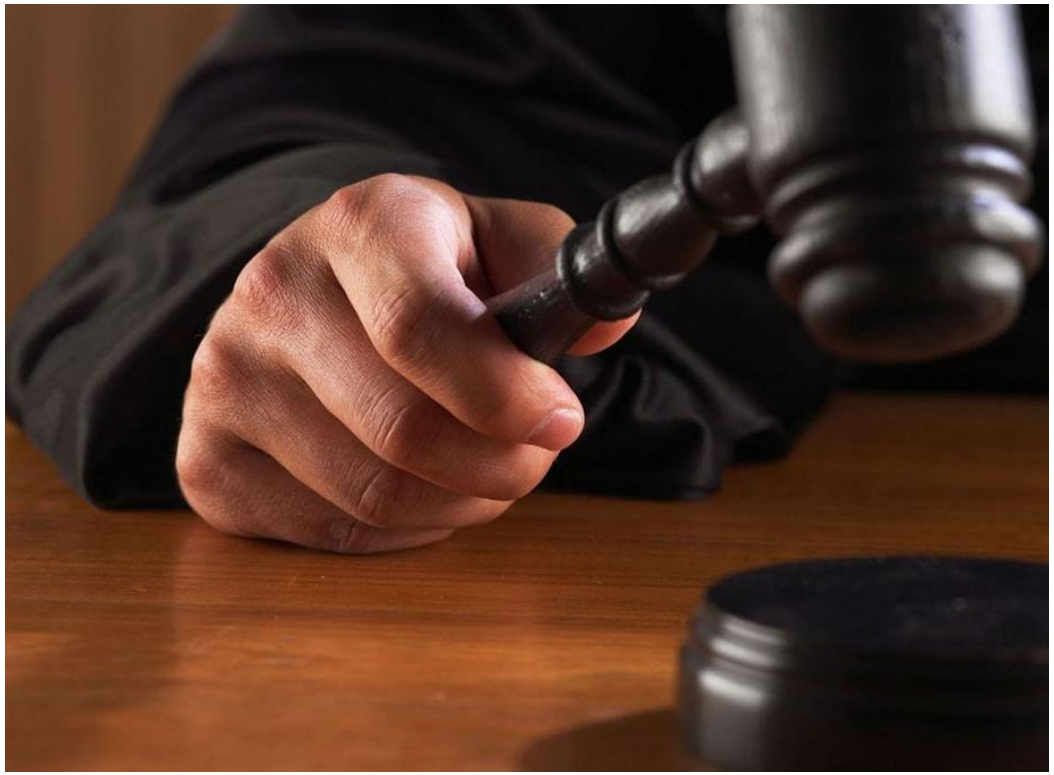
CRIMINAL LAW UPDATE

BRITTANY BROMELL, UNC SCHOOL OF GOVERNMENT

JUDGE DONNA STROUD, NC COURT OF APPEALS

LEGISLATION

STATE V. HAHN, *P. 23*



Potential juror's refusal to wear mask in jury assembly room did not justify finding of direct criminal contempt.

CRIMINAL CONTEMPT

"Judges must be allowed to maintain order, respect, and proper function in their courtrooms" because "courtroom decorum and function depends upon respect shown by its officers and those in attendance."

- Refusal to wear a mask was not a contemptuous act.
- The authority underlying the local emergency order at issue was revoked.
- No support for conclusion that defendant's conduct amounted to willful interference with the orderly functioning of a court session.


CALLIS
CHAPMAN
JONES
KELLEY
MURRAY

WEARING A MASK IN PUBLIC, *P. 1*

S.L. 2024-16 (H 237)

- Effective for offenses committed on or after June 27, 2024

- G.S. 14-12.11(a)(6):
  - "Any person wearing a mask for the purpose of ensuring the physical health or safety of the wearer or others."
  - "Any person wearing a medical or surgical grade mask for the purpose of preventing the spread of contagious disease."

