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Criminal Law Case Update

2013 District Court Judges' Fall Conference
(Includes cases decided between June 10, 2013 and October 1, 2013)

The summaries are drawn from criminal case summaries prepared by Jessica Smith, Jamie Markham, and Jeff Welty. To view all of the summaries, go to http://www.sog.unc.edu/node/488. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

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Investigation Issues

Grounds for Stop

(1) Defendant was seized when uniformed officers, one in a police cruiser and the other on a bicycle, blocked defendant's continued movement on the sidewalk; (2) Seizure was not supported by reasonable suspicion when based on defendant getting into car with cup and then getting out of car after police officer drove past

State v. Knudsen, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). Two Winston-Salem officers, on patrol downtown at 11:00 p.m. on a summer night, noticed the defendant get into, and start, a car "while holding a cup that looked similar to cups that were commonly used at downtown bars to serve mixed drinks." One of the officers rode past the car on his bicycle and peered in the window. The defendant and his companion subsequently exited the vehicle and began to walk down the sidewalk, with the defendant still carrying the cup.

The bicycle officer positioned himself on the sidewalk in the pedestrians' path, and the other officer, who was driving a cruiser, pulled into a parking lot just behind the bicycle officer in such a way as to block access to the lot. As the defendant approached the bicycle officer, the latter asked "what do you have in the cup?" The defendant said he had water in the cup, which proved true. The defendant eventually was charged with driving while impaired. He pled guilty to that offense in district court, appealed, and in superior court filed a "Motion to Dismiss for Lack of Reasonable Suspicion."

The superior court judge granted the motion, ruling (1) that the defendant was seized when the officers blocked the defendant's normal path of pedestrian travel in a way that would have made a reasonable person feel that he was not free to go, and (2) that the officers lacked reasonable suspicion for the stop.

The State appealed, and the court of appeals affirmed, finding that the trial court did not err in concluding that the officers seized the defendant. The court noted that the two officers were armed and in uniform, and took an obvious interest in the defendant. Then, the bicycle officer "imped[ed] Defendant's continued movement along the sidewalk," and the officer in the cruiser also "blocked the sidewalk" before the first officer "demanded" that the defendant state what he had in his cup. The court concluded that a reasonable person would not feel free to leave under these circumstances.

The court of appeals also determined that the seizure was not supported by reasonable suspicion. The officers observed the defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. The defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle and began walking down the sidewalk, where he was stopped. The officers stopped and questioned the defendant because he was walking on the sidewalk with the cup and the officers wanted to know what was in the cup.

See Jeff Welty, Seizure by Blocking One's Path, North Carolina Criminal Law Blog (August 22, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4427.

Vehicle Stops

Seizure occurred when defendant stopped her vehicle after fire truck following her flashed its red lights and activated its siren

State v. Verkerk, __ N.C. App. __, __ S.E.2d __ (Sept. 3, 2013). (1) A seizure occurred when the defendant stopped her vehicle after a fire truck following behind her flashed its red lights and activated its siren. The fireman took this action after observing the defendant, among other things, weave out of her lane of traffic and almost hit a passing bus. (2) The court remanded to the trial court for findings of fact and conclusions of law regarding whether the fireman was acting as a state agent or a private person when the seizure occurred. (3) Whether the fireman lacked the statutory authority to stop the defendant's vehicle is irrelevant to whether the stop violated the Fourth Amendment. The court noted that the U.S. Supreme Court has consistently applied traditional standards of reasonableness to searches or seizures effectuated by government actors who lack state law authority to act as law enforcement officers. Thus, if on remand the trial court determines that the fireman was a government actor, it should then determine whether the stop was constitutionally permissible by determining whether the stop was supported by reasonable articulable suspicion. (4) The trial court erred by holding that the fireman's stop was justified under G.S. 15A-404, which allows for a citizen's arrest when there is probable cause that certain crimes have been committed. Although reasonable suspicion may have supported a stop in this case, the evidence did not support a finding of probable cause. (5) If on remand the trial court finds that the stop was illegal, it should address whether evidence stemming from the defendant's later arrest by the police is admissible under the inevitable discovery and independent source doctrines. One judge concurred in part and dissented in part. This judge concurred with the conclusion that that stop was a seizure and that the fireman was not authorized to stop the defendant under G.S. 15A-404. He dissented however because he found that the fireman was a state actor and that the stop violated the N.C. Constitution.

Tip from a citizen caller that there was a cup of beer in defendant's car, which was parked at a gas station, did not provide reasonable suspicion for traffic stop

State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (June 18, 2013). An officer lacked reasonable suspicion to stop the defendant's vehicle. A "be on the lookout" call was issued after a citizen caller reported that there was a cup of beer in a gold Toyota sedan with license number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. Although the complainant wished to remain anonymous, the communications center obtained the caller's name as Kim Creech. An officer responded and observed a vehicle fitting the caller's description. The officer followed the driver as he pulled out of the lot and onto Wake Forest Road and then pulled him over. The officer did not observe

any traffic violations. After a test indicated impairment, the defendant was charged with DWI. Noting that the officer's sole reason for the stop was Creech's tip, the court found that the tip was not reliable in its assertion of illegality because possessing an open container of alcohol in a parking lot is not illegal. It concluded: "Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity." It further found that the officer's mistaken belief that the tip included an actual allegation of illegal activity was not objectively reasonable. Finally, the court concluded that even if the officer's mistaken belief was reasonable, it still would find the tip insufficiently reliable. Considering anonymous tip cases, the court held that although Creech's tip provided the license plate number and location of the car, "she did not identify or describe defendant, did not provide any way for [the] Officer . . . to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions."

