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Fall 2019 Criminal Case Update

Cases covered include reported decisions from North Carolina's appellate courts, the United States Court of Appeals for the Fourth Circuit, and the U.S. Supreme Court decided between May 28, 2019 and October 1, 2019. Summaries were prepared by School of Government staff and faculty. To view summaries of additional cases decided during this time frame, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Capacity to Proceed and Related Issues

A defendant who attempted suicide during trial and was held for an involuntary commitment evaluation was voluntarily absent by her own action, waiving her right to be present. The trial could continue in her absence, and the court was not required to order a competency evaluation sua sponte. Trial court also did not err by amending judgments in defendant's absence to correct clerical errors that did not change the sentence.

State v. Sides, __ N.C. App. __ (Oct. 1, 2019)
After the third day of her embezzlement trial, the defendant took 60 Xanax pills in apparent intentional overdose and suicide attempt. The defendant was taken for an involuntary commitment evaluation and the trial was postponed until the following week. When the trial resumed, the defendant was still in the hospital for evaluation and treatment. Over the defendant's objection, the trial judge ruled that pursuant to *State v. Minyard*, 231 N.C. App. 605 (2014), the defendant was voluntarily absent by her own actions and the trial would continue. The defense made a pro forma motion to dismiss at the close of the state's evidence, but not on the grounds of either her absence or her competency. The defendant was convicted of three counts of embezzlement and sentenced a few days later when she returned to court. The judgments were later amended, again in the defendant's absence, to correct a clerical error regarding the offense dates.

On appeal, the defense argued that the trial court erred by failing to order a competency hearing *sua sponte* after the defendant's apparent suicide attempt. The Court of Appeals disagreed and held that it was not error to continue the trial in the defendant's absence or decline to order a competency hearing. Under *Minyard*, the defendant was voluntarily absent and thus waived her right to be present for trial; the fact that it may have been an attempted suicide does not change that analysis. The court is only required to examine competency *sua sponte* if there is substantial evidence before it that defendant may be incompetent. Based on a review of the record as a whole, the appellate court was not persuaded that the defendant's suicide attempt was a result of mental illness rather than a voluntary act intended to avoid facing prison. The Court of Appeals further held that it was not error to amend the judgments in defendant's absence. The changes only corrected clerical errors and did not change the sentences actually imposed, so the defendant did not have to be present.

When an incompetent defendant responded to treatment and regained competency, the trial court did not err by declaring him competent based on updated psychological evaluations, a joint motion from the state and defense, and the defendant's demonstrated ability to understand the proceedings and assist in his own defense; the trial court was not required to conduct another competency hearing sua sponte.

State v. Williams, __ N.C. App. __ (Oct. 1, 2019)
In 2007, the defendant shot and killed one victim, a family friend, and seriously injured a second victim, his mother. After he was arrested and charged with murder and attempted murder, the defendant was evaluated and found to be suffering from paranoid schizophrenia and substance abuse disorder, rendering him unable to assist in his own defense and incompetent to stand trial. The state dismissed the charges with leave to reinstate. The defendant was re-evaluated by two doctors in 2015 and 2016, and both doctors concluded that the defendant had substantially improved in response to medication and treatment and was now competent to proceed. Based on the new evaluations and a joint motion

from the defense and the state, the court declared the defendant competent. The state reinstated the criminal charges and the defendant proceeded to trial, where he was convicted of murder and attempted murder. On appeal, the defense argued that the trial court erred by not ordering another competency assessment *sua sponte*, in light of the defendant's history and mental condition. Based on the record as a whole, the Court of Appeals held that the trial court did not err. Although the defendant still appeared to hold a number of delusional beliefs, "irrational beliefs and nonsensible positions" do not, by themselves, raise a bona fide doubt about competency. The trial court heard testimony from two doctors opining that the defendant was competent, and the defendant demonstrated that he was able to confer with his counsel, assist in his defense, engage in colloquies with the court on legal issues, make a knowing and voluntary waiver of his right to remain silent, and testify "lucidly and at length on his own behalf." Therefore, the defense failed to demonstrate that there was substantial evidence he was incompetent during the trial, and the trial court did not err by declining to order another competency hearing *sua sponte*.