PERSON MUST REMOVE MASK WHEN…

- ✗ During a traffic stop, including a checkpoint or roadblock pursuant to G.S. 20-16.3A.
- ✗ When a law enforcement officer has reasonable suspicion or probable cause during a criminal investigation.
- ✓ Must remove the mask upon request by a law enforcement officer.
- ✓ Must temporarily remove the mask upon request by the owner or occupant of public or private property to allow for identification of the wearer.

MASK SENTENCE ENHANCEMENT, *P. 1*

S.L. 2024-16 (H 237)

- **G.S. 15A-1340.16G:** new sentencing enhancement for a person who wears a mask or other clothing to conceal or attempt to conceal the person's identity during the commission of a crime.

- Punishment is a misdemeanor or felony that is one class higher than the underlying offense for which the person was convicted.
  - If the person would be eligible for active punishment based on the offense class and the person's prior record level, then the court must order a term of imprisonment.
- The sentencing enhancement does not apply if wearing a mask to conceal the person's identity is an element of the underlying offense.

LARCENY REVISIONS, *P. 7*

S.L. 2024-22 (H 495)

State v. Hill, p. 17

- Defendant's use of a price label sticker from another product did not represent larceny by product code under G.S. 72.11(3).

- Where a defendant transfers a legitimate product code printed on the price tag from one product to another, likely more punishable under G.S. 14-72.1(d).

LARCENY REVISIONS

- Shoplifting

- New G.S. 14-72.1(d2):
  - Class H felony to switch a price tag in a way that results in a more than $200 difference between the actual price of the item and the price listed on the new price tag.
  - Mere possession of the item or the production by shoppers of improperly priced merchandise for checkout cannot constitute prima facie evidence of guilt for this offense.

LARCENY REVISIONS

- Larceny from a merchant

- Expands 14-72.11 to include
  - Fraudulently creating a price tag for an item
  - Fraudulently affixing a price tag to an item
  - Presenting an item for purchase with a fraudulent price tag

OBSTRUCTION OF HIGHWAYS, *P. 2*

S.L. 2024-16 (H 237)

- Effective December 1, 2024
- G.S. 20-174.1 existing law:
  - A person who willfully stands, sits, or lies on the highway or street that impedes the regular flow of traffic is guilty of a Class 2 misdemeanor.
- New additions:
  - If committed during a demonstration, a person is guilty of a Class A1 misdemeanor for a first offense and a Class H felony for a second subsequent offense.
  - If this act is committed in such a way that obstructs an emergency vehicle from accessing the highway or street, a person is guilty of a Class A1 misdemeanor.
  - A person who organizes a demonstration that prohibits or impedes the use of a highway or street is civilly liable for injury to or death of any person resulting from delays caused by the obstruction of an emergency vehicle in violation of this statute.

SOLICITATION TO COMMIT A CRIME, *P. 5*

S.L. 2024-17 (H 834)

- Current penalties for solicitation apply to an adult or minor who solicits an adult to commit a crime (general scheme = two classes lower).

- New penalties for minor to minor:

OFFENSE MINOR SOLICITED TO COMMIT:	PUNISHMENT FOR MINOR WHO ENGAGED IN THE SOLICITATION:
FELONY (GENERALLY)	A felony that is two classes lower than the felony the minor solicited the other minor to commit
CLASS A OR CLASS B1 FELONY	Class C felony
CLASS B2 FELONY	Class D felony
CLASS H FELONY	Class 1 misdemeanor
CLASS I FELONY	Class 2 misdemeanor
MISDEMEANOR	Class 3 misdemeanor

- New adult to minor scheme = same class felony or misdemeanor the adult solicited the minor to commit

SOLICITATION OF A PROSTITUTE, *P. 7*

S.L. 2024-26 (H 971)

- Effective December 1, 2024

- G.S. 14-205.1 – increased punishment for soliciting a prostitute to a Class I felony (first offense) (was Class 1 misdemeanor).
- Clarifies that the punishment does not apply to the person engaging in prostitution.

