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Criminal Law Case Update

October 29, 2019

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between October 2, 2018 and October 1, 2019. Summaries were prepared by School of Government staff and faculty. To view summaries of additional cases decided during this time frame, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Police Investigation

Investigative Stops

A detailed anonymous tip regarding erratic driving, hitting another vehicle, and leaving the scene provided reasonable suspicion to stop the vehicle

State v. Neal, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019)
An anonymous person contacted law enforcement to report that a small green vehicle with license plate RCW-042 was in a specific area, had run several vehicles off the road, had struck a vehicle, and was attempting to leave the scene. Deputies went to the area and immediately stopped a vehicle matching the description given by the caller. The defendant was driving the vehicle. She was unsteady on her feet and appeared to be severely impaired. A trooper arrived and administered SFSTs, which the trooper terminated because the defendant could not complete them safely. A subsequent blood test revealed multiple drugs in the defendant's system. The defendant was charged with impaired driving, was convicted in district court and in superior court, and appealed.

The defendant argued that the stop was not supported by reasonable suspicion as it was based on an anonymous tip and was not corroborated by any observation of bad driving. The court of appeals disagreed, noting some tension between prior North Carolina case law emphasizing the need to

corroborate anonymous tips and *Navarette v. California*, 572 U.S. 393 (2014), which found reasonable suspicion of impaired driving based on an anonymous caller's report that a vehicle had nearly run the caller off the road. The court stated that it "need not resolve the apparent tension between our previous case law and *Navarette*" because the tip in this case involved a very timely report of multiple driving incidents and so was sufficiently reliable to provide reasonable suspicion.

The defendant's act of gesturing in the direction of a law enforcement officer with his middle finger extended while also in the midst of traffic gave rise to reasonable suspicion to conduct an investigatory stop of the vehicle in which the defendant was traveling

State v. Ellis, ___ N.C. App. ___, 832 S.E.2d 750 (Aug. 20, 2019), *writ of supersedeas allowed*, ___ N.C. ___, 832 S.E.2d 708 (Sept. 25, 2019)
While assisting a stalled motorist, a trooper observed the defendant gesture towards him "in an up-and-down pumping motion with his middle finger extended," which caused the trooper to pursue the defendant's vehicle and pull it over. The trooper was unclear as to whether the defendant was gesturing to him or someone in a nearby vehicle. After he stopped the vehicle, the trooper asked the defendant for his identification but the defendant refused to comply. Over a dissent, the court held that the traffic stop was justified based on reasonable suspicion. The court concluded that "[w]hile it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating." The court explained that such a "continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.'"

The dissent would have held that the facts did not support a determination that the defendant's gesture was an attempt to provoke a violent retaliation in violation of the disorderly conduct statute. And, the dissent concluded, "extending one's middle finger to a police officer from a moving vehicle, while tasteless and obscene is . . . protected speech under the First Amendment and therefore cannot give rise to a reasonable suspicion of disorderly conduct."

Sight of a known person drinking beer on the porch, coupled with seeing her purchase more beer at the store and drive away approximately two hours later, did not provide reasonable suspicion for stop

State v. Cabbagestalk, ___ N.C. App. ___, 830 S.E.2d 5 (June 18, 2019)
In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00pm. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving "normally"—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial. The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting

sample cases), but observed that "when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion." Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State's argument that the defendant's past criminal history for driving while license revoked and open container supplemented the officer's suspicions: "Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument." Despite the lack of objection at trial, the court found the trial court's finding of reasonable suspicion to be an error which had a probable impact on the jury's verdict, reversing the denial of the motion and vacating the conviction under plain error review.

