violated."

6

AFFIDAVIT ATTACHMENT "A"
Items to be searched and seized

PROPERTY TO BE SEARCHED:

The residence at 4401 US 17 Street North, Wakefield, NC. The residence is a single-story brick house with a two-car garage on the left side, front porch, driveway, and a wooden fence area. There is a fence under the car port that leads to the kitchen. The residence is occupied and appears to be under the control of William Travis Tripp.

To get to the residence take a right off of State Street (24) heading East towards Old State and US Highway 17 heading south. There will be a small gas convenience store on the right and a line of mailboxes to the left. Take a left onto 44th Street behind the line of mailboxes and follow the path to the right around a small lot. The residence is the house on the left and is marked 4401 US 17 Street across from the front door. The residence has an outside storage building on the far left side of the property.

VEHICLES TO BE SEARCHED:

Must be either within 100 FT OR approximately 100-200 FT (100-200 FEET) of the residence. The vehicle is registered to William Travis Tripp (Defendant Tripp's spouse).

A black 2016 Jeep Grand Cherokee (registration unknown)

A blue 2016 passenger vehicle (registration unknown) parked in the front left corner of the property near the wood lot.

7

STATE V. TRIPP, 873 SE2D 298

STATE V. TRIPP, 873 SE2D 298

- *Summers, Bailey, and Wilson*
- Limited authority to detain occupants during search
- Occupants includes those within immediate vicinity of premises
- "The risk of harm here was minimized by law enforcement's "unquestioned command of the situation. Because law enforcement officers are not required to ignore obvious dangers—here a drug dealer with a history of gun violence—defendant was an occupant within the immediate vicinity of his residence even though [he] was not within the lawful limits of his residence."

State v. Tripp, 2022-NCSC-78, ¶ 35, 873 S.E.2d 298, 309 (cleaned up).

8

STATE V. CHOLON, 2022 NCCOA 415

11. In my argument to the jury I did not expressly argue the elements of the offense which Mr. Cholon was charged in the bill of indictment. My argument was limited to draw a sharp contrast between the statements of Mr. Cholon and those made by M.B. Stroubens in my argument that I exonerate the guilt of Mr. Cholon, but in fact, I argued that the jury should find him not guilty.

12. I did not get permission from Mr. Cholon to make these statements and I did not request that the Court make an inquiry of Mr. Cholon pursuant to *State v. Harbison*.

13. I was aware of *State v. Harbison*, however, I did not believe that I needed to get Mr. Cholon's permission to make the statements because I did not believe I was making a full admission to all the elements of the crime.

9

STATE V. CHOLON, 2022 NCCOA 415

3 What does Mr. Derek Cholon say? The officer
4 comes back there. Officer Wright comes back there and
5 begins to talk to him and he tells this officer the
6 truth; tells her what happened between the two of them
7 "I gave him oral, and we were kissing." But now we
8 know that there's more than kissing going on with

22 Mr. Cholon did not say anything that was not
23 truthful, apparently except; "We were just talking."

10

STATE V. CHOLON, 2022 NCCOA 415

"While recognizing the *McAllister* Court's admonition 'that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence[.]' *McAllister*, 375 N.C. at 376, 847 S.E.2d at 724, we believe this case presents such a rare occurrence. Although defendant specifically maintained his innocence and filed an affidavit denying that he made incriminating statements to police, his trial counsel stated the opposite during his closing argument."

State v. Cholon, 2022-NCCOA-415, ¶ 27, 874 S.E.2d 635, 641.

11



12

STATE V. WILLIAMS, 2022 NCCOA 562

- Presumption of Innocence
- Habitual Felon
- Conflict of Interest
- Delegation of Statutory Duty

STATE V. ROUSE, 2022-NCCOA-496

North Carolina
State Highway Patrol
VOLUNTARY STATEMENT

Driver Statement Witness Statement

Name: [REDACTED]
Address: [REDACTED]
County: [REDACTED]
Date of Birth: [REDACTED]

Begin statement here in boldface letters that appear below, stating and clarifying the following facts:
**I saw a white male seen parked long
 sandy brown hair and on the ground
 the driver's seat, head resting on gas
 pulled out slowly and gradually and
 started to walk by MSU School Rd.**

13

STATE V. JOYNER, 2022-NCCOA-525

The trial court did not violate the defendant's right to confrontation when it allowed the victim's prior testimony into evidence, as the defendant was provided with a meaningful opportunity to cross-examine the victim at the hearing on the civil no contact order.