The trial court erred by failing to conduct a competency hearing sua sponte where substantial evidence raised a bona fide doubt as to the defendant's competency

State v. Hollars, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 92 (Aug. 21, 2019)
In this indecent liberties and sex offense case, the court held, over a dissent, that the trial court erred by failing to hold a competency hearing sua sponte immediately prior to or during the defendant's trial. Where there is substantial evidence before the trial court that raises a bona fide doubt as to a defendant's competency, the trial court has a constitutional duty to conduct a competency hearing. Under the court's precedent, evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry. The defendant's numerable prior forensic evaluations indicated that he suffered from a range of diagnosed mental health disorders, and other medical evidence suggested that the defendant's mental stability could drastically deteriorate over a brief period of time. There was a five-month gap between the defendant's competency hearing and his trial. At trial, the defendant's counsel raised the issue of the defendant's competency with the trial court after becoming concerned due to his behavior, but the trial court did not thereafter engage in an extended colloquy with the defendant to explore this concern. Under the totality of the circumstances, this evidence gave rise to a bona fide doubt regarding the defendant's competency. A dissenting judge would have held that there was no bona fide doubt as to the defendant's competency, noting, among other things, that there was no evidence in the record of irrational behavior or change in demeanor by the defendant during trial and faulting the majority for resting its reasoning "almost entirely on [the defendant's] prior competency evaluations."

Counsel Issues

Trial judge's denial of defendant's request to replace appointed counsel with retained counsel was structural error where trial judge analyzed the issue as a matter of effective assistance rather than the defendant's right to the counsel of his choice

State v. Goodwin, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019)
The defendant was charged with drug offenses. A lawyer was appointed to represent him. Immediately before trial, the defendant stated that he wanted to hire a lawyer instead and could afford to do so. A superior court judge determined that appointed counsel was providing effective assistance and denied

the defendant's request to retain counsel. The court of appeals found this to be structural error, as the issue was not whether the defendant was receiving effective assistance or was at an absolute impasse with his attorney, but whether he should be allowed the attorney of his choice. The court stated that "when a trial court is faced with a Defendant's request to substitute his court appointed counsel for the private counsel of his choosing, it may only deny that request if granting it would cause significant prejudice or a disruption in the orderly process of justice." The court noted that a last-minute request to change lawyers may cause such prejudice or disruption, but the trial judge did not make any such finding in this case as a result of analyzing the issue under the incorrect standard.

Waiver of counsel was not knowing, voluntary, and understanding where trial judge erroneously advised the defendant about the maximum punishments for the charges

State v. Mahatha, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019)
The defendant was charged with driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a person previously convicted of a felony; attempted robbery with a dangerous weapon; and habitual felon status. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status, dismissing the other charges. The defendant was found guilty of both, and the trial judge sentenced the defendant to 97 to 129 months' imprisonment.

The defendant argued that that the trial judge failed to comply with the statutory mandate of G.S. 15A-1242 before allowing the defendant to represent himself. The Court of Appeals agreed, finding that the trial judge failed to inform the defendant of the nature of the charges and proceedings and the range of permissible punishments. The trial court erroneously informed the defendant that: obtaining the status of habitual felon is a Class D felony when being a habitual felon is a status, not a crime; erroneously indicated that the defendant faced a maximum possible sentence of 47 months for possession of a firearm by a person previously convicted of a felony when he faced a maximum of 231 months if determined to be a habitual felon; failed to inform the defendant of the maximum prison term of 231 months for the attempted robbery with a dangerous weapon if he were determined to be a habitual felon; erroneously referred to the speeding to elude arrest as fleeing to elude arrest and failed to inform the defendant that the habitualized maximum was 204 months; and asked the defendant whether he understood that he could face 231 months when he could actually have faced 666 months and 170 days. The Court of Appeals concluded that the defendant's waiver of counsel was not knowing, intelligent, or voluntary and vacated his convictions and remanded for a new trial.

Double Jeopardy

Refusing to overturn the dual-sovereignty doctrine, the Court held that the defendant's federal prosecution for felon in possession did not violate double jeopardy despite the fact that he had been previously convicted for the same instance of possession under state law

Gamble v. United States, 587 U.S. ___, 139 S. Ct. 1960 (June 17, 2019)
Citing the text of the Double Jeopardy Clause of the Fifth Amendment, historical evidence, and "170 years of precedent," the Court refused to overturn the "dual-sovereignty" doctrine and held that the defendant's federal prosecution for unlawful possession of a handgun was not barred by principles of double jeopardy despite the fact that the defendant had been previously convicted for the same instance of possession under state law.