Weaving

Adopting dissenting opinion from court of appeals, North Carolina Supreme Court held that weaving over dotted white line between lanes followed by drifting to right side of right lane provided reasonable suspicion for a traffic stop

State v. Kochuk, __ N.C. __, 742 S.E.2d 801 (June 13, 2013). For the reasons stated in the dissenting opinion below, the court reversed and found that an officer had reasonable suspicion for a stop. In the opinion below, *State v. Kochuk*, __ N.C. App. __, 741 S.E.2d 327 (Nov. 6, 2012), the court of appeals, over a dissent, affirmed the trial court's order granting the defendant's motion to suppress all evidence obtained as a result of a vehicle stop. Relying on *State v. Fields*, 195 N.C. App. 740 (2009) (weaving alone is insufficient to support a reasonable suspicion that the defendant was driving while impaired), the trial court had determined that the officer lacked reasonable suspicion for the stop. The officer saw the defendant's vehicle cross over the dotted white line causing both passenger side wheels to enter the right lane for three to four seconds. He also observed the defendant's vehicle drift to the right side of the right lane "where its wheels were riding on top of the white line . . . twice for a period of three to four seconds each time." The court of appeals found these movements were "nothing more than weaving" and thus under *Fields*, the stop was improper. The dissenting judge believed that the officer had reasonable suspicion under *State v. Otto*, __ N.C. __, 726 S.E.2d 824 (2012).

Protective Sweep

Officers had reasonable suspicion that house defendant came out of after they knocked in order to serve order for arrest harbored an individual who posed a danger to the officer's safety; thus, 30-second protective sweep of residence was lawful

State v. Dial, __ N.C. App. __, 744 S.E.2d 144 (June 18, 2013), *temp. stay allowed*, __ N.C. __, 746 S.E.2d 374 (July 5, 2013). The trial court did not err by denying the defendant's motion to suppress evidence discovered as a result of a protective sweep of his residence where the officers had a reasonable belief based on specific and articulable facts that the residence harbored an individual who posed a danger to the officers' safety. Officers were at the defendant's residence to serve an order for arrest. Although the defendant previously had answered his door promptly, this time he did not respond after an officer knocked and announced his presence for 10-15 minutes. The officer heard shuffling on the other side of the front door. When two other officers arrived, the first officer briefed them on the situation, showed them the order for arrest, and explained his belief that weapons were inside. When the deputies again

approached the residence, "the front door flew open," the defendant exited and walked down the front steps with his hands raised, failing to comply with the officers' instructions. As soon as the first officer reached the defendant, the other officers entered the home and performed a protective sweep, lasting about 30 seconds. Evidence supporting the protective sweep included that the officers viewed the open door to the residence as a "fatal funnel" that could provide someone inside with a clear shot at the officers, the defendant's unusually long response time and resistance, the known potential threat of weapons inside the residence, shuffling noises that could have indicated more than one person inside the residence, the defendant's alarming exit from the residence, and the defendant's own actions that led him to be arrested in the open doorway.

Pretrial and Trial Procedure

Bond Forfeiture

Trial court did not abuse its discretion by imposing a monetary sanction of $285,000 on surety

State v. Cortez, __ N.C. App. __, 747 S.E.2d 346 (Aug. 20, 2013). (1) Even though the surety's name was not listed on the first page of form AOC-CR-201 (Appearance Bond for Pretrial Release), the surety was in fact the surety on a $570,000 bond, where among other things, the attached power of attorney named the surety and the surety collected the premium on the bond and did not seek to return it until 3 years later when the trial court ordered a forfeiture. (2) The trial court did not err by concluding that the surety's exclusive remedy for relief from a final judgment of forfeiture is an appeal pursuant to G.S. 15A-544.8. (3) The trial court did not err in granting the Board monetary sanctions against the surety and the bondsmen pursuant to G.S. 15A-544.5(d)(8). The court rejected the surety's argument that the Board's sanctions motion was untimely. (4) The trial court properly considered the relevant statutory factors before imposing monetary sanctions against the surety under G.S. 15A-544.5(d)(8) where there was no evidence that the surety's failure to attach the required documentation was unintentional. (5) The trial court did not abuse its discretion by imposing a monetary sanction of $285,000 on the surety.

Capacity to Proceed

Trial court erred by failing to sua sponte order a hearing to evaluate the defendant's capacity

State v. Ashe, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). The trial court erred and violated the defendant's due process rights by failing to sua sponte order a hearing to evaluate the defendant's capacity to stand trial on charges of assault inflicting serious injury on a person employed at a state detention facility and having attained habitual felon status and at his retrial on the latter charges. Although no one raised an issue of capacity, a trial court has a constitutional duty to sua sponte hold a capacity hearing if there is substantial evidence indicating that the defendant may be incapable to proceed. Here, that standard was satisfied. The defendant proffered evidence of his extensive mental health treatment history and testimony from a treating psychiatrist showing that he has been diagnosed with paranoid schizophrenia, anti-social personality disorder, and cocaine dependency in remission. Additionally, his conduct before and during trial suggests a lack of capacity, including, among other things, refusing to get dressed for trial and nonsensically interrupting witnesses. The appellate court considered it telling that when the trial court noted defendant's presence for the record before delivering the final jury instructions in the first trial, the defendant interjected "'Not nearly present at all. Elsewhere. You can continue, your Honor.'"

The court rejected the remedy of a retrospective capacity hearing, which the court characterized as a disfavored alternate remedy, on the basis that the defendant's capacity had never been assessed; thus, a retrospective determination of capacity was not possible. The court ordered a new trial.