15

STATE V. ROUSE, 2022-NCCOA-496

"[V]iewing the evidence in the light most favorable to the State after *de novo* review, the State presented sufficient circumstantial evidence for us to conclude Defendant was driving the vehicle. Hewett testified he came running from behind the house when he heard the crash, arrived within a minute or so, and found Defendant sitting with a bloody nose in the driver's seat of his own truck, the front of which rested in a ditch, with no one else nearby except Hewett's family members who were at the house before the crash. Thus, similar to *Burris*, a truck registered to Defendant was in a spot where vehicles are not normally parked, i.e., in a ditch by the side of the road, unless they have been driven there recently. As in *Clowers*, a witness saw Defendant and only Defendant near the vehicle in the immediate aftermath of a crash. Defendant also asked Hewett for assistance in removing his truck from the ditch, indicating his continued intent to possess and control his truck and, one could certainly infer, to avoid interaction with law enforcement related to any investigation of the accident."

14

STATE V. PICKENS, 2022-NCCOA-527

- Prior acts are sufficiently similar under Rule 404(b) "if there are some unusual facts present in both crimes that would indicate that the same person committed them."
- "While these similarities must be specific enough to distinguish the acts from any generalized commission of the crime, 'we do not require that they rise to the level of the unique and bizarre.'"
- Near identical circumstances are not required[;] rather, the incidents need only share 'some unusual facts' that go to a purpose other than propensity for the evidence to be admissible.



16

STATE V. PICKENS, 2022-NCCOA-527

"It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice."

17

STATE V. WENTZ, 2022-NCCOA-528

- The trial court violated G.S. 15A-1024 and erred in imposing a sentence inconsistent with the sentence set out in the defendant's plea agreement without allowing the defendant to withdraw his *Alford* plea.
- **Any** change by the trial court in the sentence that was agreed upon by the defendant and the State requires the trial court judge to give the defendant an opportunity to withdraw his guilty plea.

18

STATE V. OGLESBY, 2022-NCSC-101



In a *Miller* resentencing hearing, the resentencing court possesses the authority and the discretion to run any sentences "imposed . . . at the same time or . . . imposed on a person who is already subject to an undischarged term of imprisonment . . . either concurrently or consecutively, as determined by the court." G.S. 15A-1354(a).

19

STATE V. MCDUGALD, 2022-NCCOA-526

- The defendant's sentence did not violate the constitutional prohibitions against mandatory sentences of LWOP for juveniles.
- The application of the violent habitual felon statute to the defendant's conviction of second-degree kidnapping (committed at 33 years old) did not increase or enhance the sentence the defendant received for his prior second-degree kidnapping conviction (committed at 16 years old).

20

STATE V. GORDON, 2022 NCCOA 559



- Legitimacy of State's interest
- Scope of Defendant's privacy interest
- "intrusion imposed by lifetime satellite-based monitoring upon Defendant's diminished privacy interest."

State v. Gordon, 2022-NCCOA-559, ¶ 20, 876 S.E.2d 819, 824 (cleaned up).

21

STATE V. GORDON, 2022 NCCOA 559

Under the totality of the circumstances, the imposition of lifetime satellite-based monitoring following Defendant's conviction for an aggravated offense does not constitute an unreasonable search under the Fourth Amendment.

State v. Gordon, 2022-NCCOA-559, ¶ 22, 876 S.E.2d 819, 824.

22

15 The — upon consideration of all the evidence,
16 the Court does find that the defendant in fact committed on
17 April 1st, 2016, a new criminal offense of possession of
18 firearms by a felon and carrying a concealed weapon. The
19 Court does recognize that the matter went to trial and
20 previously on these two charges -- charges associated with
21 these two offenses, and that the jury was unable to reach a
22 unanimous verdict but the Court finds that those offenses
23 occurred and the defendant committed those offenses.

STATE V. JONES, 2022 NCSC 103

23

STATE V. JONES, 2022 NCSC 103

At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation.

N.C.G.S. § 15A-1345(e)

24

STATE V. JONES, 2022 NCSC 103

While this language could be interpreted as mandatory, the specific act required of the trial court, namely, a finding of good cause, is conditioned upon some attempt by the defendant to confront or cross-examine a witness. Thus, the plain language of N.C.G.S. § 15A-1345(e) contains a conditional statutory mandate which means normal rules of preservation apply unless the trial court fails to make a finding of good cause when the court does not permit confrontation despite a defendant's request to do so.

State v. Jones, 2022-NCSC-103, ¶ 26, 876 S.E.2d 407, 413.