The defendant pleaded guilty in Alabama state court to possession of a firearm by a person convicted of a crime of violence and thereafter was indicted by the United States for the analogous federal offense based on the same instance of possession. He moved to dismiss on the ground that the federal indictment was for "the same offence" as the one at issue in his state conviction and thus exposed him to double jeopardy. The district court denied the motion and the Eleventh Circuit affirmed, each citing the dual-sovereignty doctrine – the long-standing principle that two offenses are not the "same offence" for double jeopardy purposes if prosecuted by different sovereigns. Reviewing the text of the Double Jeopardy Clause, historical evidence, and its precedent, the Court affirmed the lower courts and declined to depart from the doctrine.

Dissenting from the majority opinion, Justice Ginsburg characterized the dual-sovereignty doctrine as "misguided" and, for reasons explained in her dissenting opinion, would have overruled it. Dissenting separately, Justice Gorsuch also would have overruled the doctrine, saying that it "was wrong when it was invented, and remains wrong today."

Jeopardy continues after a mistrial, and the State's entry of a voluntary dismissal under G.S. 15A-931 after jeopardy has attached terminates jeopardy in the defendant's favor, regardless of the reason the State gives for entering the dismissal

State. v. Courtney , ___ N.C. ___, 831 S.E.2d 260 (Aug. 16, 2019)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___ (2018), the court affirmed the Court of Appeals' decision vacating the defendant's conviction on double jeopardy grounds. In this murder case, the defendant's first trial ended in a mistrial due to a deadlocked jury. After two status hearings, the State entered a dismissal on form AOC-CR-307, checking the "dismissal" box and writing "hung jury, state has elected not to re-try case" on the form. Several years later, the discovery of additional evidence led to the defendant being re-indicted. The defendant's motion to dismiss on double jeopardy grounds was denied and the defendant was convicted of second-degree murder.

On appeal, the Supreme Court applied a two-pronged analysis to evaluate the defendant's double jeopardy claim: (1) did jeopardy attach, and (2) if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial. As to the first prong, the court said jeopardy clearly attached when the first jury was empaneled and sworn. Further, under *Richardson v. United States*, 468 U.S. 317 (1984), jeopardy continued following the mistrial. The court rejected the State's argument that mistrial created a legal fiction under which jeopardy is deemed never to have attached at the first trial, and that there was thus no jeopardy to terminate at the time the State dismissed the initial charge. To the contrary, the court read *Richardson* as contemplating a "continuing jeopardy doctrine," where jeopardy continued from its initial attachment in the first trial through the end of the case. As to the second prong of the analysis, the court concluded that the State's dismissal of the charge under G.S. 15A-931 was binding on the State and tantamount to an acquittal, and that it was thus a jeopardy-terminating event for double jeopardy purposes. As a result, the defendant's second trial was barred by double jeopardy, and the Supreme Court affirmed the Court of Appeals' decision vacating it.

Justice Newby authored a dissent, joined by Justice Ervin, which would have concluded under State v. Tyson, 138 N.C. 627, 629 (1905), that the mistrial returned the case to pretrial status where the State could dismiss the charge without prejudice. The majority's rule, the dissent argued, "places the State in the impossible position of choosing to proceed to a new trial with what one jury deemed insufficient evidence or lose any opportunity to hold the defendant accountable for the crime."

DWI Procedure

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

Mitchell v. Wisconsin , 588 U.S. ___, 139 S. Ct. 2525 (June 27, 2019)
The petitioner appealed from his impaired driving conviction on the basis that the State violated the Fourth Amendment by withdrawing his blood while he was unconscious without a warrant following his arrest for impaired driving. A Wisconsin state statute permits such blood draws. The Wisconsin Supreme Court affirmed the petitioner's convictions, though no single opinion from that court commanded a majority, and the Supreme Court granted certiorari to decide "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

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

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

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

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

Habitual Felon

Use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule

State v. Edgerton, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019)
In this habitual larceny case where the defendant was sentenced as a habitual felon, the use of an ACIS printout to prove one of the defendant's prior convictions during the habitual felon phase of trial was competent evidence that did not violate the best evidence rule. Citing State v. Waycaster, ___ N.C. App. ___, 818 S.E.2d 189 (2018), the court explained that G.S. 14-7.4 permits an original or certified copy of the court record of a prior conviction to be admitted into evidence to prove the prior conviction but does not mandate that manner of proof. The same case held that a certified copy of an ACIS printout is sufficient evidence of a prior conviction under the habitual felon statute.

