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Criminal Case Update

2008 Fall District Court Judges Conference
(includes cases decided June 17, 2008 through September 16, 2008)

The following summaries are drawn primarily from Bob Farb's criminal case summaries. To view all of the summaries, go to http://www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by e-mail, go to the above site, click on Criminal Law Listserv, and follow the instructions.

Fourth Amendment

Traffic Stops

1. **Court Rules That Reasonable Suspicion Is Standard for Stops of Vehicles for All Traffic Violations; Court Disavows Statements in Prior Court Opinions and Cases of North Carolina Court of Appeals That Probable Cause Is Standard for Stop of Vehicle for Readily Observed Traffic Violation**
2. **Court Rules That Officer Had Reasonable Suspicion to Stop Vehicle for Changing Lanes Without Signaling**

State v. Styles, ___ N.C. App. ___, ___ S.E.2d ___ (27 August 2008), *affirming*, 185 N.C. App. 271 (7 August 2007). The defendant, who was operating a vehicle moving in the same direction and in front of an officer's vehicle, changed lanes without signaling. An officer stopped the defendant for that violation.

1. The court ruled, relying on the rulings of several federal courts of appeal, that reasonable suspicion is the standard for stops of vehicles for all traffic violations. The court disavowed statements in prior court opinions and in cases of the North Carolina Court of Appeals that probable cause is the standard for the stop of a vehicle for a readily observed traffic violation. These cases include: State v. Ivey, 360 N.C. 562 (2006); State v. McClendon, 350

N.C. 630 (1999); State v. Young, 148 N.C. App. 462 (2002), and State v. Wilson, 155 N.C. App. 89 (2003).

2. The court ruled that the officer had reasonable suspicion to stop the vehicle for changing lanes without signaling under G.S. 20-154(a). The defendant's failure to signal violated the statute because changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle (in this case, the officer's vehicle).

Court Affirms, Per Curiam and Without Opinion, Ruling of Court of Appeals That Reasonable Suspicion Did Not Support Officer's Continued Detention of Vehicle Occupants After Completion of Traffic Stop

State v. Myles, 362 N.C. 344, 661 S.E.2d 732 (12 June 2008), *affirming*, ___ N.C. App. ___, 654 S.E.2d 752 (15 January 2008). The court affirmed, per curiam and without an opinion, the ruling of the North Carolina Court of Appeals that reasonable suspicion did not support an officer's continued detention of vehicle occupants (defendant was a passenger) after the completion of a traffic stop. An officer stopped a vehicle for weaving on Interstate 40 and running slightly off the highway. The officer did not detect an odor of alcohol on the driver, learned that the car was being operated under a rental agreement executed by the defendant-passenger that was one day overdue, told the driver to be more careful, and asked him to come to the officer's car so the officer could write a warning ticket. The officer noted that the driver was sweating profusely despite the fact it was a cool day. The officer talked with the driver about his travel plans. The officer then went back to the driver's car and spoke to the defendant-passenger about the rental agreement and whether it had been extended. The defendant said he had done so. The officer noticed the defendant's heart beating through his shirt. The officer eventually obtained consent to search the car from the driver and defendant. The court ruled that both the driver and the defendant-passenger were seized under the Fourth Amendment after the completion of the traffic stop, the issuance of the warning ticket, and the totality of circumstances did not support reasonable suspicion for the continued detention of the driver and defendant—the nervous behavior of the driver was insufficient. The court distinguished the ruling in State v. McClendon, 350 N.C. 630 (1999). The nervousness of the defendant could not be considered in establishing reasonable suspicion because the officer observed that behavior after the traffic stop had been completed.

Reasonable Suspicion Did Not Exist to Support Stop of Vehicle When Officer Testified That He Had No Reason to Believe That Person in Vehicle Was Engaged in Unlawful Activity

State v. Murray, ___ N.C. App. ___, ___ S.E.2d ___ (16 September 2008). An officer was performing a property check in an industrial park at 3:41 a.m. He saw a vehicle coming out of the area and decided to pull behind it and run its license plate to determine if it was a local vehicle. The officer conceded at the suppression hearing that the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. The license plate check showed the vehicle was not stolen and was in fact a rental vehicle from a nearby city. Nevertheless, the officer stopped the vehicle. The court ruled that reasonable suspicion did not support the stop. Although the officer's patrol of the area was part of increased policing due to past break-ins, he saw no indication that night of damage to vehicles or businesses in the park and stopped the vehicle because he wanted to make sure there wasn't anything illegal taking place.

Checkpoints

Court Remands to Trial Court for Additional Findings and Conclusions of Law on Constitutionality of Checkpoint; Holds That If Checkpoint Was Constitutional, Officer Had Reasonable Suspicion to Detain Driver for Additional Investigation

State v. Veazey, ___ N.C. App. ___, 662 S.E.2d 683 (1 July 2008). Around 5 p.m. on January 1, 2006, Trooper Carroll of the State Highway Patrol set up a driver's license checkpoint on Hwy 311 near the town of Walnut Cove. Forty minutes later, Thomas Marland Veazey (the defendant) drove up to the checkpoint. Trooper Carroll asked the defendant for his drivers license and registration. Defendant gave Trooper Carroll an out-of-state license and a North Carolina registration. Trooper Carroll smelled a strong odor of alcohol coming from defendant's car and saw that the defendant's eyes were red and glassy. Trooper Carroll told the defendant to drive to the shoulder of the highway. Trooper Carroll then performed a sobriety test on defendant. He determined that defendant was impaired and arrested him for DWI. A chemical analysis resulted in a BAC of .08.

Before trial, the defendant moved to suppress all evidence obtained by Trooper Carroll as a result of the checkpoint on the basis that the checkpoint violated his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution.

The trial court heard defendant's motion on February 26, 2007. Trooper Carroll was the only witness to testify. The trial court made the following oral findings and conclusions:

> [The Court is] going to deny the Motion to Suppress, and finds that the license checkpoint was not an unreasonable detention; and therefore, was valid under the Fourth Amendment. The officers had complied with the necessities of setting up a checkpoint. There were two officers who participated in this checkpoint . . . . The trooper checked with his supervisor and verified that he was going to have a-set up a checkpoint. He's not met with any objection. Said the purpose of the checkpoint was to-for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina. It was set up in a safe place, systematically done. They chose to stop every vehicle. And that upon stopping [Defendant] in this case the officers, the officer observed a strong odor of alcohol. And he further investigated the matter to make a determination as to whether or not [Defendant] was operating a vehicle while impaired. Court finds those facts and finds as a matter of law that the license checkpoint was not an unreasonable detention, and was valid under the Fourth Amendment.

The trial court did not issue a written order on February 26, 2007. The defendant pled guilty on June 5, 2007, preserving the right to appeal the trial court's denial of his motion to suppress. The trial court sentenced the defendant to 60 days in prison but suspended the sentence and placed the defendant on probation for 12 months. Defendant then gave oral notice of appeal from the trial court's denial of his motion to suppress.

The trial court issued a final written order denying defendant's motion to suppress on November 19, 2007. In the order the trial court stated that Trooper Carroll admitted the checkpoint was a "generalized checking station" and that he had significant discretion in operating it. Nonetheless, the trial court concluded that the checkpoint was proper and lawful and denied the motion to suppress. The court also voided the defendant's prior oral notice of appeal because it was entered before the court's written order denying defendant's motion to suppress. Defendant filed a new notice of appeal on November 19, 2007 from the order denying his motion to suppress.

The court of appeals began its analysis by reviewing Supreme Court cases on the reasonableness of searches and seizure under the Fourth Amendment. The United States Supreme Court's held in Terry v. Ohio, 392 U.S. 1 (1968), that the Fourth Amendment usually requires that a search or seizure be based upon consent or individualized suspicion of the person to be searched or seized. The Supreme Court has, however, recognized that vehicles may be briefly detained at checkpoints without individualized suspicion if the purpose of the checkpoint is legitimate and the checkpoint itself is reasonable. United States v. Martinez-Fuerte, 428 U.S. 543, 56 (1976). A reviewing court must undertake a two-part inquiry to determine whether a checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. City of Indianapolis v. Edmond, 531 U.S. 32, 40-42 (2000). In Edmond, the U.S. Supreme Court distinguished between checkpoints with a primary purpose related to roadway safety and checkpoints with a primary purpose related to general crime control. Checkpoints primarily aimed at addressing immediate highway safety threats can justify the intrusion on drivers' Fourth Amendment privacy interests brought about by suspicionless stops. Police must, however, have individualized suspicion to detain a vehicle for general crime control purposes. Thus, a checkpoint with a primary purpose of general crime control violates the Fourth Amendment. Edmond, 531 U.S. at 41-42 (finding unconstitutional a checkpoint with a primary purpose of interdicting illegal narcotics and stating that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life").