Discovery

Trial court abused discretion by excluding testimony by defense expert as sanction for discovery violation

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013). (1) In this murder case, the trial court abused its discretion by excluding, as a discovery sanction, testimony by defense expert Masucci. The defendant offered Masucci after the trial court precluded the original defense expert, Ward, from testifying that key incriminating computer files had been planted on the defendant's computer. The State made no pretrial indication that it planned to challenge Ward's testimony. At trial, the defendant called Ward to testify that based upon his analysis of the data recovered from the defendant's laptop, tampering had occurred with respect to the incriminating files found on the defendant's computer. The State successfully moved to exclude this testimony on the basis that Ward was not an expert in computer forensic analysis. The defendant then quickly located Masucci, an expert in computer forensic analysis, to provide the testimony Ward was prevented from giving. The State then successfully moved to exclude Masucci as a sanction for violation of discovery rules. The only State's evidence directly linking the defendant to the murder was the computer file evidence. Even if the defendant violated the discovery rules, the trial court abused its discretion with respect to the sanction imposed and violated the defendant's constitutional right to present a defense. (2) The trial court erred by failing to conduct an in camera inspection of discovery sought by the defense regarding information related to FBI analysis of the computer files. The trial court found that FBI information was used in counterterrorism and counterintelligence investigations and that disclosure would be contrary to the public interest. The court held that the trial court's failure to do an in camera review constituted a violation of due process. It instructed that on remand, the trial court "must determine with a reasonable degree of specificity how national security or some other legitimate interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review."

See John Rubin, What are Permissible Discovery Sanctions Against the Defendant, North Carolina Criminal Law (September 24, 2013), available at http://nccriminallaw.sog.unc.edu/?p=4455.

Trial court did not err by denying defendant's motion in DWI prosecution to examine Intoximeter source code

State v. Marino, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). The defendant was pulled over for speeding and subsequently arrested for impaired driving. He submitted to a breath test on the Intoxilyzer EC/IR II, and his first and second breath samples registered alcohol concentrations of .11 and .10, respectively. Marion filed a motion seeking an order that the source code for the Intoximeter was material, relevant and necessary for his defense. The trial court denied the motion, and defendant was convicted at trial. The jury returned a special verdict finding him guilty under both the appreciable impairment and per se impairment prongs of G.S. 20-138.1(a). The defendant appealed, and the court of appeals affirmed, holding that the trial court did not err by denying his motions to examine the Intoximeter source code. The court rejected the defendant's argument that the source code was *Brady* evidence, reasoning that he failed to show that it was favorable and material. The court noted that the

jury found the defendant guilty under both prongs of the DWI statute; thus he failed to show that having the source code would have affected the outcome of his case. The court also rejected the defendant's argument that under *Crawford* and the Confrontation Clause he was entitled to the source code. (2) The court held that the defendant had no statutory right to pretrial discovery and rejected the defendant's argument that G.S. 15A-901 violated due process. The court noted, however, that the defendant did have discovery rights under *Brady.*

See Shea Denning, State v. Marino Finds No Error in Denying Defendant Source Code, North Carolina Criminal Law (August 21, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4426.

Evidence

Authentication

State failed to properly authenticate photographs used in photographic lineups

State v. Murray, __ N.C. App. __, 746 S.E.2d 452 (Aug. 20, 2013). In this drug case where the defendant denied being the perpetrator and suggested that the drugs were sold by one of his sons, the State failed to properly authenticate two photographs used in photographic lineups as being of the defendant's sons. An informant involved in the drug buy testified that he had purchased drugs from the people depicted in the photos on previous occasions but not on the occasion in question. The State then offered an officer to establish that the photos depicted the defendant's sons. However, the officer testified that he wasn't sure that the photos depicted the defendant's sons. Given this lack of authentication, the court also held that the photos were irrelevant and should not have been admitted.

Confrontation Clause

No Confrontation Clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory

State v. Ortiz-Zape, __ N.C. __, 743 S.E.2d 156 (June 27, 2013). Reversing the court of appeals' decision in an unpublished case, the court held that no Confrontation Clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory. At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire the defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. The trial court rejected the defendant's Confrontation Clause objection and ruled that Ray could testify about the practices and procedures of the crime lab, her review of the testing in this case, and her independent opinion concerning the testing. However, the trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The court of appeals reversed, finding that Ray's testimony violated the Confrontation Clause. The N.C. Supreme Court disagreed. The court viewed the U.S. Supreme Court's decision in *Williams v. Illinois* as "indicat[ing] that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." Noting that when an expert gives an opinion, the expert opinion itself, not its underlying factual basis, constitutes substantive evidence, the court concluded:

> Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements.

(quotations and citations omitted). Turning to the related issue of whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder, the court stated:

> Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of . . . information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and machine-generated results, such as a printout from a gas chromatograph. The former is the testimonial statement of a person, and the latter is the product of a machine. . . . Because machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial. We note that representations[ ] relating to past events and human actions not revealed in raw, machine-produced data may not be admitted through "surrogate testimony." Accordingly, consistent with the Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

(quotations and citations omitted). Turning to the case at hand, the court noted that here, the report of the non-testifying analyst was excluded under Rule 403; thus the only issue was with Ray's expert opinion that the substance was cocaine. Applying the standard stated above, the court found that no confrontation violation occurred. Providing additional guidance for the State, the court offered the following in a footnote: "we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule . . . 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." Finally, the court held that even if error occurred, it was harmless beyond a reasonable doubt given that the defendant himself had indicated that the substance was cocaine.