Indictment & Pleading Issues

Prosecutor's amendment of a citation impermissibly changed the nature of the offense, so the district court lacked jurisdiction to enter a judgment; the superior court erred by denying defendant's petition for writ of certiorari to review the district court's denial of her MAR.

State v. Bryant, __ N.C. App. __ (Oct. 1, 2019)
Defendant was charged by citation with misdemeanor larceny under G.S. 14-72. The prosecutor amended the citation by striking through the charging language and handwriting the word "shoplifting" on the citation, along with the prosecutor's initials and the date. The defendant entered a guilty plea to a lesser charge of shoplifting under G.S. 14-72.1, but later filed an MAR in district court arguing that the amendment was improper and the court lacked subject matter jurisdiction to enter judgment. The district court denied the MAR, and the superior court denied defendant's petition for writ of certiorari to review the denial. The Court of Appeals granted the defendant's petition for writ of certiorari, and held that the lower courts erred and the MAR should have been granted. The purported amendment to the citation impermissibly changed the nature of the offense because larceny and shoplifting are separate crimes with different elements. "Thus, the amendment was not legally permissible and deprived the district court of jurisdiction to enter judgment against Defendant." The Court of Appeals reversed the superior court's denial of the petition for writ of certiorari and vacated the shoplifting judgment.

Waiver of indictment that did not include defense attorney's signature was invalid, depriving the trial court of jurisdiction.

State v. Futrelle, ___ N.C. App. ___, 831 S.E.2d 99 (July 2, 2019)
The defendant pled guilty to controlled substance offenses pursuant to a bill of information and waiver of indictment. In an MAR, the defendant argued that the pleadings were defective and the trial court lacked jurisdiction because the waiver of indictment was not signed by his attorney. The trial court denied the MAR, finding that the pleadings substantially complied with the statute, but the appellate court reversed and remanded with instructions to grant the MAR and vacate the judgment. The requirements listed in G.S. 15A-642 for a waiver of indictment, including the signature of the defendant's attorney, are mandatory. Therefore, the waiver in this case was "invalid without Defendant's attorney's signature, depriving the trial court of jurisdiction to accept Defendant's guilty plea and enter judgment."

Pleas

The trial court did not err by denying the defendant's motion to withdraw his guilty plea where the defendant did not establish that withdrawal of his plea would prevent manifest injustice

State v. Konakh, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019)
In this case involving a motion to withdraw a plea and an MAR, the trial court did not err by denying the defendant's motions. On April 10, 2018 the defendant pleaded guilty to felony drug offenses, answering affirmatively that he understood the charges to which he was pleading and that he was in fact guilty of the charges. On April 12, 2018 the defendant filed the motions at issue, alleging that he "felt dazed and confused" at the time of the plea because of lack of sleep and medications he was taking, did not understand that he was pleading to three felonies, did not understand what a consolidated judgment meant, did not have enough time to consider his plea and felt pressure to make a decision, and was not aware of the negative employment ramifications of his plea. On April 16, the motions were heard in Superior Court, where the court made extensive findings of fact supporting its conclusion that the motions were without merit. The defendant argued on appeal that the trial court erred because the circumstances demonstrated that withdrawal of his plea would prevent manifest injustice. Specifically, the defendant argued that his plea should be withdrawn because he (1) is innocent, (2) pled guilty in haste, and (3) pled guilty in confusion based on erroneous beliefs about the nature of a consolidated judgment. The court reviewed the record and, for reasons stated in the opinion, found each of these arguments meritless.

Trial court did not err by refusing to allow defendant to withdraw his no contest plea more than two months after defendant was advised of what his sentence would be, even though final judgment had not been entered.