Vague anonymous tip without corroboration was insufficient to support vehicle stop

State v. Carver, ___ N.C. App. ___, 828 S.E.2d 195 (May 21, 2019), *writ of supersedeas allowed*, ___ N.C. ___, 828 S.E.2d 34 (June 17. 2019)

Over a dissent, the court held that no reasonable suspicion supported the warrantless traffic stop based on an anonymous tip. A sheriff's deputy received a dispatch call, originating from an anonymous tipster, just before 11 PM. The deputy was advised of a vehicle in a ditch on a specified road, possibly with a "drunk driver, someone intoxicated" and that "a truck was attempting—getting ready to pull them out." The tip provided no description of the car, truck or driver, nor was there information regarding the caller or when the call was received. When the deputy arrived at the scene about 10 minutes later, he noticed a white Cadillac at an angle partially in someone's driveway. The vehicle had mud on the driver's side and the deputy opined from gouges in the road that it was the vehicle that had run off the road. However he continued driving and saw a truck traveling away from his location. He estimated that the truck was travelling approximately 15 to 20 miles below the posted 55 mph speed limit. He testified that the truck was the only one on the highway and that it was big enough to pull the car out. He did not see any chains, straps, or other devices that would indicate it had just pulled the vehicle out of the ditch. He initiated a traffic stop. His sole reason for doing so was "due to what was called out from communications." The truck was driven by Griekspoor; the defendant was in the passenger seat. When the deputy explained to the driver that there was a report of a truck attempting to pull a vehicle out of the ditch, the driver reported that he had pulled the defendant's car out of the ditch and was giving him a ride home. The deputy's supervisor arrived and went to talk with the defendant. The defendant was eventually charged with impaired driving. At trial he unsuccessfully moved to suppress, was convicted and appealed. The court found that the stop was improper. As the State conceded, the anonymous tip likely fails to provide sufficient reliability to support the stop. It provided no description of either the car or the truck or how many people were involved and there is no indication when the call came in or when the anonymous tipster saw the car in the ditch with the truck attempting to pull it out. The State argued however that because nearly every aspect of the tip was corroborated by the officer there was reasonable suspicion for the stop. The court disagreed. When the deputy passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or was able to pull, a car out of the ditch and could not see how many people were in the truck. He testified that it was not operating in violation of the law. "He believed it was a suspicious vehicle merely because of the fact it was on the highway." The details in the anonymous tip were insufficient to establish identifying characteristics, let alone allow the deputy to corroborate the details. The tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After the deputy passed the scene and the Cadillac he noticed a truck driving under the posted speed limit. He provided no testimony to show that the truck was engaging in unsafe, reckless, or illegal

driving. He was unable to ascertain if it contained a passenger. The court concluded: "At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." Under the totality of the circumstances the deputy lacked reasonable suspicion to conduct a warrantless stop of the truck.

Stop based on profanity yelled from car lacked reasonable suspicion and was not justified by community caretaking exception

State v. Brown, ___ N.C. App. ___, 827 S.E.2d 534 (April 16, 2019)
In this DWI case, neither reasonable suspicion nor the community caretaking exception justified the vehicle stop. While standing outside of his patrol car in the early morning hours, a deputy saw a vehicle come down the road and heard the words "mother fucker" yelled in the vehicle. Concerned that someone might be involved in a domestic situation or argument, he pursued the vehicle and stopped it to "make sure everybody was okay." The deputy did not observe any traffic violations or other suspicious behavior. The defendant was subsequently charged with DWI. In the trial court, the defendant moved to suppress arguing that no reasonable suspicion supported the stop. The trial court denied the motion to suppress, finding "that the officer's articulable and reasonable suspicion for stopping the vehicle was a community caretaking function." The defendant was convicted and he appealed. The court began by noting that the trial court conflated the reasonable suspicion and community caretaking exceptions to the warrant requirement. Analyzing the exceptions separately, the court began by holding that no reasonable suspicion supported the stop where the sole reason for it was that the deputy heard someone yelling a profanity in the vehicle. Turning to the community caretaking doctrine, it held: "we do not think the totality of the circumstances establish an objectively reasonable basis for a community caretaking function." The sole basis for the stop was that the deputy heard someone in the vehicle yell a profanity. The deputy did not know if the driver or a passenger yelled the words, if the vehicle contained passengers, if the windows were opened, or who the words were directed to. Among other things, he acknowledged that they could have been spoken by someone on the telephone. The court concluded: "We do not believe these facts . . . establish an objectively reasonable basis for a stop based on the community caretaking doctrine." The court went on to note that it has previously made clear that the community caretaking exception should be applied narrowly and carefully to mitigate the risk of abuse. In cases where the community caretaking doctrine has been held to justify a warrantless search, the facts unquestionably suggested a public safety issue. Here no such facts exist. Jeff Welty blogged about the case here.