See Jessica Smith, The NC Supreme Court's Recent Substitute Analyst Cases, North Carolina Criminal Law (July 10, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4351.

State v. Brewington, __ N.C. __, 743 S.E.2d 626 (June 27, 2013). Reversing the court of appeals, the North Carolina Supreme Court held that no *Crawford* violation occurred when the State proved that the substance at issue was cocaine through the use of a substitute analyst. The seized evidence was analyzed at the SBI by Assistant Supervisor in Charge Nancy Gregory. At trial, however, the substance

was identified as cocaine, over the defendant's objection, by SBI Special Agent Kathleen Schell. Relying on Gregory's report, Schell testified to the opinion that the substance was cocaine; Gregory's report itself was not introduced into evidence. Relying on *Ortiz-Zape* (above), the court concluded that Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.

State v. Hurt, __ N.C. __, 743 S.E.2d 173 (June 27, 2013). In another substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above), reversed the court of appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis).

Admission of lab reports through the testimony of a substitute analyst violated the defendant's Confrontation Clause rights where the testifying analyst did not give her own independent opinion, but merely recited the opinion of non-testifying testing analysts that the substances were cocaine

State v. Craven, __ N.C. __, 744 S.E.2d 458 (June 27, 2013). The court held that admission of lab reports through the testimony of a substitute analyst (Agent Schell) violated the defendant's Confrontation Clause rights where the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that merely recited the opinion of non-testifying testing analysts that the substances at issue were cocaine. Distinguishing *Ortiz-Zape* (above), the court held that here the State's expert did not testify to an independent opinion obtained from the expert's own analysis but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts. With regard to the two lab reports at issue, the testifying expert was asked whether she agreed with the non-testifying analysts' conclusions. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. The court concluded: "It is clear . . . that Agent Schell did not offer—or even purport to offer—her own independent analysis or opinion [of the] . . . samples. Instead, Agent Schell merely parroted [the non-testifying analysts'] . . . conclusions from their lab reports." Noting that the lab reports contained the analysts' certification prepared in connection with a criminal investigation or prosecution, the court easily determined that they were testimonial. The court went on to find that this conclusion did not result in error with regard to the defendant's conspiracy to sell or deliver cocaine conviction. As to the defendant's conviction for sale or delivery of cocaine, the six participating Justices were equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, as to that charge the court of appeals' decision holding that the error was reversible remains undisturbed and stands without precedential value. However, the court found that the court of appeals erroneously vacated the conviction for sale or delivery and that the correct remedy was a new trial.

Any Confrontation Clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine

State v. Williams, __ N.C. __, 744 S.E.2d 125 (June 27, 2013). Reversing the court of appeals, the court held that any Confrontation Clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine. When cocaine was discovered near the defendant, he admitted to the police that a man named Chris left it there for him to sell and that he had sold some that day. The substance was sent to the crime lab for analysis. Chemist DeeAnne Johnson performed the analysis of the substance. By the

time of trial however, Johnson no longer worked for the crime lab. Thus, the State presented Ann Charlesworth of the crime lab as an expert in forensic chemistry to identify the substance at issue. Over objection, she identified the substance as cocaine. The trial court also admitted, for the purpose of illustrating Charlesworth's testimony, Johnson's lab reports. At trial, the defendant reiterated what he had told the police. The defendant was convicted and he appealed. The court of appeals reversed, finding that Charlesworth's substitute analyst testimony violated the defendant's confrontation rights. The N.C. Supreme Court held that even if admission of the testimony and exhibits was error, it was harmless beyond a reasonable doubt because the defendant himself testified that the seized substance was cocaine.

Equally divided North Carolina Supreme Court left undisturbed court of appeals' opinion that no *Crawford* violation occurred

State v. Hough, __ N.C. __, 743 S.E.2d 174 (June 27, 2013). With one Justice not taking part in the decision and the others equally divided, the court, per curiam, left undisturbed the decision below, *State v. Hough*, 202 N.C. App. 674 (Mar. 2, 2010). In the decision below, the court of appeals held that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. [Author's note: Because the Justices were equally divided, the decision below, although undisturbed, has no precedential value.]

Statements made by Wal-Mart assistant manager to the store's loss prevention coordinator in connection with the loss of a product were non-testimonial as were any assertions by him contained in a receipt for evidence form

State v. Call, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). (1) In a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were non-testimonial. The loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter. The court stated:

> [The] statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, [the declarant] privately notified his colleague . . . about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. Furthermore, [the] statement was not aimed at defendant, and it is unreasonable to believe that his conversation with [the loss prevention coordinator] would be relevant two years later at trial since defendant was not a suspect at the time this statement was made.

(2) Any assertions by the assistant manager contained in a receipt for evidence form signed by him were non-testimonial. The receipt—a law enforcement document—established ownership of the baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store.

Hearsay

Trial court properly admitted data obtained from an electronic surveillance device worn by defendant

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court properly admitted data obtained from an electronic surveillance device worn by the defendant and placing him at the scene. The specific evidence included an exhibit showing an event log compiled from data retrieved from the defendant's device and a video file plotting the defendant's tracking data. The court began by holding that the tracking data was a data compilation and that the video file was merely an extraction of that data produced for trial. Thus, it concluded, the video file was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation was laid. The defendant did not dispute that the device's data was recorded in the regular course of business near the time of the incident. Rather, he asserted that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. The court disagreed noting that the officer-witness established his familiarity with the GPS tracking system by testifying about his experience and training in electronic monitoring, concerning how the device transmits data to a secured server where the data was stored and routinely accessed in the normal course of business, and how, in this case, he accessed the tracking data for the defendant's device and produced evidence introduced at trial.