The Supreme Court in *Edmond* noted that a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers. Otherwise "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also include a license or sobriety check. "

Upon determining that the primary purpose of the checkpoint is legitimate, the second prong of the two-prong analysis requires that the court judge the reasonableness of the stop. To determine the reasonableness of the intrusion under the Fourth Amendment, the court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. This requires the court to weigh (1) the gravity of the public concerns served by the seizure, (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. Brown v. Texas, 443 U.S. 47, 51 (1979). If, on balance, these factors weigh in favor of the public interest the checkpoint is reasonable and therefore constitutional. See, e.g., Illinois v. Lidster, 540 U.S. 419, 427-28 (2004) (holding that police did not violate Fourth Amendment by conducting a checkpoint aimed at gathering information

obtain information about a hit-and-run accident occurring about one week earlier at the same location and time of night).

After setting forth the applicable Fourth Amendment principles, the court of appeals turned to its review of the trial court's findings of fact. The state argued that the court should consider only the trial court's oral findings and conclusions at the February 26, 2007 hearing because once the defendant appealed that ruling on June 5, 2007, the trial court no longer had jurisdiction to enter a written order containing findings of fact different from those it announced on February 26, 2007. The court did not reach the issue of whether the court's written order containing findings of fact that differed from the oral findings of the court issued before the notice of appeal had to be vacated, finding instead that its conclusion would be the same regardless of which findings it considered.

As to the primary programmatic purpose of the checkpoint, the court noted that it had previously held that where there is no evidence to contradict the State's proffered purpose for the checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. State v. Burroughs, 185 N.C. App. 496, 648 S.E.2d 561 (2007). However, where there is evidence that could support a finding of an unlawful purpose, the trial court cannot rely solely on the officer's statements regarding the checkpoint's purpose but instead must closely review the scheme at issue. The court of appeals concluded that the evidence was conflicting regarding the State's primary purpose. The court cited Trooper Carroll's testimony that the purpose was '"[t]o enforce any kinds of motor vehicle law violations," and as well as his testimony that he was "looking for all violations," including criminal violations that were not motor vehicle violations. Trooper Carroll also testified that the primary purpose of the checkpoint was to check for to check for driver's license, registration and insurance violations, as contrasted from all motor vehicle violations.

[The court noted that the U.S. Supreme Court had previously indicated that checking for drivers license and vehicle registration violations is a lawful purpose for a checkpoint and that the North Carolina courts had upheld checkpoints designed to uncover drivers license and vehicle registration violations. However, the court reiterated that a checkpoint designed to find any and all criminal violations is unconstitutional, even if the police have secondary objectives related to highway safety. The court further stated that it was unclear whether a primary purpose of finding any and all motor vehicle violations is a lawful primary purpose. The court recognized that checkpoints are an appropriate tool for helping police discover certain types of motor vehicle violations, such as the requirement that a driver be licensed and have insurance, since police cannot detect those types of violations simply by observing a vehicle during normal road travel. Checkpoints may not, however, be appropriate to enforce motor vehicle violations that are readily observable.]

The court of appeals held that the trial court was required to make findings regarding the actual primary purpose of the checkpoint and was required to reach a conclusion reading whether this purpose was lawful. Merely reciting Trooper Brown's testimony, as the court did in its oral findings and later in its written order, did not constitute a finding of fact resolving the conflicting evidence. Therefore, the court remanded the case to the trial court to issue new findings and conclusions regarding the primary programmatic purpose of the checkpoint.

Even if the trial court had determined that the primary programmatic purpose of the checkpoint was lawful, it was then required to apply the three prong inquiry set out in *Brown* to determine whether the checkpoint itself was reasonable. Under the first prong, the court must assess the gravity of the public concerns served by the seizure. The U.S. Supreme Court and North Carolina courts agree that license and registration checkpoints advance an important purpose.

The U.S. Supreme Court has also held that states have a vital interest in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads. But, without determining the primary programmatic purpose of the checkpoint, the trial court could not have assessed the strength of the State's interest in conducting the checkpoint.

After determining the strength of the State's interest, the trial court was required to determine the degree to which the seizure advanced the public interest, or, in other words, whether the police appropriately tailored the checkpoint stop to serve their primary purpose. Factors to be considered are whether the police spontaneously decided to set up a checkpoint, whether police offered any reason why a particular road was chosen, whether the checkpoint has a set starting or ending time, and whether police offered any reason why that particular time span was selected. Though the court made findings that the checkpoint was tailored, the appellate court noted that the order did not indicate that the court balanced these findings against the other *Brown* factors to determine whether the checkpoint was reasonable.

The third prong of *Brown* requires that the court assess the severity of the interference with individual liberty brought about by the checkpoint. While a checkpoint stop and search are generally less intrusive than a roving patrol stop, courts have required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than necessary to achieve the checkpoint's objectives. Factors relevant to this determination include:

- the checkpoint's potential interference with legitimate traffic;
- whether police put drivers on notice of an approaching checkpoint;
- whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field;

- whether the police stopped every vehicle that came through the checkpoint or stopped vehicles pursuant to a pattern;
- whether drivers could see visible signs of officer's authority;
- whether police operated the checkpoint pursuant to any oral or written guidelines;
- whether the officers were supervised; and
- whether officers received permission from their supervising officer to conduct the checkpoint.

Again the court of appeals noted that while the trial court made some findings under the third *Brown* prong, its failure to make findings under the first two prongs could not support its conclusion that the checkpoint was constitutional.

Moreover, the court of appeals determined that the findings in the trial court's written order weighed in favor of a conclusion that the checkpoint was unreasonable. Thus, the appellate court held that the trial court was required to explain why it concluded that the public interest in the checkpoint outweighed the intrusion on the defendant's liberty interests. The court of appeals instructed the trial court that if it determined on remand that the State's primary purpose for the checkpoint was lawful, it was required to issue new findings and conclusions regarding the reasonableness of the checkpoint.

Finally, the defendant argued that even if the checkpoint was constitutional, he was unreasonably detained by being directed to a secondary checking station. Defendant argued that if the primary purpose of the checkpoint was to check for a valid license, he should have been allowed to proceed through the checkpoint after he presented one. Noting that any further detention beyond the brief detention at a checkpoint must be based either upon consent or individualized suspicion, the court of appeals found that Trooper Carroll's detection of a strong odor of alcohol and his observation that defendant's eyes were red and glassy provided sufficient reasonable suspicion for the continued investigation and detention of defendant.

Court Remands to Trial Court for Additional Findings and Conclusions of Law on Constitutionality of Checkpoint

State v. Gabriel, ___ N.C. App. ___, ___ S.E.2d ___ (2 September 2008). Members of the State Highway Patrol (SHP) established a driver's license checkpoint. Several armed robberies had occurred near the checkpoint location in the preceding week, and suspects in the most recent robbery were seen driving a stolen sports utility vehicle in the vicinity of the checkpoint's location. The court reviewed two cases involving checkpoints: State v. Rose, 170 N.C. App. 284

(2005), and State v. Veazey, ___ N.C. App. ___, 662 S.E.2d 683 (2008), and noted that when there is no evidence to contradict the state's proffered purpose for a checkpoint, the trial judge may rely on the officer's assertion of a legitimate primary purpose. However, when there is evidence that could support a finding of either a lawful or unlawful purpose, the trial judge cannot rely solely on an officer's bare assertion of the checkpoint's purpose. A SHP officer was only witness to testify at the suppression hearing. He said that the reason for the checkpoint was several armed robberies having been committed in the area, and the purpose of the checkpoint was to issue citations for "anything that came through." The officer also testified about using the checkpoint to check for driver's licenses. The court concluded that because the officer's testimony varied concerning the primary programmatic purpose of the checkpoint, the trial judge could not simply accept the state's invocation of a proper purpose, but instead was required make independent findings of fact and conclusions of law concerning the primary purpose. Because the trial judge had not done so, the court remanded the case to the trial court to make those findings and conclusions. The court, citing *Rose*, stated that if the trial judge finds that the checkpoint had a proper primary programmatic purpose, the judge must also enter findings of fact and conclusions of law concerning its reasonableness.