SEXUAL EXTORTION, *P. 8*

S.L. 2024-37 (H 591)

- G.S. 14-202.7
  - Intentionally threatening to disclose or refusing to delete/remove private images of victim or victim's family member
  - To compel victim or family member to act or refrain from acting against their will
  - In order to obtain more private images or anything else of value
- Punishment:
  - Class F felony for a person who is an adult at the time of the offense
  - Class 1 misdemeanor for a person who is a minor at the time of the offense (first offense)
  - Class F felony for a person who is a minor at the time of the offense (subsequent offense)
- Aggravated sexual extortion if the person commits sexual extortion, and the victim is a minor or an individual with a disability and the person is an adult at the time of the offense. Class E felony.

SEXUAL EXPLOITATION OF A MINOR, DISCLOSURE OF PRIVATE IMAGES, *P. 12-14*

S.L. 2024-37 (H 591)

- Accounts for AI-created and other technologically-generated images
  - E.g. "material created, adapted, or modified to appear that an identifiable minor is engaged in sexual activity"
- New definition of "identifiable minor"
  - The term "identifiable minor" does not require proof of the actual identity of the minor.
- New definition of "child sex doll"

FERAL SWINE, *P. 10*

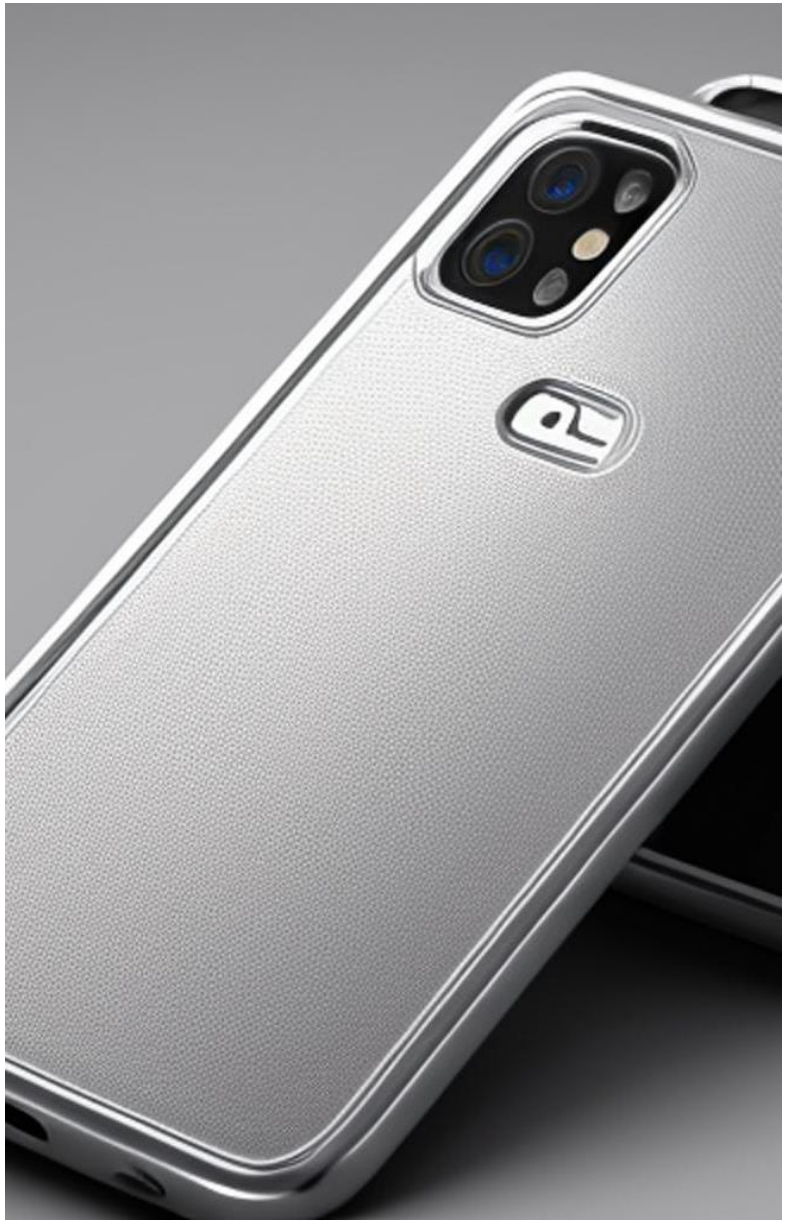
S.L. 2024-32 (S 355)