In a case involving an anonymous tip regarding a suspicious person, the trial court erred by finding that there was reasonable suspicion for an investigative stop

State v. Horton, ___ N.C. App. ___, 826 S.E.2d 770 (April 2, 2019)
In this drug case, the trial court erred by denying the defendant's motion to suppress evidence obtained in a traffic stop. Sometime after 8:40 PM, an officer received a dispatch relating an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed. The officer knew that a business across the street had been broken into in the past and that residential break-ins and vandalism had occurred in the area. When the officer arrived at the location he saw a silver vehicle in the parking lot. The officer parked his vehicle and walked towards the car as it was approaching the parking lot exit. When he shined his flashlight towards the driver's side and saw the defendant, a black male, in the driver's seat. The defendant did not open his window. When the officer asked the defendant, "What's up boss man," the defendant made no acknowledgment and continued exiting the parking lot. The officer considered this behavior a "little

odd" and decided to follow the defendant. After catching up to the defendant's vehicle on the main road, and without observing any traffic violations or furtive movements, the officer initiated a traffic stop. Contraband was found in the subsequent search of the vehicle and the defendant was arrested and charged. The trial court denied the defendant's motion to suppress the evidence seized as a result of the stop. The defendant was convicted and he appealed. The court determined that the officer's justification for the stop was nothing more than an inchoate and unparticularized suspicion or hunch. The anonymous tip reported no crime and was only partially correct. Although there was a silver car in the parking lot, the tip also said it could have been gold, and there was no white male in the lot or the vehicle. Additionally, the tip merely described the individual as "suspicious" without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. As a result there is nothing inherent in the tip itself to allow a court to deem it reliable and provide reasonable suspicion. Additionally the trial court's findings of fact concerning the officer's knowledge about criminal activity refer to the area in general and to no particularized facts. The officer did not say how he was familiar with the area, how he knew that there had been break-ins, or how much vandalism or other crimes had occurred there. Additionally the trial court's findings stipulated that there was no specific time frame given for when the previous break-ins had occurred. The court rejected the State's argument that the officer either corroborated the tip or formed reasonable suspicion on his own when he arrived at the parking lot. It noted that factors such as a high-crime area, unusual hour of the day, and the fact that businesses in the vicinity were closed can help to establish reasonable suspicion, but are insufficient given the other circumstances in this case. The State argued that the defendant's nervous conduct and unprovoked flight supported the officer's reasonable suspicion. But, the court noted, the trial court did not make either of those findings. The trial court's findings say nothing about the defendant's demeanor, other than that he did not acknowledge the officer, nor do they speak to the manner in which he exited the parking lot. The court went on to distinguish cases offered by the State suggesting that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity and an unusual hour. The court noted that in those cases the officers were already in the areas in question because they were specifically known and had detailed instances of criminal activity. Here, the officer arrived at the parking lot because of the vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for residential break-ins and vandalism. The trial court made no findings as to what suspicious activity by the defendant warranted the officer's suspicion. In fact the officer acknowledged that the defendant was not required to stop when he approached the defendant's vehicle. The court concluded:

> Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

Where reasonable suspicion developed during normal incidents of the traffic stop, the stop was not unlawfully extended under *Rodriguez*

State v. McNeil, ___ N.C. App. ___, 822 S.E.2d 317 (Nov. 20, 2018)
In this DWI case, an officer did not unduly prolong a traffic stop. While on patrol, officers ran a vehicle's tag and learned that the registered owner was a male with a suspended license. An officer stopped the vehicle based on the suspicion that it was being driven without a valid license. The officer who approached the vehicle immediately saw that the defendant, a female, was in the driver's seat and that a female passenger was next to her. Although the officer determined that the owner was not driving the vehicle, the defendant ended up charged with DWI. On appeal, the defendant argued that while the officers may have had reasonable suspicion to stop the vehicle, the stop became unlawful when they verified that the male owner was not driving the vehicle. The court disagreed, stating:

> Defendant's argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical "male" hairstyles nor do they all wear "male" clothing. The driver's license includes a physical description of the driver, including "sex." Until [the] Officer . . . had seen Defendant's driver's license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

Additionally, the time needed to complete a stop includes the time for ordinary inquiries incident to the stop, including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. The officer's mission upon stopping the vehicle included talking with the defendant to inform her of the basis for the stop, asking for her driver's license, and checking that the vehicle's registration and insurance had not expired. While the officer was pursuing these tasks, the defendant avoided rolling her window all the way down and repeatedly fumbled through cards trying to find her license. Additionally because she was mumbling and had a slight slur in her speech, the officer leaned towards the window where he smelled an odor of alcohol. This evidence gave him reasonable suspicion to believe that the defendant was intoxicated. Because he developed this reasonable suspicion while completing the original mission of the stop, no Fourth Amendment violation occurred. Jeff Welty blogged about the case here.

Searches

An officer's warrantless search of a USB drive was not valid under the private-search doctrine in the absence of a finding of "virtual certainty" that the device contained nothing of significance beyond what had already been discovered by a private party

State v. Terrell , ___ N.C. ___, 831 S.E.2d 17 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E. 2d 719 (2018) (discussed in an earlier blog post by Shea Denning, https://nccriminallaw.sog.unc.edu/state-v-terrell-

private-search-doctrine/), the Supreme Court affirmed the Court of Appeals' decision that an officer's warrantless search of a defendant's USB drive following a prior search by a private individual violated the defendant's Fourth Amendment rights. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her 9-year-old granddaughter sleeping, exposed from the waist up. Believing the image was inappropriate, the defendant's girlfriend contacted the sheriff's office and gave them the thumb drive. Later, a detective conducted a warrantless search of the thumb drive to locate the image in question, during which he discovered other images of what he believed to be child pornography before he found the photograph of the granddaughter. At that point the detective applied for and obtained a warrant to search the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The initial warrant application relied only on information from the defendant's girlfriend, but after the State Bureau of Investigation requested additional information, the detective included information about the images he found in his initial search of the USB drive. The SBI's forensic examination turned up 12 images, ten of which had been deleted and archived in a way that would not have been viewable without special forensic capabilities. After he was charged with multiple sexual exploitation of a minor and peeping crimes, the defendant filed a pretrial motion to suppress all of the evidence obtained as a result of the detective's warrantless search. The trial court denied the motion, finding that the girlfriend's private viewing of the images frustrated the defendant's expectation of privacy in them, and that the detective's subsequent search therefore did not violate the Fourth Amendment. After his trial and conviction, the defendant appealed the trial court's denial of his motion to suppress.

The Supreme Court agreed with the Court of Appeals that the girlfriend's opening of the USB drive and viewing some of its contents did not frustrate the defendant's privacy interest in the entire contents of the device. To the contrary, digital devices can retain massive amounts of information, organized into files that are essentially containers within containers. Because the trial court did not make findings establishing the precise scope of the girlfriend's search, it likewise could not find that the detective had the level of "virtual certainty" contemplated by United States v. Jacobsen, 466 U.S. 109 (1984), that the device contained nothing else of significance, or that a subsequent search would not tell him anything more than he already had been told. The search therefore was not permissible under the private-search doctrine. The court affirmed the decision of the Court of Appeals and remanded the case for consideration of whether the warrant would have been supported by probable cause without the evidence obtained through the unlawful search.

Justice Newby dissented, writing that the majority's application of the virtual certainty test needlessly eliminates the private-search doctrine for electronic storage devices unless the private searcher opens every file on the device.