Search

Magistrate Did Not Have Substantial Basis for Finding Probable Cause to Issue Search Warrant

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). Between August 2, 2006, and September 27, 2006, a reliable, confidential informant made six controlled purchases of cocaine at 3095 Brewer Road in Faison, North Carolina, under the supervision of a law enforcement officer. The search warrant application described two dwellings on the property to be searched: a mobile home and wood frame house located directly behind the mobile home. The application did not identify the owner or occupant of either dwelling. The affidavit was silent concerning where specifically on the property and from whom the informant made the controlled purchases. The affidavit lacked any facts concerning whether the officer saw the informant enter either the mobile home or the wood frame house to make the purchases. Distinguishing State v. Riggs, 328 N.C. 213 (1991), the court ruled that the magistrate did not have a substantial basis for finding probable cause to issue the search warrant.

1. **Hotel Personnel Have Implied Right to Enter Hotel Room to Keep Hotel in Reasonably Safe Condition and To Exercise Reasonable Care to Discover Criminal Acts That Might Cause Harm to Other Guests**
2. **Officers' Entry into Hotel Room with Hotel Personnel Was Search Under Fourth Amendment and Was Not Justified**

State v. McBennett, ___ N.C. App. ___, 664 S.E.2d 51 (5 August 2008). A waitress who delivered room service to the defendant's hotel room reported that the room was in disarray. A hotel manager decided to investigate and could not enter the room because the door caught on the interior lock. The defendant told the manager that he did not need housekeeping and did not open the door. The manager called law enforcement. When the defendant refused to open the door, the manager told the defendant that they would bust the door down. The defendant opened the door and an officer who was the first to enter the room saw marijuana and syringes in the room.

1. The court ruled that hotel personnel have the implied right to enter a hotel room to keep the hotel in a reasonably safe condition and to exercise reasonable care to discover criminal acts that might cause harm to other guests. The entry of hotel personnel for this purpose is not a search under the Fourth Amendment.
2. The court ruled that the officers' entry into the hotel room with the hotel personnel was a search under the Fourth Amendment and the discovery of the evidence in the room was not justified by the plain view theory because the officers' entry was not lawful. There were no exigent circumstances to authorize the entry. Also, the defendant did not voluntarily consent to allow the officers' entry.

Search of Vehicle Incident to Arrest of Vehicle's Driver Did Not Violate Fourth Amendment

State v. Carter, ___ N.C. App. ___, 661 S.E.2d 895 (17 June 2008). An officer stopped a vehicle because he noticed that the temporary tag was old or worn and with an obscured expiration date. The officer learned after the stop that the registration for the temporary tag had expired several days earlier. The officer also saw several pieces of paper lying on the passenger seat. The officer arrested the defendant for the expired temporary tag and conducted a search of the vehicle incident to the arrest. The officer put the pieces of paper together and found a change of address form for a credit card belonging to the victim. The court ruled, citing State v. Logner, 148 N.C. App. 135 (2001), State v. Brooks, 337 N.C. 132 (1994) (arrest of vehicle occupant permits search of entire interior of vehicle including containers), and other cases, that the search incident to arrest did not violate the Fourth Amendment. The court rejected the

defendant's argument that an officer may lawfully search incident to arrest only property connected to the crime with which he is charged and the illegal nature of the evidence must be readily apparent.

Fifth Amendment

Self-Incrimination

Constitutional Error to Allow State to Introduce as Substantive Evidence Defendant's Pre-Arrest Silence to Law Enforcement; Such Evidence Is Admissible Only for Impeachment and Defendant Did Not Testify at Trial

State v. Boston, ___ N.C. App. ___, 663 S.E.2d 886 (5 August 2008). The state was allowed to introduce evidence that the defendant, who had not been arrested, refused a law enforcement officer's request to come to the police department to answer questions about an arson. This evidence was admitted as substantive evidence of the defendant's guilt. The defendant did not testify at trial. The court ruled it was constitutional error to admit this pre-arrest silence as substantive evidence. It could only be introduced as impeachment evidence. The court ruled, distinguishing Jenkins v. Anderson, 447 U.S. 231 (1980), and relying on several federal appellate cases, that the admission of the defendant's pre-arrest silence as substantive evidence was constitutional error. The court nevertheless concluded that the error was harmless beyond a reasonable doubt.

Double Jeopardy

1. **Defendant's Failure to Request Hearing to Contest Validity of 30-Day Civil DWI Revocation Barred Appellate Review of Revocation's Validity in Criminal Appeal**
2. **State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal**
3. **State Properly Showed That Person Who Withdrew Blood Sample for DWI Chemical Testing Was Qualified Person Under G.S. 20-139.1(c)**
4. **Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under Crawford v. Washington, 541 U.S. 36 (2004)**
5. **30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge**

State v. Hinchman, __ N.C. App ___, ___S.E.2d ___ (16 September 2008): The defendant was charged with impaired driving, driving after consuming by a person under 21, and reckless driving. The defendant was convicted after a jury trial of impaired driving and sentenced to 60 days imprisonment, suspended for 12 months, subject to terms of probation.

The facts at trial established the following facts. On June 23, 2004, defendant (who was then under 21) and some of his friends were drinking alcohol at defendant's parents' house. They then left the house in defendant's car. Defendant lost control of the car and hit a guard rail. The car turned over. Trooper William Brown of the State Highway Patrol arrived on the scene minutes after the crash. Defendant said that he was driving and that he was not hurt. Trooper Brown smelled alcohol on defendant's breath and saw that his eyes were red and glassy. Trooper Brown also noticed that the defendant did not look like he was 21. Trooper Brown arrested the defendant and charged him with impaired driving [G.S. 20-138.1], driving after consuming by a person under 21 [G.S. 20-138.3], and reckless driving [G.S. 20-140].

Trooper Brown had a permit from the North Carolina Department of Health and Human Services (DHHS) allowing him to administer chemical analyses of blood, and he took the defendant to Pitt County Memorial Hospital to have blood drawn. He gave the defendant up to 30 minutes to contact an attorney or witness to view the testing procedures. Defendant was unable to reach an attorney and submitted to the blood test. June Anderson, an employee of the blood laboratory at the hospital drew the defendant's blood. Trooper Brown submitted the blood to the SBI for chemical analysis. The blood was analyzed by SBI chemical analyst Richard Waggoner, who held a DHHS permit to perform chemical analysis of blood. Waggoner analyzed

the blood sample and completed a laboratory report on August 30, 2004, which stated that testing revealed a blood alcohol concentration (BAC) of .10.

On September 16, 2004, the defendant was served with the laboratory report. Trooper Brown filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, in defendant's absence, ordering him to surrender his driver's license and revoking his license for a minimum of thirty days pursuant to G.S. 20-16.5. Defendant surrendered his license on November 10, 2004.

On November 18, 2004, defendant filed a motion to dismiss the impaired driving charge on the basis that revocation of his license was criminal punishment and that further prosecution would subject him to double jeopardy. On April 11, 2005, the district court granted defendant's motion and later entered a written order dismissing all the charges. The district court found that "'[t]he revocation of Defendant's drivers license, approximately 140 days after the date of the offense, does not constitute the necessary prompt legal action to remove Defendant from the highways of North Carolina in order to protect the public and therefore, is punishment which prohibits further prosecution of the Defendant for these charges which would subject him to double jeopardy.'"

The state appealed the district court's order to superior court pursuant to G.S. 15A-1432. Defendant moved to dismiss the state's appeal. The superior court vacated the order dismissing the charges and remanded the case to district court. Defendant sought interlocutory appeal, but the court denied that request, finding that the issues were not appropriately justiciable and such an appeal would be for purposes of delay.

On January 25, 2007, the district court found defendant guilty of impaired driving. He was sentenced at a Level 5 to sixty days imprisonment suspended for 12 months subject to completion of 24 hours of community service, payment of fine and court costs, and compliance with probation. Defendant appealed to superior court, where he again filed a motion to dismiss based upon double jeopardy. The superior court denied the motion to dismiss, concluding that its previous order was the law of the case, and that defendant was not twice put in jeopardy for the same offense.