Identification

Out-of-court show-up identification was not impermissibly suggestive

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). An out-of-court show-up identification was not impermissibly suggestive. Police told a victim that they "believed they had found the suspect." The victim was then taken to where the defendant was standing in a front yard with officers. With a light shone on the defendant, the victim identified the defendant as the perpetrator from the patrol car. For reasons discussed in the opinion, the court held that the show-up possessed sufficient aspects of reliability to outweigh its suggestiveness.

Opinion Testimony

Trial court committed reversible error in murder trial by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013). In this murder case, the trial court committed reversible error by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot on a nearby road where the victim's body later was found. Applying the old version of NC Evidence Rule 702 and the *Howerton* test, the court found that the trial court erred by concluding that the defendant's expert was

not qualified to offer the relevant expert testimony. It went on to conclude that this error deprived the defendant of his constitutional right to present a defense.

Trial court did not commit plain error by allowing the State's medical experts to testify that the victim's injuries were consistent with previous cases involving intentional injuries and were inconsistent with previous cases involving accidental injuries

State v. Perry, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013). In a child homicide case, the trial court did not commit plain error by allowing the State's medical experts to testify that their review of the medical records and other available information indicated that the victim's injuries were consistent with previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries. The defendant asserted that these opinions rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." The court rejected this argument, noting that there was no information in the record about the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur.

Amended N.C. Evid. R. 702 applies to cases where the indictment is filed on or after October 1, 2011

State v. Gamez, __ N.C. App. __, 745 S.E.2d 876 (July 16, 2013). (1) In criminal cases, the amendment to N.C. Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying the amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply. (2) In a child sex case decided under pre-amended R. 702, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

Trial court committed plain error in counterfeit controlled substance trial by admitting evidence identifying a substance based solely upon an expert's visual inspection

State v. Hanif, __ N.C. App. __, 743 S.E.2d 690 (July 2, 2013). In a counterfeit controlled substance case, the trial court committed plain error by admitting evidence identifying a substance as tramadol hydrochloride based solely upon an expert's visual inspection. The State's witness Brian King, a forensic chemist with the State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride. Specifically he compared the tablets' markings to a Micromedex online database. King performed no chemical analysis of the pills. Finding that *State v. Ward*, 364 N.C. 133 (2010), controlled, the court held that in the absence of a scientific, chemical analysis of the substance, King's visual inspection was insufficient to identify the composition of the pills.

Trial court did not err in murder case by excluding testimony of social worker who briefly observed defendant that he "appeared noticeably depressed with flat affect"

State v. Storm, __ N.C. App. __, 743 S.E.2d 713 (July 2, 2013). In a murder case, the trial court did not err by excluding testimony of Susan Strain, a licensed social worker. Strain worked with the defendant's step-father for several years and testified that she occasionally saw the defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion the defendant "appeared noticeably depressed with flat affect." The trial court allowed Strain to testify to her observation of the defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of the defendant some time ago. The defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert; her opinion thus was limited to the defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. The statement that the defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Furthermore Strain lacked personal knowledge because she only saw the defendant on occasion in the lobby, her observations occurred seven years before to the murder, she did not spend any appreciable amount of time with him, and the defendant did not present any evidence to indicate Strain had any personal knowledge of his mental state at that time.

Character Evidence

Trial court erred by excluding evidence of defendant's truthful character in tax evasion case

State v. Tatum-Wade, __ N.C. App. __, 747 S.E.2d 382 (Aug. 20, 2013). In this tax evasion case, the trial court erred by excluding the defendant's character evidence. The facts indicated that the defendant believed advice from others that by completing certain Sovereign Citizen papers, she would be exempt from having to pay taxes. The defendant's witness was permitted to testify to the opinion that the defendant was a truthful, honest, and law-abiding citizen. However, the trial court excluded the witness's testimony regarding the defendant's trusting nature. The court agreed with the defendant that her character trait of being trusting of others was pertinent to whether she willfully attempted to evade paying taxes. The court found the error harmless.

Trial court erred by excluding evidence of defendant's positive interaction with children in child sex case

State v. Walston, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013), *temp. stay allowed*, __ N.C. __, __ S.E.2d __ (Sept. 9, 2013). In a child sex case, the trial court committed prejudicial error by excluding opinion testimony that the defendant was respectful around children and interacted in a positive way with children. The court reasoned:

> Testimony of Defendant's character for respectful treatment of children is relevant because it has a tendency to make the existence of "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence of character for respectful treatment of children tends to make the facts central to the charges, that Defendant committed, inter alia, first-degree statutory rape of a child, less probable than they would be without such evidence. Testimony of this character trait is therefore relevant and "pertinent."

Slip Op. at p. 10 (citation omitted).

Rule 404(b)

In second degree murder prosecution arising from impaired driving, trial court did not err by admitting testimony from defendant's former girlfriend that two months earlier the defendant had driven while impaired on the same road

State v. Grooms, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). In a second-degree murder case arising after the defendant drove while impaired and hit and killed two bicyclists, the trial court did not err by admitting Rule 404(b) evidence. Specifically, Thelma Shumaker, a woman defendant dated, testified regarding an incident where the defendant drove while impaired on the same road two months before the collision in question. Shumaker testified that she was so frightened on that occasion that she told the defendant to pull the car over. Shumaker also testified that the defendant habitually drank alcohol, drank alcohol while driving 20 times, and drove while impaired one or two additional times. The trial court found that Shumaker's testimony regarding the specific incident was admissible to show malice. With regard to Shumaker's other testimony, the court held that even if the evidence was inadmissible, the defendant could not establish the requisite prejudice, given the other evidence.