25

STATE V. ORE, 2022-NCSC-380



"Defendant does not possess the statutory right to appeal an extension of his probation or his informed and admitted waiver of counsel, nor does the statute provide this Court the statutory authority to review his PWC on modification of his probation."

26

STATE V. ADAMS, 2022-NCSC-596

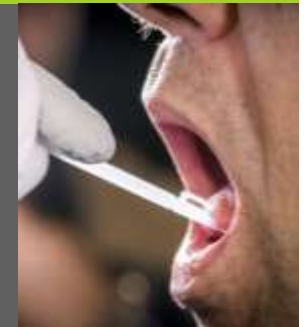
- "When a defendant has given notice of appeal: . . . Probation or special probation is stayed." G.S. 15A-1451(a)(4).
- Because the defendant's probation was stayed by G.S. 15A-1451 upon his notice of appeal, the trial court erred when it ordered him to complete conditions of his probation while his appeal was pending.

27

DNA FOR ASSAULT AND DV OFFENSES S.L. 2022-50 (H 674)

Expands the list of offenses for which a person is required to provide a DNA sample upon conviction or a finding of NGRI

- Assault on a female as proscribed by G.S. 14-33(c)(2)
- Assault on a child as proscribed by G.S. 14-33(c)(3)
- All offenses described in G.S. 50B-4.1
 - Violations of a valid protective order



28

ARSON LAW REVISIONS

S.L. 2022-8 (H 315)

- Increases the punishment for second degree arson from a Class G felony to a Class E felony
- Adds new G.S. 14-59.1
 - Burning of a penal institution → Class D felony
- Adds new G.S. 14-62.3
 - Burning of commercial structures
 - Burning of an occupied commercial structure → Class D felony
 - Burning of an unoccupied commercial structure → Class E felony
- Expands G.S. 14-62.2
 - Includes synagogues, temples, longhouses, mosques, or any other building that is regularly used and clearly identifiable as a place for religious worship
- Expands G.S. 14-69.3
 - First responder suffers serious injury while discharging official duties → Class F felony

29

ORGANIZED RETAIL THEFT

S.L. 2022-30 (S 766)

Class H Felony	Class G Felony	Class F Felony	Class E Felony
Value exceeding \$1,500	Value exceeding \$20,000	Value exceeding \$50,000	Value exceeding \$400,000

30



- Adds new G.S. 14-86.7
 - Damage to property during organized retail theft
 - Value of stolen goods must exceed one thousand dollars \$1,000
 - Damage to property must exceed \$1,000
 - Assault during organized retail theft
 - Value of stolen goods must exceed \$1,000
 - Assault must be against an employee or independent contractor of the retail establishment or a law enforcement officer
- Both offenses are punished as a Class A1 misdemeanor

31

CONTROLLED SUBSTANCE ACT AMENDMENTS

S.L. 2022-32 (S 455)

Permanently authorizes hemp and hemp products in the state



32



STATE V. FAUCETTE,
2022-NCCOA-629

Insufficient evidence showing that the defendant intended to fraudulently represent that he was any actual person living or dead

33

STATE V. LANCASTER, 2022-NCCOA-495



The private parking lot of an apartment complex does not constitute a "public highway" for purposes of charging the defendant with going armed to the terror of the public.

34

**STATE V.
LANGLEY,**
2022-NCCOA-457

- The trial court did not err by not requiring a unanimous jury as to what acts constituted indecent liberty with a minor, because the offense does not require such a finding.
- Mistake of age is not a valid defense to the charge of taking indecent liberties with a child.

35

**STATE V.
MCLYMORE,**
2022-NCSC-12

- Self-Defense Disqualification - G.S. 14-51.4
- Perfect Self-Defense is not available if:
 - D. is the initial aggressor (subject to narrow exceptions)
 - OR
 - D. was committing a felony, attempting a felony, or escaping from the commission of a felony

36

**STATE V.
MCLYMORE,**
2022-NCSC-12

- Self-defense statutes abrogated common law perfect self-defense
- For felony disqualification to apply, there must be a nexus between the felony and the need for D. to use defensive force

37

**STATE V.
WILLIAMS,**
2022-NCCOA-381

- No causal nexus between defendant's felonious possession of a firearm and defendant's use of defensive force
- The trial court erred by failing to instruct the jury on perfect defense-of-another and failing to instruct the jury that the State was required to prove an immediate causal nexus between his commission of possession of a firearm by a felon and the circumstances giving rise to his perceived need to use defensive force.

38

QUESTIONS?

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39