Defendant was tried before a jury, which found him guilty on July 27, 2007. The superior court imposed the same sentence imposed by the district court. The defendant appealed his conviction and sentence to the court of appeals.

1. Defendant argued that the revocation report was not properly executed and was not "expeditiously filed" with the court, as required by G.S. 20-16.5(c) because it was filed 132 days after his arrest. The court of appeals noted that G.S. 20-16.5(c) requires the charging officer to ensure that the affidavit and revocation report is "expeditiously filed with a

judicial official" and that G.S. 20-16.5(g) permits a defendant to contest the validity of a revocation by filing a request for hearing within 10 day of the effective date of the revocation. Because the defendant did not request a hearing to contest the validity of the revocation through the means prescribed in G.S. 20-16.5(g), the court found that the issue was not properly preserved.

2. The defendant then argued that the court erred in denying his motion to dismiss the State's motion to appeal because the State's motion was filed in the wrong division of the court and failed to specify the legal basis of its appeal. The court summarily rejected the first argument, finding the state's assertion that "no competent evidence was presented to support the motion and order to dismiss" and that the dismissal was "contrary to law," a sufficient statement of the basis for appeal. The court further concluded that the district court caption on the State's motion to appeal, even if incorrect, was not prejudicial to the defendant and did not deprive the superior court of jurisdiction.

3. The defendant further contended that the trial court erred in admitting evidence related to the chemical analysis of his blood because the state failed to establish that June Anderson, the person who withdrew his blood, was a qualified person and the laboratory report and the chemical analyst's permit were inadmissible testimonial evidence under Crawford v. Washington, 541 U.S. 36 (2004). The court of appeals determined that Trooper Brown's testimony that Anderson was a lab technician at the hospital was sufficient to show that she was a qualified person under G.S. 20-139.1(c).

4. The court further determined that introduction of the laboratory report and chemical analyst's permit was proper. Citing its holding in State v. Heinricy, 183 N.C. App. 585, 591, 645 S.E.2d 147, 151, disc. review denied, 362 N.C. 90, 656 S.E.2d 593 (2007), that a chemical analyst's affidavit is nontestimonial evidence under *Crawford* when the "'affidavit [i]s limited to [the analyst's] objective analysis of the evidence and routine chain of custody information,'" the court determined that the laboratory report for the defendant's blood sample was properly admitted into evidence. The court further determined that the chemical analyst's permit was not testimonial evidence inadmissible pursuant to Crawford since the permit was "neutral evidence . . . created to serve a number of purposes other than to be used as evidence at trial, and [] is not the type of testimonial evidence described in *Crawford*."

5. Finally, the court addressed the defendant's contention that his conviction of DWI after his license was revoked subjected him to double jeopardy in violation of the U.S. and N.C. Constitutions. The court began by citing its determination in *State v. Evans*, 145 N.C. App.

324, 334, 550 S.E.2d 853, 860 (2001), that a license revocation pursuant to G.S. 20-16.5 is a civil remedy rather than a criminal punishment. The court rejected the defendant's contention that *Evans* was inapplicable because the 135 day delay between his arrest and license revocation did not serve the intended purpose of the statute. The court of appeals cited Hudson v. United States, 522 U.S. 93 (1997), as establishing the principle that the criminal or civil nature of a sanction is "determined on the face of the statute" rather than on "an individual basis." Accordingly, the court relied upon Evans in concluding that the defendant's 2004 license revocation was a civil remedy. Thus, the court held that the defendant's right to be free from double jeopardy was not violated by his trial and conviction for a crime after the civil revocation.

Double Jeopardy Clause Does Not Bar Prosecution in Superior Court for DWI to which Defendant Pled Guilty in District Court where Defendant was Indicted for Misdemeanor DWI and Felony Habitual DWI in Superior Court Before Defendant Pled Guilty to Misdemeanor DWI for the Same Offense Conduct in District Court

State v. Corbett, ___ N.C. App ___, 661 S.E.2d 759 (17 June 2008). Defendant was charged with misdemeanor DWI by citation on January 7, 2006 in Alamance County. Meanwhile, a grand jury indicted defendant in superior court on September 5, 2006 for misdemeanor DWI and felony habitual DWI. Both charges were based on defendant's operation of a vehicle on January 7, 2006, for which he was cited. The grand jury issued a superseding indictment for the same two offenses on September 25, 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on December 11, 2006.

Defendant's misdemeanor DWI citation was not dismissed from district court after he was indicted in superior court. While his case was pending in superior court, he pled guilty in district court on November 27, 2006 to the misdemeanor DWI offense. The district court continued sentencing until December 27, 2006. After the defendant pled guilty in district court, the state dismissed the felony habitual DWI charge in superior court because of the defendant's plea of guilty in district court to misdemeanor DWI for the January 7 offense.

At defendant's December 27, 2006 sentencing in district court, the state moved to strike defendant's guilty plea. The district court entered an order on December 29, 2006 concluding that because defendant had been indicted for the misdemeanor and felony DWI offenses in superior court on September 5, 2006, the district court lacked jurisdiction to accept defendant's guilty plea on November 27, 2006. Therefore, the district court struck defendant's November

27, 2006 guilty plea to the misdemeanor DWI charge as void ab initio. Defendant was never sentenced for the DWI offense in district court.

After defendant's guilty plea in district court was stricken, a grand jury on January 2, 2007, issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI. Defendant moved to dismiss the new charges in superior court on grounds of Double Jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the state from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charge in superior court as a predicate offense for the felony habitual DWI charge. The superior court denied defendant's motion to dismiss. Defendant pled guilty to the felony habitual DWI charge in exchange for the State dismissing the misdemeanor DWI charge.

Defendant appealed to the court of appeals on the basis that the superior court erroneously failed to dismiss the charges against him based on double jeopardy. The state filed a motion to dismiss the defendant's appeal on the basis that he had no statutory right to appeal his conviction and waived appellate review of his double jeopardy argument.

The first issue before the court was whether defendant waived review of double jeopardy issues by pleading guilty. The court began by noting that a defendant's right to appeal is purely statutory. Under G.S. 15A-1444(e), a defendant who pleads guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. The court concluded that under State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971), the defendant had no right to appeal. In *Hopkins*, the defendant was indicted for first degree burglary, which was later reduced to nonfelonious breaking and entering. The defendant moved to dismiss the charge on double jeopardy grounds, but the court denied the motion. The defendant pled guilty to nonfelonious breaking and entering and appealed his conviction based on the denial of his plea of former jeopardy. The Supreme Court determined the defendant had waived his right to appeal that issue by pleading guilty after his plea of former jeopardy was overruled.

Defendant Corbett argued that Menna v. New York, 423 U.S. 61 (1975), controlled – rather than Hopkins. In Menna, the defendant was indicted in state court in New York for refusing to testify before a grand jury. The defendant moved to dismiss the case on double jeopardy grounds, claiming that he had previously been adjudicated in contempt of court for refusing to testify on the same occasion. The trial court denied the defendant's motion, and the defendant pled guilty to the indictment. The defendant appealed his conviction on Double Jeopardy grounds, and the New York Court of Appeals held that the defendant had waived appellate review of his Double Jeopardy claim by entering a counseled guilty plea.

The U.S. Supreme Court reversed, holding that "'[w]here the State is precluded by the United States Constitution from hauling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." In a footnote, the Supreme Court clarified: "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."

The state Court of Appeals concluded that even though *Menna* and *Hopkins* conflicted, it was bound by Hopkins, the Supreme Court of North Carolina's interpretation, "until otherwise instructed."

Judge Elmore dissented, concluding that the Court was bound by *Menna*, and that defendant's felony habitual DWI conviction should be vacated.

The dissent noted that the U.S. Supreme Court carved out an exception to the general rule applying to collateral challenges to guilty pleas in Blackledge v. Perry, 417 U.S. 21 (1974). In *Blackledge*, the defendant was convicted in district court of misdemeanor assault. The defendant gave notice of appeal for a trial de novo in superior court. After the defendant filed his notice of appeal, but before his trial in superior court, the prosecutor obtained an indictment charging the defendant with felony assault based on the same circumstances as the original misdemeanor charge. The defendant pled guilty to the felony charge in superior court. Months later, the defendant filed a habeas corpus petition in federal district court, claiming that the felony indictment for which he pled guilty constituted double jeopardy and deprived him of due process. The district court granted the writ. The U.S. Supreme Court held that the due process clause of the Fourteenth Amendment prohibited the state from responding to defendant's invocation of his statutory right to appeal by bring a more serious charge. The court further held that the defendant's guilty plea did not preclude him from challenging his conviction in a habeas corpus proceeding since "'[t]he very initiation of the proceedings against him in superior court operated to deny him due process of law.'"