- Effective December 1, 2024
- Amended G.S. 113-291.12 – it is unlawful to remove feral swine from a trap while the swine is still alive or to transport live feral swine without authorization from the Wildlife Resources Commission.
  - Class 2 misdemeanor, punishable by a fine of at least $1,000 (first offense)
  - Class A1 misdemeanor, punishable by a fine of at least $5,000 or $500 per feral swine, whichever is greater. (subsequent offense)
- The acts of removal from a trap and of transporting live feral swine are separate offenses.

CASES

STATE V. DURAN-RIVAS, *P. I*

- Motion to suppress oral and written statements of defendant and evidence from defendant's cell phones
- Search of Defendant's old silver cell phone. He gave old phone to 2-year-old son to watch videos; son brought it to defendant's wife when it stopped working and she discovered the incriminating videos. Wife gave the phone to police and gave permission to search phone.
- Wife is a person who is reasonably apparently entitled to give or withhold consent to a search of the old silver phone.
- Officer's seizure of Defendant's current black cell phone after he tried to pull it away as officer tried to view deleted files was justified by exigent circumstances exception. Officer later got warrant to search the contents of the black phone.



STATE V. CORROTHERS, *P. 5*

Moore borrowed money from Regina and told her he was going to defendant's home, about 5 minutes away and he would then return. He also texted her defendant's number. Her understanding was that the purpose of visit was to buy drugs.

Moore did not return after several hours, and no one could reach him by phone and he was not at his residence.

The next morning, Jan. 28, Regina discovered Moore's truck parked at a cemetery and he was reported as missing.

On Feb. 4 officers identified defendant's address as the last known location of Moore's cell phone; went to house and knocked on door but no answer. Officers saw 4 cars parked at the home and a wheelchair on the porch, walked around the curtilage of the house and saw a hole in the ground.

On Feb. 5 officers got a search warrant for the property and found Moore's body in the hole.
On Feb. 6 officers got a search warrant for defendant's cell phone records.
On appeal Defendant made plain error and ineffective assistance of counsel arguments because defendant did not file motion to suppress in trial court.

- Defendant claimed the "search warrants were tainted by [the detective's] alleged unlawful 4 February search of the curtilage of Defendant's residence." "The central question raised in [his] brief" is "whether the warrant application was 'prompted by' the illegal search" of the curtilage when Detective Rockenbach first visited the Property.
- "Detective Rockenbach's observation of the hole during his walk about the Property after his unsuccessful "knock and talk" on 4 February 2020 did not prompt the warrant applications when viewed in light of the totality of the circumstances, which supported the trial court's determinations of probable cause."
- Search warrants were based upon information acquired independently of the unlawful entry (even assuming the search of the curtilage was unlawful)
- First search warrant application showed established that Moore had been missing for approximately one week; that he was last known to be headed to the Property to conduct a drug deal; that Moore's cellular phone was pinpointed at the Property, where it went offline after 30 minutes; and that individuals at the Property were not answering the door.
- Subsequent search warrant applications showed "Moore's remains were found on the property on which [Defendant] lives."
- Detective Rockenbach's affidavit supporting the application to search the Property makes no reference to the hole, and the facts alleged in the application reveal that the allegations "came from sources wholly unconnected with the [alleged] unlawful entry and w[ere] known to [Detective Rockenbach] before the initial [alleged] unlawful" walk about the curtilage of the Property. Id. The search warrants were supported by probable cause—they were not "based on, or prompted by, information obtained from" Detective Rockenbach's alleged unlawful entry, but rather "on information acquired independently of the warrantless entry so as to purge the search warrant of [any] primary taint."