Trial court properly admitted evidence of defendant's earlier purse-snatching in robbery case involving purse-snatching

State v. Gordon, __ N.C. App. __, 745 S.E.2d 361 (July 16, 2013). In a robbery case involving a purse snatching, a purse-snatching by the defendant 6 weeks prior was properly admitted under Rule 404(b). The court found that the incidents were sufficiently in that they both occurred in Wal-Mart parking lots and involved a purse-snatching from a female victim who was alone. Also, the requirement of temporal proximity was satisfied.

Trial court properly admitted evidence in counterfeit controlled substance case involving counterfeit Vicodin that the defendant also had Epsom salt in a baggie, which resembled crack cocaine

State v. Hanif, __ N.C. App. __, 743 S.E.2d 690 (July 2, 2013). In a counterfeit controlled substance case in which the defendant was alleged to have sold tramadol hydrochloride, representing it to be Vicodin, evidence that he also possessed Epsom salt in a baggie was properly admitted under Rule 404(b). The salt bore a sufficient similarity to crack cocaine in appearance and packaging that it caused an officer to do a field test to determine if it was cocaine. Under these circumstances, evidence that the defendant possessed the salt was probative of intent, plan, scheme, and modus operandi.

Use of Defendant's Silence at Trial

State's introduction at trial of evidence of defendant's silence during a non-custodial interview did not violate the Fifth Amendment

Salinas v. Texas, 570 U.S. __ (June 17, 2013). Without being placed in custody or receiving *Miranda* warnings, the defendant voluntarily answered an officer's questions about a murder. But when asked whether his shotgun would match shells recovered at the murder scene, the defendant declined to answer. Instead, he looked at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap,

and began "to tighten up." After a few moments, the officer asked additional questions, which the defendant answered. The defendant was charged with murder and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant was convicted and on appeal asserted that this argument violated the Fifth Amendment. The Court took the case to resolve a lower court split over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief. In a 5-to-4 decision, the Court held that the defendant's Fifth Amendment claim failed. Justice Alito, joined by the Chief Justice and Justice Kennedy found it unnecessary to reach the primary issue, concluding instead that the defendant's claim failed because he did not expressly invoke the privilege in response to the officer's question and no exception applied to excuse his failure to invoke the privilege. Justice Thomas filed an opinion concurring in the judgment, to which Justice Scalia joined. In Thomas's view the defendant's claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

Crimes

Contributing to the Delinquency of a Minor

State presented sufficient evidence that the defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected

State v. Stevens, __ N.C. App. __, 745 S.E.2d 64 (July 16, 2013), *temp. stay allowed*, __ N.C. __, __ S.E.2d __ (Aug. 5, 2013). The evidence was sufficient to show that the defendant committed the offense of contributing to the delinquency/neglect of a minor. The court rejected the defendant's argument that the State presented no evidence that the defendant was the minor's parent, guardian, custodian, or caretaker, concluding that was not an element of the offense. The court further found that the State presented sufficient evidence that the defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected. Specifically, he took the juvenile away from the area near the juvenile's home, ignored the juvenile after he was injured, and then abandoned the sleeping juvenile in a parking lot. The court concluded: "Defendant put the juvenile in a place or condition where the juvenile could be adjudicated neglected because he could not receive proper supervision from his parent."

Burglary & Related Offenses

Trial court erred by denying the defendant's motion to dismiss charges of breaking or entering a boat where the State failed to present evidence that the boats contained items of value

State v. Fish, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). The trial court erred by denying the defendant's motion to dismiss charges of breaking or entering a boat where the State failed to present evidence that the boats contained items of value. Although even trivial items can satisfy this element, here the record was devoid of any evidence of items of value. The batteries did not count because they were part of the boats.

Drug Offenses

(1) Trial court did not err by denying defendant's motion to dismiss charges of possession of a controlled substance in a local confinement facility; (2) Trial court erred by entering judgment for defendant's convictions for both possession of a controlled substance in a local confinement facility and simple possession of marijuana

State v. Barnes, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). (1) Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence. (2) The trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.

See Jeff Welty, When an Arrestee "Brings" Drugs to the Jail, North Carolina Criminal Law (September 25, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4469.

DVPO, Violation of

Trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) as statutory amendments after State v. Byrd rendered ex parte orders entered under Chapter 50B valid protective orders

State v. Poole, __ N.C. App. __, 745 S.E.2d 26 (July 2, 2013), *temp. stay allowed*, __ N.C. __, 746 S.E2d 379 (July 19, 2013). The trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. The trial court entered an ex parte Chapter 50B DVPO prohibiting the defendant from contacting his wife and ordering him to surrender all firearms to the sheriff. The day after the sheriff served the defendant with the DVPO, officers returned to the defendant's home and discovered a shotgun. He was arrested for violating the DVPO. The trial court granted the defendant's motion to dismiss, finding that under *State v. Byrd,* 363 N.C. 214 (2009), the DVPO was not a protective order

entered within the meaning of G.S. 14-269.8 and that the prosecution would violate the defendant's constitutional right to due process. The State appealed. The court concluded that *Byrd* was not controlling because of subsequent statutory amendments and that the prosecution did not violate the defendant's procedural due process rights.