The dissent concluded that *Menna*, which was decided a year after Blackledge, was directly on point since the trial court could determine the merits of Defendant Corbett's claim based solely on the indictment without seeking new evidence.

While recognizing that the court of appeals cannot overrule the state supreme court, the dissent reasoned that *Hopkins* did not control as it was decided before *Blackledge* and *Menna* and therefore "was not informed by the constitutional principles later established by the United States Supreme Court in those cases."

The dissent stated that while a defendant's right to appeal in a criminal proceeding derives from G.S. 15A-1444, which does not authorize a criminal defendant who pled guilty at trial to challenge his conviction on Double Jeopardy grounds as a matter of right, United States Supreme Court precedent makes clear that under these facts a defendant has the ability under the Fifth and Fourteenth amendments to challenge the State's power to bring him into court on the impaired driving charge. For these reasons, the dissent concludes that the court should deny the state's motion to dismiss and proceed to the merits.

The dissent began its analysis of the merits by reviewing the lower courts' jurisdiction. Under state statute, district courts have exclusive, original jurisdiction for the trial of misdemeanor criminal actions. G.S. 7A-272(a). Superior courts have exclusive, original jurisdiction over "all criminal actions not assigned to the district court division," including felony criminal actions. G.S. 7A-271(a). Therefore, when defendant was issued the citation for the misdemeanor impaired driving charge on January 7, 2006, the district court gained jurisdiction over the case.

Superior courts, however, have jurisdiction to try a misdemeanor case in limited circumstances, including when the misdemeanor charge is a lesser included offense of a felony on which an indictment has been returned. G.S. 7A-271(a)(1). A lesser included offense is a crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.

Impaired driving under G.S. 20-138.1 is a lesser included offense of felony habitual DWI under G.S. 20-138.5 as all of the elements of the lesser charge are required to convict a defendant of the greater charge. Therefore, under G.S. 7A-271(a)(1), the superior court gained jurisdiction to try defendant on the misdemeanor impaired driving charge when the grand jury indicted defendant on the felony habitual impaired driving charge on September 5, 2006.

The dissent disagreed with the state's assertion that the district court lost jurisdiction over the misdemeanor charge when the superior court gained jurisdiction. The dissent recognized that the superior court has jurisdiction over lesser included offense – but not exclusive jurisdiction. The dissent reasoned that when district court has jurisdiction over a misdemeanor criminal action under G.S. 7A-272(a) and a superior court acquires jurisdiction of the action pursuant to G.S. 7A-271(a), the two courts share concurrent jurisdiction in the action. The State may choose to prosecute the action in district or superior court.

Given that the jurisdiction was concurrent, the first court to exercise jurisdiction obtained it to the exclusion of others. The district court accepted Defendant's guilty plea on November 27, 2006, while the superior court did not attempt to exercise jurisdiction until April 2, 2007, when the defendant moved to dismiss and then pled guilty to the misdemeanor and felony DWI

offenses. The dissent therefore concluded that the district court obtained jurisdiction to the exclusion of the superior court.

The dissent further concluded that jeopardy attached on the misdemeanor impaired driving charge when the district court accepted the defendant's plea and that the superior erred by failing to dismiss the misdemeanor impaired driving charge and the felony habitual DWI charge on Double Jeopardy grounds.

Court, Per Curiam and Without Opinion, Affirms Court of Appeals Ruling That Defendant's Double Jeopardy Challenge to Convictions of Two Sexual Offenses Arising From Single Transaction Was Not Preserved for Appellate Review, and Even If It Was Preserved, Double Jeopardy Was Not Violated Because Multiple Sex Acts Occurring During Single Transaction Are Separate Offenses

State v. Gobal, 362 N.C. 342, 661 S.E.2d 732 (12 June 2008), *affirming*, ___ N.C. App. ___, 651 S.E.2d 279 (16 October 2007). The defendant was convicted of two counts of first-degree sexual offense (cunnilingus and fellatio) and other offenses. All offenses arose from a single transaction involving a child, the child's mother (the defendant), and a male. The court, per curiam and without an opinion, affirmed the ruling of the North Carolina Court of Appeals that the defendant's double jeopardy challenge to the convictions of two sexual offenses arising from a single transaction was not preserved for appellate review, and even if it was preserved, double jeopardy was not violated because multiple sex acts occurring during a single transaction are separate offenses, citing State v. James, ___ N.C. App. ___, 643 S.E.2d 34 (2007), and State v. Dudley, 319 N.C. 656 (1987).

Due Process

City Ordinance Prohibiting Registered Sex Offenders from Knowingly Entering Any Public Park Owned, Operated, or Maintained by City Did Not Violate Their Due Process Rights to Intrastate Travel—Ruling of Court of Appeals Is Affirmed

Standley v. Town of Woodfin, 362 N.C. 328, 661 S.E.2d 728 (12 June 2008), *affirming*, ___ N.C. App. ___, 650 S.E.2d 618 (2 October 2007). The court ruled that a city ordinance prohibiting registered sex offenders from knowingly entering any public park owned, operated, or maintained by the city did not violate their due process right to intrastate travel. The court determined that this right is not fundamental, so the ordinance needed only to meet a rational basis test, which the court concluded it did.

Sixth Amendment

Right to Counsel

Sixth Amendment Right to Counsel Attached (Began) at Proceeding Before Magistrate Who Determined Probable Cause and Set Bail; Prosecutor Need Not Be Aware of or Be Involved in Proceeding for It to Be Considered the Initiation of Adversary Judicial Proceedings Under Sixth Amendment Right to Counsel

Rothgery v. Gillespie County, 128 S. Ct. 2578, ___ L. Ed. 2d ___ (23 June 2008). Local Texas officers arrested Rothgery and brought him before a Texas state magistrate, who found probable cause, formally apprised him of the accusation, and set bail. Rothgery was soon released after posting bond. Based on an unwritten county policy of denying appointed counsel for indigent defendants out on bond until at least the entry of an information or indictment, Rothgery was not appointed counsel for six months. The only issue before the Court was whether the proceeding before the magistrate was the initiation of adversary judicial proceedings under the Sixth Amendment right to counsel so that the right to counsel attached (began) then. The Court, citing Brewer v. Williams, 430 U.S. 387 (1997), Michigan v. Jackson, 475 U.S. 625 (1986), and other cases, ruled that the proceeding was the initiation of adversary judicial proceedings, with the consequent state obligation to appoint counsel within a reasonable time once a defendant's request for assistance was made. A prosecutor need not be aware of or be involved with the proceeding for it to be considered the initiation of adversary judicial proceedings. [Author's note: Although not decided in this case, it is highly likely that the Court would rule that neither a proceeding before a magistrate nor a first appearance before a district court judge is a critical stage of a prosecution at which a defendant has a Sixth Amendment right to counsel to represent him or her at these proceedings. There is a distinction between when the Sixth Amendment right to counsel attaches (begins) and a critical stage of a prosecution, at which a defendant has a Sixth Amendment right to have counsel represent him or her (the Court in *Rothgery* noted that distinction). A probable cause hearing is a critical stage, Coleman v. Alabama, 399 U.S. 1 (1970), and in any event there is a statutory right to counsel for an indigent defendant under G.S. 7A-451(b)(4) and for a non-indigent defendant under G.S. 15A-606(e). The Court's ruling does affect North Carolina case law on investigative activities, which had ruled that the Sixth Amendment right to counsel does not attach (begin) for a felony until the first appearance in district court or indictment, whichever occurs first. See Robert L. Farb, Arrest, Search, and Investigation in North Carolina (3d ed. 2003) (hereafter, ASI), at pages 206, 210, and 212. Thus, for a typical felony case that begins with an

arrest either with or without a warrant and an appearance before a magistrate or other judicial official, the Sixth Amendment right to counsel attaches (begins) with the appearance before a magistrate. That means a critical stage occurring thereafter (for example, an officer's deliberate elicitation of information from the defendant by interrogation or conversation or the defendant's appearance in a lineup) is subject to case law concerning the Sixth Amendment right to counsel. The attachment (beginning) of the Sixth Amendment right to counsel no longer awaits the defendant's first appearance in district court. Based on Patterson v. New York, discussed on page 207 of ASI, it is highly likely that the Court would rule that an officer's interrogation of a defendant at or after the defendant's appearance before a magistrate can be accomplished with *Miranda* warnings and waiver even though the defendant also has a Sixth Amendment right to counsel. North Carolina Supreme Court rulings are in accord. See cases cited in note 116 on page 222 of ASI. Of course, if the defendant requests counsel at or after the appearance before a magistrate, that request prevents interrogation even if the defendant is no longer in custody because the Sixth Amendment right to counsel, unlike *Miranda's* Fifth Amendment right to counsel, applies whether or not the defendant is in custody.]