State v. Lankford, ___ N.C. App. ___, 831 S.E.2d 109 (July 2, 2019)
Pursuant to a plea agreement, the defendant entered a no contest plea to charges including fleeing to elude and being an habitual felon, and in return several other charges were dismissed by the state. The defendant was advised of what his sentence would be, but was released on conditions until his sentencing date two months later. The defendant failed to appear for sentencing, and an order for his

arrest was issued. At the next court hearing, the defendant asked to withdraw his no contest plea. The trial court denied the request and entered judgment.

As a matter of first impression, the Court of Appeals held that when a defendant has been advised of what his or her sentence will be, the standard for evaluating whether the defendant should have been allowed to withdraw from the plea is the same as the standard used after a defendant has been sentenced: "it is appropriate to review the trial court's denial of Defendant's motion only to determine whether it amounted to a manifest injustice, and not according to the 'any fair and just reason' standard." The court reasoned that the same considerations (e.g, the possibility that the defendant will view the plea as a 'tactical mistake' once he learns the sentence, the state's detrimental reliance on the plea, and the policy of protecting the finality of convictions) are present in both situations, so the same standard should apply.

Alternatively, even under the lower 'any fair and just reason' standard that applies to requests to withdraw a guilty or no contest plea prior to sentencing, the particular facts of this case did not warrant relief.

The trial court erred by imposing a sentence inconsistent with that set out in his plea agreement without informing the defendant that he had a right to withdraw his guilty plea

State v. Marsh, ___ N.C. App. ___, 829 S.E.2d 245 (June 4, 2019)
The defendant was charged with multiple counts involving multiple victims and occurring between 1998 and 2015. On the third day of trial, he negotiated a plea agreement with the State, whereby he would plead guilty to a number of offenses and would receive a single, consolidated active sentence of 290 to 408 months imprisonment. Over the next weeks and prior to sentencing, the defendant wrote to the trial court asserting his innocence to some of the charges and suggesting his desire to withdraw from the plea agreement. The trial court acknowledged receipt of the letters and forwarded them to defense counsel. When the defendant later appeared for sentencing, he formally moved to withdraw his guilty plea, which was denied. Contrary to the plea agreement, the trial court entered two judgments, one for the 2015 offenses and one for the 1998 offenses, based on the different sentencing grids that applied to the crimes. Specifically, the trial court sentenced the defendant to 290 to 408 months for the 2015 offenses, and for the 1998 offenses a separate judgment sentencing the defendant to 288 to 355 months imprisonment. The trial court ordered that the sentences would run concurrently. The defendant appealed. Because the concurrent sentences imposed by the trial court differed from the single sentence agreed to by the defendant in his plea agreement, the defendant was entitled to withdraw his plea. Any change by the trial judge in the sentence agreed to in the plea agreement, even a change benefiting the defendant, requires the judge to give the defendant an opportunity to withdraw his plea.

Sentencing

A trial court may not revoke a defendant's probation after it has expired without making the statutorily required finding of fact that good cause exists to do so

State v. Morgan, ___ N.C. ___, 831 S.E.2d 254 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 814 S.E.2d 843 (2018), the Supreme Court considered the statutory requirements for revoking probation after it has expired. In this case the defendant's probation officer filed a violation report on May 12, 2016 alleging, among other things, that the defendant committed a new criminal offense. His probation expired on August 28, 2016, and then came on for a violation hearing in early September. The trial court revoked the defendant's probation based on the defendant's admission that he absconded and committed a new criminal offense. On appeal, the defendant argued that the trial court erred by revoking his probation after expiration without making a specific finding that it was doing so for good cause shown and stated as required by G.S. 15A-1344(f)(3). The Court of Appeals held, over a dissent, that under *State v. Regan*, 253 N.C. App. 351 (2017), no specific findings were required. The Supreme Court reversed, concluding that the plain language of the statute does require a finding of good cause—just as former G.S. 15A-1344(f)(2) required a finding that the State had made a "reasonable effort" to notify a probationer and conduct a violation hearing earlier to give a court jurisdiction to act on a case after probation expired. *See* State v. Bryant, 361 N.C. 100 (2006). The court remanded the case to the trial court to make a determination of whether good cause existed to revoke the defendant's probation after it had already expired and, if so, to make an appropriate finding of fact.

When multiple charges arising out of a single incident are adjudicated together in the same proceeding, only one court cost may be imposed.