Officers exceeded authority for knock and talk by walking around defendant's yard and peering through a fan into the crawlspace of the home

State v. Ellis, ___ N.C. App. ___, 829 S.E.2d 912 (June 18, 2019)
After discovering stolen property at a home across the street, officers approached the front door of the defendant's residence after being informed by a witness that the person who stole the property was at the residence. No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they

observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan and an officer looked between the fan slats, where he observed marijuana plants. A search warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the home by the front path, knock promptly, and then (absent invitation to linger longer) leave." (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

> While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing . . . supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of the residence.

Because the officers here only smelled the marijuana after leaving the front porch and lingering in the curtilage, officers were not in a position they could lawfully be, and the plain view exception to the Fourth Amendment did not apply. Even if officers were lawfully present in the yard, the defendant had a reasonable expectation of privacy in his crawl space area, and officers violated that by looking through the fan slats. The denial of the motion to suppress was therefore reversed.

(1) Officers were lawfully present in defendant's driveway when they smelled marijuana and their presence did not constitute a search; (2) Defendant's argument that his signage on his front door revoked any implied license to approach the home was unpreserved and therefore waived

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018)

In this drug case, the trial court did not err by denying the defendant's motion to suppress. After receiving a tip that the defendant was growing marijuana at his home, officers drove there for a knock and talk. They pulled into the driveway and parked in front of the defendant's car, which was parked at the far end of the driveway, beside the home. The garage was located immediately to the left of the driveway. An officer went to the front door to knock, while two detectives remained by the garage. A strong odor of marijuana was coming from the garage area. On the defendant's front door was a sign that reading "inquiries" with his phone number, and a second sign reading "warning" with a citation to several statutes. As soon as the defendant opened the front door, an officer smelled marijuana. The officer decided to maintain the residence pending issuance of a search warrant. After the warrant was obtained, a search revealed drugs and drug paraphernalia. (1) The court began by rejecting the defendant's argument that the officers engaged in an unconstitutional search and seizure by being present in his driveway and lingering by his garage. Officers conducting a knock and talk can lawfully approach a home so long as they remain within the permissible scope afforded by the knock and talk.

Here, given the configuration of the property any private citizen wishing to knock on the defendant's front door would drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, the officers' conduct, in pulling into the driveway by the garage, getting out of their car, and standing between the car and the garage, was permitted. Additionally the officers were allowed to linger by the garage while their colleague approached the front door. Thus, "the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment."

(2) The court went hold that by failing to raise the issue at the trial level, the defendant failed to preserve his argument that he revoked at the officers' implied license through his signage and that by ignoring this written revocation, the officers of violated the Fourth Amendment.

Criminal Offenses

Attempt and Solicitation

Meeting and paying undercover officer to kill wife was sufficient to prove solicitation, but insufficient to constitute an overt act for attempted murder

State v. Melton, ___ N.C. ___, 821 S.E.2d 424 (Dec. 7, 2018)
On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), the court reversed, holding that the evidence was insufficient to sustain a conviction for attempted murder. The evidence showed that the defendant solicited an undercover officer—who he thought to be a hired killer--to kill his former wife. He gave the officer $2,500 as an initial payment, provided the officer details necessary to complete the killing, and helped the officer plan how to get his former wife alone and how to kill her out of the presence of their daughter. The defendant was arrested after he left his meeting with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder. Phil Dixon blogged about the case here.

Impaired Driving

(1) Court vacates judgment of Wisconsin Supreme Court affirming petitioner's impaired driving conviction and remands for application of new exigency test; (2) Plurality concludes that when the State has probable cause to believe that an unconscious driver has committed the offense of driving while impaired, exigent circumstances "almost always" permit the State to carry out a blood test without a warrant; (2) Opinion concurring in the judgment only would hold that the dissipation of alcohol creates an exigency justifying a warrantless search any time the State has probable cause for impaired driving

Mitchell v. Wisconsin , 588 U.S. ___, 139 S. Ct. 2525 (June 27, 2019)
The petitioner appealed from his impaired driving conviction on the basis that the State violated the Fourth Amendment by withdrawing his blood while he was unconscious without a warrant following his arrest for impaired driving. A Wisconsin state statute permits such blood draws. The Wisconsin Supreme