Larceny

(1) Cumulative value of goods taken is evidence of a conspiracy to steal goods of that value; (2) State presented sufficient evidence that the value of the stolen boat batteries was more than $1,000

State v. Fish, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). (1) In a case in which the defendant was charged with conspiracy to commit felony larceny, the trial court did not err by denying the defendant's motion to submit a jury instruction on conspiracy to commit misdemeanor larceny. The court determined that evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, even if the conspirators' agreement is silent as to exact quantity. Here, the evidence showed that the value of the items taken was well in excess of $1,000. (2) The State presented sufficient evidence that the fair market value of the stolen boat batteries was more than $1,000 and thus supported a conviction of felony larceny.

(1) A larceny was from the person when the defendant stole the victim's purse from her shopping cart; (2) Trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny

State v. Sheppard, __ N.C. App. __, 744 S.E.2d 149 (July 2, 2013). (1) A larceny was from the person when the defendant stole the victim's purse, which was in the child's seat of her grocery store shopping cart. At the time, the victim was looking at a store product and was within hand's reach of her cart; additionally she realized that the larceny was occurring as it happened, not some time later. (2) The trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. Larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. While it is proper to indict a defendant on alternative theories of felony larceny and allow the jury to determine guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny.

Sex Offenses and Offenders

Forced self-penetration supports a sex offense conviction

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). Deciding an issue of first impression, the court held that the defendant's act of forcing the victim at gunpoint to penetrate her own vagina with her own fingers constitutes a sexual act supporting a conviction for first-degree sexual offense.

See Jessica Smith, Forced Self-Penetration Supports a Sex Offense Conviction, North Carolina Criminal Law (September 24, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4468.

Sentencing of defendant for first-degree statutory rape and incest did not violate double jeopardy

State v. Marlow, __ N.C. App. __, __ S.E.2d. ___ (Sept. 17, 2013). The defendant was 21. He sexually abused his much younger half-sisters. He was charged with and convicted of, inter alia, first-degree rape and incest. Among other issues, he argued on appeal that the trial court violated his double jeopardy rights for sentencing him for both offenses. The court of appeals disagreed. It stated that under *Missouri v. Hunter*, 459 U.S. 359 (1983), a defendant may not be punished twice for the same offense in the same proceeding, unless there is clear legislative intent to support the double punishment. Whether two crimes constitute the same offense is determined under the *Blockburger* same elements test. The court ruled that first-degree statutory rape and incest are distinct offenses because statutory rape "requires a showing of the victim's and the defendant's age, while the elements of incest can be proven without any reference to age, and incest requires a familial relationship that is not required for one to be convicted of statutory rape." The court cited *State v. Etheridge*, 319 N.C. 34 (1987), which ruled that incest is not a lesser-included offense of statutory rape. The defendant argued that the 2002 addition of subsection (b) to the incest statute, G.S. 14-178, rendered the two offenses the same; that subsection provides that incest is a B1 felony (it is normally an F) when the victim is under 13 and the defendant is at least 12 and at least four years older than the victim. (In essence, the defendant argued that first-degree statutory rape is a lesser included offense of the B1 incest offense, as the latter includes all the elements of the former and the additional element of a familial relationship.) The court of appeals ruled that "the elements of incest remained unchanged following the amendment," which established only a "punishment and sentencing scheme" that "is only applicable after the elements of incest have been established."

Weapons Offenses

No violation of double jeopardy occurred when the trial court sentenced the defendant for three counts of discharging a firearm into occupied property

State v. Kirkwood, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). No violation of double jeopardy occurred when the trial court sentenced the defendant for three counts of discharging a firearm into occupied property. Although the three gunshots were fired in quick succession, the bullet holes were in different locations around the house's front door area. The evidence also showed that at least one shot was fired from a revolver, which, in single action mode, must be manually cocked between firings and, in double action mode, can still only fire a single bullet at a time. The other gun that may have been used was semiautomatic but it did not always function properly and many times, when the trigger was pulled, would not fire. Neither gun was a fully automatic weapon such as a machine gun. There was sufficient evidence to show that each shot was "distinct in time, and each bullet hit the [house] in a different place." In reaching this holding, the court declined to apply assault cases that require a distinct interruption in the original assault for the evidence to support a second conviction.

Sentencing and Probation

Probation Violations

Defendant placed on probation for offense committed before effective date of Justice Reinvestment Act (JRA) could not be revoked for absconding for actions that occurred after JRA became effective

State v. Nolen, __ N.C. App. __, 743 S.E.2d 729 (July 2, 2013). The defendant was placed on probation for attempted drug trafficking in 2010. In June 2012 her probation officer filed a violation report alleging

that on June 15, 2012, she violated the condition that she "remain within the jurisdiction of the court" by not being present during a home visit. The officer alleged that the defendant made her whereabouts unknown, "therefore absconding supervision." At the ensuing violation hearing the court found that the defendant had absconded and revoked her probation.

On appeal, the defendant argued that because her alleged violation occurred after December 1, 2011, the JRA limited the court's authority to revoke to new criminal offenses, absconding under G.S. 15A-1343(b)(3a), and violations occurring after she served two periods of confinement in response to violation (CRV). Her probation officer alleged that she "absconded," but the defendant pointed out that she was not subject to G.S. 15A-1343(b)(3a). That condition didn't exist when she was placed on probation in 2010, and the legislation creating it applied only to offenses committed on or after December 1, 2011.

The court agreed with the defendant and reversed the trial court. The mere fact that the probation officer called the violation "absconding" was not sufficient to make it eligible for revocation. After the Justice Reinvestment Act, a violation of the "remain within the jurisdiction" condition such as the defendant's is a technical violation, subject at most to CRV. To be revoked for absconding, a person must be subject to the revocation-eligible absconding condition. And to be subject to that condition, the person must be on probation for an offense that occurred on or after December 1, 2011.