STATE V. LITTLE, *P. 2*

- Smell of marijuana alone was sufficient for probable cause for search; changes in law regarding hemp did not substantially change the law on plain view or plain smell as to marijuana.
- No factual dispute that marijuana and industrial hemp smell and look alike.

- But the issue here is not whether the officers could identify the substance in Defendant's car as hemp or marijuana for purposes of proving the elements of a criminal offense beyond a reasonable doubt. The issue for purposes of probable cause for the search is only whether the officer, based upon his training and experience, had reasonable basis to believe there was a " 'practical, nontechnical' probability that incriminating evidence" would be found in the vehicle. *Brown*, 460 U.S. at 742.
- The requirement of the plain view doctrine at issue here is whether it may be "immediately apparent" that the item viewed – or smelled – is likely to be contraband. *Coolidge*, 403 U.S. at 466-67.
- "Our courts have defined the term 'immediately apparent' as being satisfied where the police have probable cause to believe that what they have come upon is evidence of criminal conduct." *State v. Hunter*, 286 N.C. App. 114, 117 (2022). *State v. Little*, No. COA23-410, 2024 WL 4019033, at *8–9 (N.C. Ct. App. Sept. 3, 2024).

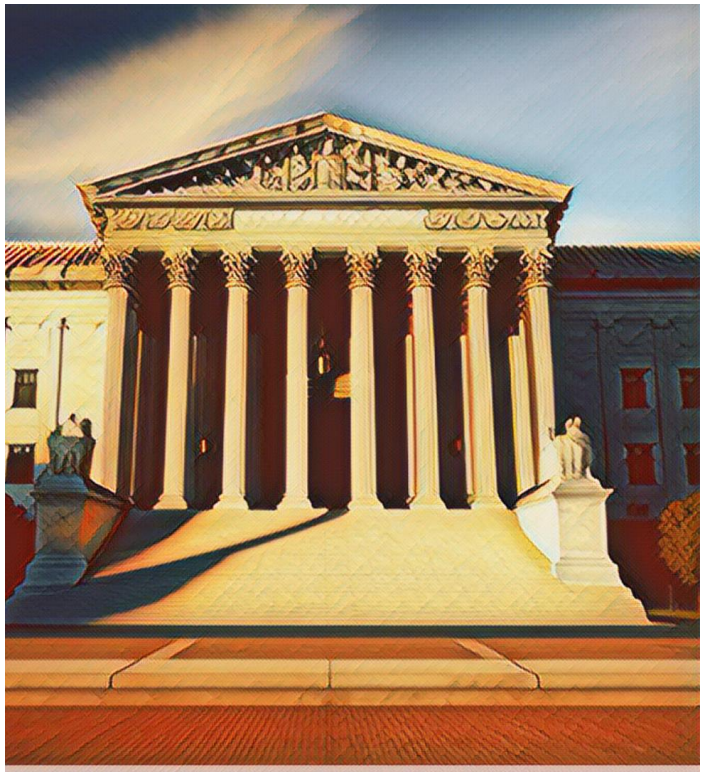
STATE V. SILER, *P. 4*

- Motion to suppress drugs found in car

- Officer had probable cause to search the car where "the information known to the officer created a practical probability that there was an orange pill bottle containing illicit drugs inside Defendant's vehicle."