Court affirmed the petitioner's convictions, though no single opinion from that court commanded a majority, and the Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

Justice Alito, joined by Chief Justice Roberts, Justice Breyer and Justice Kavanaugh announced the judgment of the court and wrote the plurality opinion. The plurality noted at the outset that the Court's opinions approving the general concept of implied consent laws did not rest on the idea that such laws create actual consent to the searches they authorize, but instead approved defining elements of such statutory schemes after evaluating constitutional claims in light of laws developed over the years to combat drunk driving. The plurality noted that the Court had previously determined that an officer may withdraw blood from an impaired driving suspect without a warrant if the facts of a particular case establish exigent circumstances. *Missouri* v.*McNeely*, 569 U.S. 141 (2013); *Schmerber* v. *California*, 384 U. S. 757, 765 (1966). While the natural dissipation of alcohol is insufficient by itself to create per se exigency in impaired driving cases, exigent circumstances may exist when that natural metabolic process is combined with other pressing police duties (such as the need to address issues resulting from a car accident) such that the further delay necessitated by a warrant application risks the destruction of evidence. The plurality reasoned that in impaired driving cases involving unconscious drivers, the need for a blood test is compelling and the officer's duty to attend to more pressing needs involving health or safety (such as the need to transport an unconscious suspect to a hospital for treatment) may leave the officer no time to obtain a warrant. Thus, the plurality determined that when an officer has probable cause to believe a person has committed an impaired driving offense and the person's unconsciousness or stupor requires him to be taken to the hospital before a breath test may be performed, the State may almost always order a warrantless blood test to measure the driver's blood alcohol concentration without offending the Fourth Amendment. The plurality did not rule out that in an unusual case, a defendant could show that his or her blood would not have been withdrawn had the State not sought blood alcohol concentration information and that a warrant application would not have interfered with other pressing needs or duties. The plurality remanded the case because the petitioner had no opportunity to make such a showing.

Justice Thomas concurred in the judgment only, writing separately to advocate for overruling *Missouri* v. *McNeely*, 569 U.S. 141 (2013), in favor of a rule that the dissipation of alcohol creates an exigency in every impaired driving case that excuses the need for a warrant.

Justice Sotomayer, joined by Justices Ginsburg and Kagan, dissented, reasoning that the Court already had established that there is no categorical exigency exception for blood draws in impaired driving cases, although exigent circumstances might justify a warrantless blood draw on the facts of a particular case. The dissent noted that in light of that precedent, Wisconsin's primary argument was always that the petitioner consented to the blood draw through the State's implied-consent law. Certiorari review was granted on the issue of whether this law provided an exception to the warrant requirement. The dissent criticized the plurality for resting its analysis on the issue of exigency, an issue it said Wisconsin had affirmatively waived.

Justice Gorsuch dissented by separate opinion, arguing that the Court had declined to answer the question presented, instead upholding Wisconsin's implied consent law on an entirely different ground, namely the exigent circumstances doctrine.

Evidence that defendant had an unquantified amount of impairing substances in his blood was sufficient to go to the jury on impairment when defendant admitted taking drugs the day of the crash and his behavior indicated a lack of awareness and poor judgment