State v. Rieger, __ N.C. App. __ (Oct. 1, 2019)
The defendant was stopped in his vehicle for following too closely, and officers discovered marijuana and drug paraphernalia in his possession. The defendant was charged with two separate misdemeanor drug offenses and convicted of both at a jury trial. The trial court entered two judgments and assessed two court costs. G.S. 7A-304(a) states that court costs shall be assessed "in every criminal case," so the issue on appeal was whether this matter represented one case or two (i.e., the one underlying event or the two separate criminal charges). The Court of Appeals concluded that there were reasonable arguments in favor of both interpretations, and neither the plain language nor the legislative history of the statute provides a clear answer. Turning to the spirit and purpose behind the act, the appellate court held that court costs are not intended to be a punishment or a fine; instead, they are only intended to recoup the actual costs imposed on the justice system. "With this in mind, we hold that when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single 'criminal case' for purposes of the costs statute. Accordingly, we vacate the imposition of costs in one of the two judgments against Rieger."

Where a defendant was arrested at a demonstration outside an abortion clinic, a probation condition requiring him to stay 1,500 feet away from the clinic was reasonably related to his rehabilitation.

State v. Pavkovic, __ N.C. App. __, __ S.E.2d __ (Sept. 17, 2019)
The defendant was speaking at an anti-abortion event outside an abortion clinic in Charlotte. He was using an amplified microphone and was sitting at the table where the amplification controls were

located. Officers measured his amplified voice at more than 80 decibels and approached him to cite him for violating the city's noise ordinance. The defendant refused to produce identification, so the officers arrested him and charged him with resisting, delaying, and obstructing a law enforcement officer as well as the noise ordinance violation. At a bench trial in superior court, a judge convicted the defendant of R/D/O and dismissed the noise ordinance violation because, although the judge concluded that the defendant had violated the ordinance, the city "had discretion to decide which enforcement penalties it would levy against a violator of the noise ordinance, but . . . failed to do so." The judge sentenced the defendant to probation, one condition of which was that the defendant stay at least 1,500 feet away from the abortion clinic where the event took place. The defendant appealed. Among other issues: (1) The defendant's conduct was covered by the ordinance, so the officers' initial stop was valid. The ordinance applies, in part, to persons "operating . . . sound amplification equipment." The defendant contended that simply speaking into a microphone does not amount to "operating" any "amplification equipment." The court of appeals viewed that construction as "unduly narrow" and found that the "plain meaning" of the ordinance was that speaking into an amplified microphone, while sitting at a table with the amplification controls present, was covered. (2) The probation condition is reasonably related to the defendant's rehabilitation as required by statute, in part because it reduces the likelihood that he will commit a similar offense again.

A defendant may not stipulate to the use in calculating his or her prior record level of a prior offense that is classified as an infraction at the time of the current offense

State v. Ellis, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 347 (Aug. 29, 2019)
The court determined that the trial court erred in calculating the defendant's prior record level (PRL) based on the defendant's stipulation that a prior conviction for expired operators' license was a Class 2 misdemeanor. At the time of the instant offense, driving with an expired license had been reclassified as an infraction. G.S. 15A-1340.21(b) provides that an offense may be included in determining a defendant's PRL only "if it is either a felony or misdemeanor at the time the offense for which the offender is being sentenced is committed." Distinguishing *State v. Arrington*, ___ N.C. ___, 819 S.E.2d 329 (2018), which held that a defendant's stipulation regarding the classification of a prior felony conviction was binding as a factual determination where two possible classifications existed for the offense at issue, the court explained that because "no misdemeanor category crime for possession of an expired operators' license existed" at the relevant time, as a matter of law the defendant could not stipulate as he did.