- Officer's car at gas pump next to car in which Defendant was passenger
- While pumping gas, officer saw Defendant move an unlabeled orange pill bottle containing while pills from the center console to under his seat.
- Officer knew defendant from previous illicit drug activities, including defendant trying to hide drugs when the officer was serving him with an indictment on another drug charge.
- Defendant got out of car to pump gas; officer asked him about the location of the pills in the orange bottle and defendant denied he had any pills.
- Officer persisted in questioning and Defendant produced a white pill bottle from his pocket containing his own medication. Bottle looked like one for OTC medication such as ibuprofen.
- Defendant tried to put bottle back in pocket but officer demanded to see it. Defendant again lied about orange pill bottle and admitted the white bottle contained Vicodin, a narcotic, he got from a friend.
- It is illegal for a prescription to be dispensed or distributed without a label. Neither bottle had a label. Officer opened the white bottle and found what he believed to be Vicodin.
- Officer searched the car and found the orange bottle with 73 pills inside, later confirmed as opioids.
- Officer had probable cause to search the vehicle. Officer saw defendant hide the unlabeled orange pill bottle after he saw officer; Officer was aware of defendant's past drug involvement; Defendant repeatedly lied about the orange pill bottle.

SMITH V. ARIZONA, *P. 10*



Unanimous result in favor of defendant (although not unanimous on rationale) with 7 justices agreeing on the "truth of the matter" portion; did not address whether the statements were testimonial (remand on that issue.)

Majority, Justice Kagan; Justices Sotomayor, Kavanaugh, Barrett, and Jackson joined.

- Justices Thomas and Gorsuch joined as to Parts I, II, and IV.
- Justice Thomas filed opinion concurring in part.
- Justice Gorsuch filed opinion concurring in part.
- Justice Alito filed opinion concurring in the judgment, in which Chief Justice Roberts joined.

- **When an expert witness conveys a non-testifying analyst's statements in support of the expert's opinion, and the statements provide that support only if true, the statements are offered for the truth of the matter asserted and are hearsay implicating the Confrontation Clause.**
- Confrontation clause does not allow **testimonial hearsay** by a substitute analyst.
- Held the underlying report was being offered for the truth of the matter asserted (and thus **hearsay**) since the substitute analyst used the report as the basis for his opinion.
- Court did not decide whether the underlying report was also **testimonial**.

PRACTICAL RESULTS OF SMITH V. ARIZONA

- Changes in the way expert reports are admitted at trial.
- State may be required to have the original testing analyst at trial or if that person is not available, to have testing redone if possible.
- State should use notice and demand statutes and if defendant fails to file a timely objection demanding the analyst's presence at trial, no Confrontation clause violation.

U.S. Supreme Court Curtails Substitute Analyst Testimony

July 15, 2024 Phil Dixon

Print

STATE V. HOLLIS, *P. 13*

Can hearsay evidence presented under business records exception be properly authenticated by an affidavit made under penalty of perjury when the affidavit was not notarized or otherwise sworn by an official authorized to administer oaths?

STATE V. HOLLIS

- In lieu of live testimony, the proponent may submit:

  [a]n affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]

STATE V. HOLLIS

- Effective March 1, 2024
  - S.L. 2023-151 amended Rule 803(6) to allow for authentication of business records "by a certification that complies with 28 U.S.C. 1746 made by the custodian or witness."
  - 28 U.S.C. 1746 grants unsworn written statements made under penalty of perjury the same legal effect as a statement sworn to before a notary public.

STATE V. MAYE, *P. 8*

Failure to appear for hearing on motion to set aside bond forfeiture did not justify denial of motion when statutory reason was provided in the motion.

(g), and (h) of this section apply regardless of the reason for relief given or the procedure followed.

(b) Reasons for Set Aside. – Except as provided by subsection (f) of this section, a forfeiture shall be set aside for any one of the following reasons, and none other:

(1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.

(2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.

(3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.

(4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.

(5) The defendant died before or within the period between the forfeiture and the

STATE V. CABLE, P. 22

For purposes of G.S. 14-315.1 (failure to store a firearm to protect a minor), "in a condition that the firearm can be discharged" means when the firearm is loaded.

STATE V. NORRIS, *P. 15*

State's evidence did not demonstrate constructive possession for purposes of possession of a firearm by a felon.

STATE V. MCNEIL, *P. 16*

Defendant had constructive possession of FedEx package containing methamphetamine to support conviction.