See Jamie Markham, Court of Appeals Decides an Absconding Donut Hole Case, North Carolina Criminal Law (July 8, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4342.

Trial court lacked jurisdiction to revoke probation for violation not alleged in report

State v. Kornegay, __ N.C. App. __, 745 S.E.2d 880 (July 16, 2013). The trial court lacked jurisdiction to revoke the defendant's probation and activate his sentence. Although the trial court revoked on grounds that the defendant had committed a subsequent criminal offense, such a violation was not alleged in the violation report. Thus, the defendant did not receive proper notice of the violation. Because the defendant did not waive notice, the trial court lacked jurisdiction to revoke.

Defendant has no right to appeal CRV

State v. Romero, __ N.C. App. __, 745 S.E.2d 364 (July 16, 2013). The defendant was a felony probationer who committed technical violations of probation in 2012. In response, the court ordered a 90-day CRV. The defendant appealed, but the State filed a motion to dismiss the appeal on the grounds that there is no statutory right to appeal a CRV.

The court of appeals agreed with the State. The court noted that G.S. 15A-1347 allows a probationer to appeal only when the court "activates a sentence or imposes special probation." Because CRV is neither of those things, and because a defendant's right to appeal is purely a creation of state statute, the court concluded that there is no right to appeal a CRV. The court rejected the defendant's argument that imposition of a CRV is a final judgment of a superior court, generally appealable under G.S. 7A-27(b).

In a footnote, the court declined to express any opinion about whether a different rule would apply to a so-called terminal CRV—that is, one that uses up the defendant's entire remaining suspended sentence. Slip op. at 6 n. 1. Mr. Romero had additional time left to serve on his 6–8 and 18–22 month felony

sentences, and so the court didn't need to consider whether his 90-day CRV was a "de facto revocation" for purposes of G.S. 15A-1347.

See Jamie Markham, No Appeal of Confinement in Response to Violation, North Carolina Criminal Law (July 16, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4356.

Sex Offender Registration, Satellite-Based Monitoring, and Other Consequences

Trial court did not err by ordering lifetime SBM for defendant convicted of first-degree statutory rape

State v. Marlow, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2013). Where the defendant was convicted of first-degree statutory rape the trial court did not err by ordering the defendant to enroll in lifetime SBM upon release from imprisonment. The offense of conviction involved vaginal penetration and force and thus was an aggravated offense.

Trial court erred by ordering lifetime sex offender registration and lifetime SBM for defendant convicted of first-degree sexual offense

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

Social Networking Prohibition for Sex Offenders Unconstitutional

State v. Packingham, __ N.C. App. __, __ S.E.2d __ (Aug. 20, 2013), *temp. stay allowed*, __ N.C. __, 747 S.E.2d 247 (Aug. 26, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied.

See Jamie Markham, Social Networking Prohibition for Sex Offenders Facially Unconstitutional, North Carolina Criminal Law (August 20, 2013), *available at* http://nccriminallaw.sog.unc.edu/?p=4424.

Post-Conviction

Newly Discovered Evidence

Defendant not entitled to new trial based on newly discovered evidence where information implicating defendant's father was available before the defendant's conviction

State v. Rhodes, __ N.C. __, 743 S.E.2d 37 (June 13, 2013). Reversing the court of appeals, the court held that information supporting the defendant's motion for appropriate relief (MAR) was not newly discovered evidence. After the defendant was convicted of drug possession offenses, his father told a probation officer that the contraband belonged to him. The trial court granted the defendant's MAR, concluding that this statement constituted newly discovered evidence under G.S. 15A-1415(c). The court concluded that because the information implicating the defendant's father was available to the

defendant before his conviction, the statement was not newly discovered evidence and that thus the defendant was not entitled to a new trial. The court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws. Although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means. It noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs.

Sentencing

Trial court erred by granting the defendant's MAR and retroactively applying 2009 amendments to the Structured Sentencing Act to the defendant's 2005 offenses

State v. Lee, __ N.C. App. __, 745 S.E.2d 73 (July 16, 2013). The trial court erred by granting the defendant's MAR and retroactively applying 2009 amendments to the Structured Sentencing Act (SSA) to the defendant's 2005 offenses. The court reasoned that the Session Law amending the SSA stated that "[t]his act becomes effective December 1, 2009, and applies to offenses committed on or after that date." Thus, it concluded, it is clear that the legislature did not intend for the 2009 grid to apply retroactively to offenses committed prior to December 1, 2009.

Judicial Administration

In re Cline, __ N.C. App. __, __ S.E.2d __ (Oct. 1, 2013). (1) In a proceeding for removal of an elected district attorney (DA) from office, the trial court did not err by denying the DA's motion to continue where the statute, G.S. 7A-66, mandated that the matter be heard within 30 days. (2) In the absence of a statutory or rule-based provision for discovery in proceedings under the statute, the DA did not have a right to discovery. (3) Where the trial court put the burden of proof in the removal proceeding on the party who had initiated the action by clear, cogent and convincing evidence, no error occurred. (4) The court held that the trial court's rulings in the removal proceeding did not violate the DA's right to due process, noting that the DA had no right to discovery and that the trial court properly allocated the burden of proof. (5) The standard in the relevant provision of the removal statute of conduct prejudicial to the administration of justice which brings the office into disrepute is not unconstitutionally vague. (6) No violation of the prosecutor's First Amendment free speech rights occurred where the DA's removal was based on statements she made about a judge. The statements were made with actual malice and thus were not protected speech by the First Amendment. (7) Qualified immunity does not insulate the DA from removal based on statements made with actual malice. (8) Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence, and the trial court did not err in admitting lay testimony.