Right to Speedy Trial

Court Rules That State Violated Defendant's Constitutional Right to Speedy Trial and Orders Convictions Vacated and Charges Dismissed With Prejudice

State v. Washington, ___ N.C. App. ___, ___ S.E.2d ___ (2 September 2008). The defendant was convicted of multiple offenses (first-degree burglary, armed robbery, attempted first-degree sexual offense, etc.) arising from a burglary that occurred in May 2002. The state brought the defendant to trial in February 2007. The court conducted an extensive analysis of the four factors set out in Barker v. Wingo, 407 U.S. 514 (1972) (length of delay; reason for the delay; defendant's assertion of the right to speedy trial; prejudice to the defendant) and ruled that the state had violated the defendant's constitutional right to a speedy trial and ordered that the convictions be vacated and the charges dismissed with prejudice (which bars a retrial).

Crawford and the Doctrine of Forfeiture by Wrongdoing

Testimonial Statements by Nontestifying Witness May Not Be Introduced Into Evidence Under Forfeiture-by-Wrongdoing Doctrine Unless There Is Evidence That Defendant Engaged in Wrongdoing Intended to Prevent the Witness From Testifying

Giles v. California, 128 S. Ct. 2678 (25 June 2008). The defendant was on trial for the murder of his ex-girlfriend. The state was allowed to introduce statements that the victim had made to a law enforcement officer concerning a domestic violence incident with the defendant that occurred about three weeks before the homicide (for the purpose of this case, it was assumed, without deciding, that the statements were testimonial). A California state appellate court ruled that the statements were admissible under the doctrine of forfeiture by wrongdoing recognized by Crawford v. Washington, 124 S. Ct. 1354 (2004), because the defendant had committed the murder for which he was on trial and his intentional criminal act made the victim unavailable to testify. The United States Supreme Court reversed that ruling. It ruled that the doctrine of forfeiture by wrongdoing requires evidence that the defendant engaged in wrongdoing intended to prevent the witness from testifying. Merely causing the witness to be unavailable to testify is insufficient. The Court commented on domestic violence and the doctrine of forfeiture by wrongdoing: "Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed an intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify."

Criminal Procedure

Discovery

Trial Judge Abused Discretion in Failing to Grant Continuance When State Had Failed to Provide Timely Discovery to Defendant—But Error was Harmless

State v. Cook, 362 N.C. 285, 661 S.E.2d 874 (12 June 2008), *reversing in part*, 184 N.C. App. 401 (3 July 2007).

Evidence at trial established that on October 28, 2004, the defendant was playing poker and drinking alcoholic beverages with friends. He drove away from the poker game in his own car. Witnesses testified that they saw defendant's car speeding and moving erratically moments before it crashed, swerving around other vehicles and on to the shoulder of the road. Shortly after midnight on October 29, 2004, defendant crashed his car into a car parked on the shoulder of I-40/I-85. Three men were sitting inside the parked car. One of the men was killed. The other two men were seriously injured.

The defendant was taken to a hospital after the crash. A paramedic in the ambulance smelled alcohol on his breath. Defendant told the paramedic he had drunk a couple of beers. At the hospital, an emergency department physician wrote on defendant's medical records that defendant was "intoxicated." A blood sample drawn at 1:30 a.m. had a blood alcohol concentration (BAC) of .059. The hospital's medical records for defendant also included a notation that defendant "admits to alcohol and cannabis."

On February 14, 2005, defendant was indicted for second-degree murder and two counts of assault with a deadly weapon inflicting serious injury. On March 23, 2005, defendant filed a "Request for Voluntary Disclosure" pursuant to Article 48 of Chapter 15A of the NC General Statutes. Defendant sough in this request the name and curriculum vitae of each expert witness the state intended to call, a summary of each expert opinion the State intended to present, and the results of all reports of scientific tests or studies made in connection with the case. Defendant filed a second discovery request on January 18, 2006.

The state retained Paul Glover, a research scientist and training specialist with the Forensic Test for Alcohol Branch at the NC Department of Health and Human Services, as an expert witness in blood analysis and the effects of alcohol and drugs on human performance and behavior. Before defendant's trial, Glover had testified approximately 100 times in North Carolina courts regarding toxicology reports.

In a January 13, 2006 report, Glover prepared a retrograde extrapolation of defendant's blood alcohol concentration at the time of the crash. Retrograde extrapolation is a mathematical analysis in which a known BAC is used to determine what an individual's BAC would have been at a specified earlier time. The analysis determines the prior BAC based on two factors: (1) the time elapsed between the driving event and the blood test; and (2) the rate of elimination of alcohol from the subject's blood during the time between the event and the test. Glover's initial retrograde extrapolation report used defendant's 3 a.m. blood test along with an average blood alcohol elimination rate. This analysis resulted in an estimated BAC of .08 at the time of the crash.

Defendant's trial was set for Monday February 20, 2006. On Wednesday, February 15, 2006, the state notified defendant that Glover would testify as an expert witness and provided Glover's curriculum vitae. On the afternoon of Friday, February 17, 2006, the state sent to defendant Glover's retrograde extrapolation report, which the prosecutor testified he received that day.

Defendant filed a motion to continue the trial upon receiving the report, citing GS 15A-903(a)(2) and arguing that the State had failed to notify him of Glover's expert opinion within a reasonable time before trial. Defendant's counsel said that because of the late notice, he did not have sufficient time to find and consult an expert to rebut Glover's testimony.

The trial court denied defendant's motion to continue. Glover testified that he was able to calculate the rate at which defendant metabolized alcohol because his blood was tested two different times after the crash. Glover testified that based upon defendant's actual blood elimination rate of .0147 in lieu of an average blood elimination rate of .0172, he calculated that defendant had a BAC of .07 at the time of the crash. This was lower than the .08 BAC Glover calculated in the January 2006 report. Glover further testified that the toxicology screen showed amphetamines and marijuana in defendant's blood and that the combination of alcohol, amphetamines, and marijuana in defendant's system could increase defendant's impairment.

The jury found defendant guilty of second-degree murder and both counts of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to consecutive prison terms of 176 to 221 months for second-degree murder and 27 to 42 months for each count of assault. Defendant appealed his second-degree murder conviction to the Court of Appeals, arguing that the trial court abused its discretion by denying his motion to continue.

In a divided opinion the court of appeals found no error in part and remanded in part. In its mandate remanding the case, the majority instructed the trial court to hold a hearing to make findings of fact and conclusions of law concerning whether the State complied with GS 15A-903

when it provided Glover's curriculum vitae and retrograde extrapolation report. The dissenting judge believed the trial court properly denied the continuance pursuant to State v. Fuller, 176 NC App 104, 626 SE2d 655 (2006). The state appealed to the Supreme Court on the basis of the dissent.

The state supreme court began its analysis by noting that a defendant's rights to discovery are statutory, not constitutional, as there is no general constitutional or common law right to discovery in criminal cases. The court concluded that the state violated G.S. 15A-903(a)(2) when it failed to furnish the defendant with sufficient notice of its intent to use blood alcohol concentration retrograde extrapolation evidence within a reasonable time before trial. The court determined that State v. Fuller, a court of appeals case in which the court found no error in the trial court's denial of a continuance based on the state's notification to the defendant the morning of trial of its intent to call an expert witness on blood alcohol retrograde extrapolation, did not control. The supreme court distinguished Fuller, a misdemeanor impaired driving case that originated with in district court, on the basis that the statutory discovery requirements at issue apply only to cases within the original jurisdiction of the superior court. The supreme court further distinguished Fuller on the basis that Fuller moved to dismiss the case rather than simply for a continuance.