State v. Shelton, ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019)
In this felony death by vehicle case involving the presence of narcotics in an unknown quantity in the defendant's blood, the evidence was sufficient to establish that the defendant was impaired. The State's expert testified that Oxycodone and Tramadol were present in the defendant's blood; tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the "detection limits" used by the SBI for the test; the half-lives of Oxycodone and Tramadol are approximately 3-6 and 4-7 hours, respectively; she was unable to determine the precise quantities of the drugs present in the defendant's blood; and she was unable to accurately determine from the test results whether the defendant would have been impaired at the time of the accident. The defendant's motion to dismiss was denied and the defendant was found guilty of felony death by motor vehicle based on a theory of impairment under G.S. 20-138(a)(1) ("While under the influence of an impairing substance"). On appeal the court rejected the defendant's argument the State's evidence merely showed negligence regarding operation of his vehicle as opposed to giving rise to a reasonable inference that he was impaired. The court noted that it was undisputed that the defendant ingested both drugs on the day of the accident and that they were present in his blood after the crash. It continued: "Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired." Specifically, the court noted: the labels on the medicine bottles warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after ingestion, and these substances are Schedule II and Schedule IV controlled substances, respectively; the defendant testified that he failed to see the victim on the side of the road despite the fact that it was daytime, visibility was clear, the road was straight, and three eyewitnesses saw the victim before the defendant hit her; the defendant admitted that he was unaware that his vehicle had hit a human being despite the fact that the impact of the crash was strong enough to cause the victim's body to fly 59 feet through the air; and the defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately before the accident, he decided not to remain at the scene, instead driving his truck out of the ditch and to his home despite the fact that he had no operable brakes. Finding that this was sufficient evidence for the issue of impairment to go to the jury, the court noted that under *Atkins v. Moye*, 277 N.C. 179 (1970), impairment can be shown by a combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired. Shea Denning blogged about the case here.

Stalking

Stalking statute unconstitutional as applied to defendant; social media posts "about" the victim but not "directed at" the victim were protected speech

State v. Shackelford, ___ N.C. App. ___, 825 S.E.2d 689 (Mar. 19, 2019)
Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the content of posts made to his Google Plus account. On appeal, the

defendant asserted an as-applied challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State's argument that the defendant's Google Plus posts are excluded from First Amendment protection because they constitute "speech that is integral to criminal conduct." The court reasoned that in light of the statutory language "his speech itself was the crime," and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

The court next analyzed the defendant's free speech argument within the framework adopted by the United States Supreme Court. It began by determining that as applied to the defendant, the statue constituted a content-based restriction on speech, and thus that strict scrutiny applies. It went on to hold that application of the statute to the messages contained in the defendant's social media posts did not satisfy strict scrutiny.

Having determined that the defendant's posts could not constitutionally form the basis for his convictions, the court separately examined the conduct giving rise to each of the convictions to determine the extent to which each was impermissibly premised on his social media activity. The court vacated his first conviction because it was premised entirely upon five social media posts; no other acts supported this charge. The second and third charges were premised on multiple social media posts and a gift delivery to the victim's workplace. The gift delivery, unlike the social media posts, constituted non-expressive conduct other than speech and therefore was not protected under the First Amendment. However, because the statute requires a course of conduct, this single act is insufficient to support a stalking conviction and thus these convictions also must be vacated. The defendant's fourth conviction encompassed several social media posts along with two emails sent by the defendant to the victim's friend. Even if the emails are not entitled to First Amendment protection, this conviction also must be vacated. Here, the jury returned general verdicts, without stating the specific acts forming the basis for each conviction. Because this conviction may have rested on an unconstitutional ground, it must be vacated. Shea Denning blogged about the case here.

Threats & Related Offenses

A juvenile petition alleging that a juvenile wrote "bomb incoming" on a school bathroom wall did not allege that the juvenile made a false "report" of mass violence on educational property

In the Matter of D.W.L.B., ___ N.C. App. ___, 832 S.E.2d 565 (Sept. 17, 2019)
Circumstantial evidence indicated that a juvenile wrote "BOMB INCOMING" in a school bathroom. Officers obtained a juvenile petition charging the juvenile with making a false report of mass violence on educational property in violation of G.S. 14-277.5. The petition alleged in pertinent part that the juvenile did "make a report by writing a note on the boy's bathroom wall . . . stating 'bomb incoming'." The court of appeals held the petition to the same standard as a criminal indictment and found it to be defective for failing to allege that the juvenile made "a report." The petition literally asserted that the juvenile made a report, but the court found that the described conduct clearly failed to constitute a report within the meaning of the statute. The message was not directed at anyone in particular, and a person who saw it would not likely view it as a warning of an imminent event.