The supreme court then concluded that the trial court's denial of the defendant's motion for a continuance was an abuse of discretion, though it cautioned that it was not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery. Moreover, the court proceeded to hold that it could grant a new trial only if the defendant's case was prejudiced by the error. Thus, the court applied harmless error analysis.

The court found that the record demonstrated that the error was harmless beyond a reasonable doubt. Noting that the defendant's continuance motion "only sought more time to prepare a defense for Glover's testimony," the court determined that even if a continuance had provided defendant sufficient time to obtain an expert who rebutted Glover's testimony in its entirety, "the State had abundant other admissible evidence of defendant's impairment, including witnesses who observed defendant's consumption of alcohol at the poker game; witnesses who saw defendant's erratic driving just before the crash; a paramedic in the ambulance who smelled alcohol on defendant's breath; defendant's admission to the paramedic that he had consumed alcohol; a physician's note on defendant's medical records that defendant was 'intoxicated'; the results of two blood samples showing alcohol, amphetamines and marijuana in defendant's system shortly after the wreck; and the notation in defendant's medical records on the morning after the crash that he admitted to alcohol and

marijuana consumption." The court found that the "extrapolation testimony was but a thread in the web of evidence presented by the State."

Thus, the supreme court reversed the Court of Appeals and vacated its remand to the trial court.

1. Trial Judge Did Not Abuse Discretion in Precluding Defendant as Discovery Sanction From Asserting Defenses of Voluntary Intoxication and Diminished Capacity

2. No Ineffective Assistance of Counsel When Defense Counsel Failed to Give Notice to State of Defenses of Voluntary Intoxication and Diminished Capacity

State v. McDonald, ___ N.C. App. ___, 663 S.E.2d 462 (5 August 2008). The defendant was convicted of attempted first-degree murder and a felonious assault. On the first day of trial, the state moved for an order precluding the defendant from asserting any of the defenses covered by G.S. 15A-905(c) because the defendant had not responded to the state's reciprocal motions for discovery and notice of defenses. The trial judge ruled that the defendant would be permitted to assert the defenses of accident and duress, but was barred from asserting any other defenses. The defendant had informed the judge that he also wanted to assert the defenses of voluntary intoxication and diminished capacity, but was barred from doing so by the judge's ruling.

1. The court ruled that the judge did not abuse his discretion in precluding the two defenses as a discovery sanction. (Author's note: The defendant waived a constitutional objection to the judge's ruling by failing to raise that objection at trial.) The court noted that the trial judge's decision to allow the defendant to use two defenses (accident and duress) demonstrates that the judge affirmatively exercised his discretion and precluded only those defenses that would have prejudiced the state (obtaining experts at a late date).
2. The court ruled that there was no ineffective assistance of counsel when defense counsel failed to give notice to the state of the defenses of voluntary intoxication and diminished capacity. Reviewing the evidence in this case, the court concluded that the defendant cannot show that there was a reasonable probability that the outcome of the trial would have been different.

Evidence

Admission of Defendant's Confession Through Reading to Jury of Officer's Handwritten Notes Was Error Because Officer Did Not Have Defendant Review and Confirm Notes as Accurate Representation of Defendant's Answers, Nor Were Notes a Verbatim Account of Defendant's Confession

State v. Spencer, ___ N.C. App. ___, ___ S.E.2d ___ (19 August 2008). The court ruled, relying on State v. Walker, 269 N.C. 135 (1967), and State v. Bartlett, 121 N.C. App. 521 (1996), that the admission of the defendant's confession through the reading to the jury of an officer's handwritten notes was error because the officer did not have the defendant review and confirm the notes as an accurate representation of the defendant's answers, nor were the notes a verbatim account of the defendant's confession. [Author's note: For a discussion of the admissibility of a written confession, see page 236 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

1. Admission of Evidence of Prior Conviction in Trial of Possession of Firearm by Felon Did Not Violation Rules 403 and 404(b), Although Defendant Offered to Stipulate to Conviction

2. Trial Judge Did Not Err in Prohibiting as Defendant's Evidence Admission of Statement of Unavailable Witness to SBI Agent

State v. Little, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). The defendant was on trial for attempted first-degree murder, a felonious assault, possession of firearm by felon, and discharging a firearm into occupied property.

1. The state was allowed to introduce evidence of the defendant's prior conviction of involuntary manslaughter to prove an element of possession of firearm by felon. The defendant had offered to stipulate to the prior conviction and objected to the admission of the conviction evidence under Rules 403 (exclusion of relevant evidence on grounds of prejudice, etc.) and 404(b) (other crimes, wrongs, or acts). The court ruled that the admission of the conviction evidence did not violate these rules.

2. An SBI agent investigated a shooting and took a statement from a witness several hours later while seated in the agent's vehicle outside a local police department. The defendant sought to admit the statement of the witness, who was unavailable at trial, under several hearsay exceptions. The court ruled that the statement was not admissible under present

sense impression [803(1)], excited utterance [803(2)], reports of regularly conducted activity [803(6)], or public records and reports [803(8)].

1. Trial Judge Did Not Err Under Rule 404(b), Rule 401, and Rule 403 in Admitting Various Prior Criminal Acts in Trial of Attempted First-Degree Burglary
2. Sufficient Evidence to Support Conviction of Attempted First-Degree Burglary
3. Trial Judge Did Not Err in Not Submitting Attempted Misdemeanor Breaking or Entering as Lesser Offense of Attempted First-Degree Burglary

State v. Martin, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). The defendant was convicted of attempted first-degree burglary that was committed on March 29, 2007. A person taking a bath in a house heard a loud noise, looked out the bathroom window, and saw the defendant walk around the corner of her house. She then heard scratching at her bedroom window. She pulled back the window shade and saw the defendant on the other side of the window, pulling on the window and a cord attached to the window. The defendant had put his fingers around the window screen and had pushed the window off its track. The defendant then left the area.

1. The court ruled that the trial judge did not err under Rule 404(b), Rule 401, and Rule 403 in admitting the following prior criminal acts: (i) breaking and entering a motor vehicle and misdemeanor larceny committed on April 28, 2005, and breaking and entering a residence and misdemeanor larceny committed on April 24, 2005, to show the defendant's motive and intent to commit a larceny; (ii) possession of marijuana on March 26, 2007, to show defendant's motive to commit the attempted burglary because he needed money and as evidence of the crime scenario (the marijuana possession having occurred three days before the attempted burglary); and (iii) breaking and entering a residence through a window on October 4, 2006, in the same neighborhood as the attempted burglary, to show identity and intent.

2. The court ruled that the evidence was sufficient to support the defendant's conviction of attempted first-degree burglary.

3. The court ruled that the trial judge did not err in not submitting attempted misdemeanor breaking or entering as a lesser offense of attempted first-degree burglary. The court stated that there was no evidence presented at trial to suggest that the defendant's intent was anything other than to commit a felony within the home. There was no evidence to support

the defendant's appellate argument that the defendant could have been attempting to look at the person while she was bathing.

Other Criminal Offenses

Sufficient Evidence of Defendant's Construction Possession of Firearm in Vehicle to Support Conviction of Possession of Firearm by Felon

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (16 September 2008). The defendant was convicted of possession of firearm by felon. An officer stopped a Ford pick-up truck for failing to display a proper registration tag. After the stop, the officer smelled the odor of marijuana emanating from the vehicle. Two other officers conducted a warrantless search (the defendant refused to give consent) and recovered a handgun in the bed (cargo area) of the vehicle. The bed was fitted with a lift-up cover. The officers did not find any marijuana. The court ruled that there was sufficient evidence of the defendant's construction possession of the firearm in the vehicle to support the conviction of possession of firearm by a felon. The evidence tended to show: (i) the defendant was the owner and driver of the vehicle; (ii) the defendant exclusively controlled the vehicle; (iii) the vehicle's cargo area contained other objects owned by the defendant; (iv) the defendant stated that everything in the cargo area belonged to him; and (v) the handgun was found in the cargo area wrapped in a man's jacket.

1. **Sufficient Evidence to Support Conviction of Third-Degree Sexual Exploitation of Minor**
2. **State Was Properly Permitted to Amend Indictments During Trial to Amend Dates of Offenses**
3. **Trial Judge Did Not Abuse Discretion in Allowing State to Present to Jury Twelve Brief Video Clips of Children Engaged in Sexual Activity to Support the Twelve Charges of Third-Degree Sexual Exploitation of Minor**

State v. Riffe, ___ N.C. App. ___, 661 S.E.2d 899 (17 June 2008). The defendant was convicted of twelve counts of third-degree sexual exploitation of a minor under G.S. 14-190.17A.

1. The court ruled that there was sufficient evidence that the defendant (i) knew the character or content of the material, and (ii) possessed the material. An officer testified that the defendant operated a business out of a warehouse where a computer was found with images of a minor engaging in sexual activity. The SBI agent who examined the computer's contents found twelve files saved to the computer with names indicating that they

contained child pornography. The computer was registered to the defendant. A receipt signed by the defendant, a payment receipt that included the defendant's name and address, and two deposit slips (one bearing the defendant's signature, the other his name), were found in and around the desk where the computer was located. All the files that were saved on the hard drive had been opened on the day the computer was seized by the officers.

2. The indictments alleged the date of each offense as August 30, 2004. Defense counsel cross-examined all witnesses whether the defendant possessed the hard drive on that date. Each witness conceded that on that date the computer was in the possession of a law enforcement agency, not the defendant. During the trial, the trial judge allowed the state to amend the dates in the indictments. The court ruled that the trial judge did not err. The court noted that time was not an element of the offenses, and a variance about time is material when it deprives the defendant of an opportunity to adequately present a defense. The court noted that the defendant did not present an alibi defense.

3. The court ruled that the trial judge did not abuse his discretion in allowing the state to present to the jury twelve brief video clips of children engaged in sexual activity to support the twelve charges. The court noted that the clips were not duplicative and were not improperly displayed in the courtroom.

Only One Conviction of Possession of Firearm by Felon Is Permitted When More Than One Weapon Is Possessed Simultaneously

State v. Garris, ___ N.C. App. ___, 663 S.E.2d 340 (15 July 2008). The court ruled, relying on federal and state case law, that only one conviction of possession of firearm by felon (G.S. 14-415.1) is permitted when more than one weapon is possessed simultaneously.

Insufficient Evidence to Support Conviction of Carrying Concealed Weapon

State v. Soles, ___ N.C. App. ___, 662 S.E.2d 564 (1 July 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of carrying a concealed weapon. An officer stopped the defendant's van for a motor vehicle violation and ordered the defendant out of the van. The officer searched a backpack in the back of the van (there were no seats there) and found a pistol. The court noted case law that there must be evidence that a weapon

must be within the reach and control of the defendant. Because the state failed to offer evidence on this issue, there was insufficient evidence to support the defendant's conviction.

1. Sufficient Evidence of Serious Injury in Felonious Assault Trial
2. Defendant Was Not Prejudiced in Joint Trial of Felonious Assault and Possession of Firearm by Felon by Admission of Prior Conviction of Possession of Cocaine to Prove Element of Possession of Firearm by Felon

State v. Tice, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). The defendant was convicted of assault with a deadly weapon inflicting serious injury and possession of a firearm by felon.

1. The court ruled that there was sufficient evidence of serious injury to support the assault conviction. The defendant was shot in the knee, took pain medication for two weeks, walked with a limp for one to two weeks, and required one month to heal.
2. The defendant argued on appeal that he was denied effective assistance of counsel when his trial lawyer agreed to stipulate that the defendant had a prior felony conviction (possession of cocaine) for the charge of possession of firearm by felon without insisting, as a condition of that stipulation, that the nature of the conviction not be disclosed to the jury. The court rejected the defendant's argument, ruling that the defendant was not prejudiced in the trial of the felonious assault charge by the revelation of the conviction of possession of cocaine, a nonviolent crime.

Sufficient Evidence of Discharging Firearm into Occupied Property When Bullet Was Fired into Exterior Wall of Apartment Building; Bullet Need Not Penetrate Inner Wall or Enter Apartment

State v. Canady, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). The court ruled, relying on State v. Cockerham, 155 N.C. App. 729 (2003), and State v. Watson, 66 N.C. App. 306 (1984), that there was sufficient evidence of discharging a firearm into an occupied property when the bullet was fired into an exterior wall of an apartment building; the bullet need not penetrate an inner wall or enter an apartment.

Court Upholds Convictions for Both Felonious Possession of More 1.5 Ounces of Marijuana and Possession of Marijuana With Intent to Sell or Deliver, Based on Same Marijuana

State v. Spencer, ___ N.C. App. ___, ___ S.E.2d ___ (19 August 2008). The court, relying on State v. Pipkins, 337 N.C. 431 (1994), and State v. Perry, 316 N.C. 87 (1986), and discussing in footnote four the overruling of a contrary ruling in State v. Pagon, 64 N.C. App. 295 (1983), upheld the defendant's convictions for both felonious possession of more 1.5 ounces of marijuana and possession of marijuana with intent to sell or deliver, based on the same marijuana.

Insufficient Evidence to Support Second-Degree Kidnapping When Defendant During Armed Robbery Ordered Victims to Lie on Floor, But They Were Not Bound

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (5 August 2008). The court ruled, relying on State v. Ripley, 360 N.C. 333 (2006), State v. Beatty, 347 N.C. 555 (1998), and other cases, that there was insufficient evidence to support the defendant's second-degree kidnapping convictions when the defendant during an armed robbery ordered the victims to lie on the floor, but they were not bound.

1. **Insufficient Evidence to Support Conviction of Resisting, Delaying, or Obstructing Officer**
2. **Officer Did Not Have Reasonable Suspicion for Investigative Stop**
3. **Sufficient Evidence to Support Conviction of Possession of Cocaine**
4. **Indictment Was Not Defective When Grand Jury Foreperson Did Not Place Check by Witness Who Testified Before Grand Jury**

State v. Sinclair, ___ N.C. App. ___, 663 S.E.2d 866 (5 August 2008). The defendant was convicted of possession of cocaine; resisting, delaying, or obstructing an officer; and being an habitual felon. A detective and other officers approached the defendant and others at a local hangout known for drug activity. The detective on prior dates had searched the defendant for drugs. The defendant asked the detective whether he wanted to search him, and the detective responded affirmatively and walked toward the defendant. The defendant quickly shoved both of his hands in his front pockets and then removed them. The defendant made his hands into

fists as the detective got closer. The defendant said he had to leave and took off running across an adjacent vacant lot. The officers chased the defendant through the lot. The defendant eventually stopped and lay down. A search revealed a pack of cigarettes and $170.00 in cash. An officer getting out of a vehicle saw the chase and how the grass had been bent where the chase had taken place. This officer followed the path and found a clear, plastic bag on top of the bent grass. The bag was clean and undisturbed, and cocaine was found inside.

1. The court determined that the initial encounter between the officer and the defendant was consensual and then ruled that the defendant's flight from a consensual encounter was not evidence that the defendant was resisting, delaying, or obstructing the officer. Thus, there was insufficient evidence to support the defendant's conviction of resisting, delaying, or obstructing an officer (RDO).
2. Alternatively, the court ruled that even if the detective was attempting to effectuate an investigatory stop, there was not reasonable suspicion to support the stop. Thus, concerning the RDO charge, the officer was not discharging or attempting to discharge a lawful duty of his office.
3. The court ruled that there was sufficient evidence to support the defendant's conviction of possession of cocaine based on the following: the defendant's flight upon learning that the detective wanted to search him; the defendant's keeping his hands in front of him during the chase; the bag with the cocaine was found on the precise route of the chase; the bag was on top of the bent grass; and the bag was clean and undisturbed.
4. The court ruled, relying on State v. Gary, 78 N.C. App. 29 (1985), that the habitual felon indictment was not fatally defective when the grand jury foreperson did not place a check by the witness who testified before the grand jury.

Term "Explosive Device" in G.S. 15A-1343(b)(5) Does Not Include Firearm Ammunition, and Thus Possession of Bullets Was Not Ground for Probation Revocation

State v. Sherrod, ___ N.C. App. ___, 663 S.E.2d 470 (5 August 2008). The court ruled that the term "explosive device" in G.S. 15A-1343(b)(5) does not include firearm ammunition, and thus possession of bullets was not a ground for probation revocation.