Applying *State v. Arrington*, Court of Appeals holds (1) stipulation to drug paraphernalia as class 1 misdemeanor was binding; (2) stipulation to felony where the court had judgment of conviction before it showing offense was a misdemeanor was improper; (3) stipulation to carrying concealed weapon as a class 1 misdemeanor was improper

State v. Green, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019)
The defendant pled guilty pursuant to *Alford* to drug and firearms offenses and to habitual felon status. The plea agreement specified that the offenses would be consolidated for judgment and the defendant sentenced in a specific mitigated range. The defense stipulated to a Prior Record Level Worksheet, identifying 19 prior conviction points and classifying the defendant as a Level VI for felony sentencing. On appeal, the defendant argued that three convictions on the record level worksheet were improperly counted. The three convictions at issue were (1) a 1994 drug paraphernalia conviction, listed as a class 1 misdemeanor on the worksheet; (2) a 1993 conviction for maintaining a vehicle/dwelling, listed as a

class I felony; and (3) a 1993 conviction for carrying a concealed weapon, listed as a class 1 misdemeanor. A copy of the judgment for the maintaining a vehicle/dwelling was introduced at trial and classified the offense as a misdemeanor (but failed to identify the class).

(1) In the recent case of *State v. Arrington*, 371 N.C. 518 (2018), the North Carolina Supreme Court instructed: "[W]hen a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense." (internal citation omitted) As to the drug paraphernalia conviction, the court found that *Arrington* applied:

> Here, on the Worksheet, Defendant—as 'the person most familiar with the facts surrounding his offense'—stipulated that his 1994 Possession-of-Drug-Paraphernalia conviction was classified as a class 1 misdemeanor. Thus, Defendant was stipulating that the facts underlying his conviction justify that classification. (citing *Arrington*)

There was therefore no error to include a record level point for that conviction.

(2) As to the 1993 maintaining a vehicle/dwelling conviction, the court determined *Arrington* did not apply when a copy of the judgment of conviction was before the court, which showed the offense was classified as a misdemeanor. In the court's words:

[W]hen evidence (such as a certified copy of the judgment) is presented to the trial court conclusively showing a defendant's stipulation is to an incorrect classification—as is the case here—*Arrington* does not apply, and a reviewing court should defer to the record evidence rather than a defendant's stipulation.

(3) As to the final conviction for carrying a concealed weapon, the defendant pointed out that that offense is typically a class 2 misdemeanor under G.S. 14-269, and therefore should not have been counted as a felony sentencing point. That offense may be elevated to a class H felony when the defendant has been previously convicted of the misdemeanor, but in no case is a violation of that statute a class 1 misdemeanor. Here, nothing showed the defendant had a prior conviction for the crime. The court acknowledged this was a "conundrum" under *Arrington*. The court identified one circumstance under the statutes where the offense could possibly be classified as a class 1 misdemeanor—when a defendant with a concealed weapon permit carries a concealed handgun while consuming alcohol, under G.S. 14-415.21(a1) (and by reference to G.S. 14-415.11). It was therefore possible for the conviction to be counted as a class 1 misdemeanor. However, the court observed:

> [W]e do not believe the intent of *Arrington* was to require a reviewing court to undertake *sua sponte* a voyage of discovery through our criminal statutes to locate a possibly applicable statute and imagine factual scenarios in which it could apply. Rather, we defer to the parties who stipulated to the prior conviction as to what statute applies. Therefore, because Section 14-269 does not provide for a violation of its provisions to be classified as a Class 1 misdemeanor, we conclude *Arrington* is inapplicable and that the trial court erred in accepting the Defendant's stipulation.

The maintaining a vehicle/dwelling and carrying concealed weapon convictions added two points to the defendant's record level worksheet, without which the defendant would have been classified as a prior record level V. The errors were therefore not harmless. Because the defendant's sentence was imposed

pursuant to a plea bargain, remand for resentencing was inappropriate. The court instead vacated the judgment, set aside the entire plea, and remanded for trial or plea on the original charges.

The district court had subject matter jurisdiction over a probation revocation hearing because of the defendant's implied consent to the court's exercise of jurisdiction

State v. Matthews, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019)
In this probation revocation case that was appealed by a petition for writ of certiorari, the court held that the defendant failed to demonstrate error with respect to the district court's exercise of subject matter jurisdiction to revoke her probation. On May 5, 2017, the defendant was placed on 12 months of supervised probation pursuant to a conditional discharge plea agreement related to a felony drug charge. On March 4, 2018, the defendant's probation officer filed a violation report asserting that she had only completed a small fraction of her court-ordered community service hours and had not yet paid in full her court costs and supervised probation fee. At a May 4, 2018, hearing on the violation report, which resulted in the trial court finding a willful violation of probation and entering judgment on the felony drug charge, the defendant did not object to the district court's jurisdiction and fully participated in the hearing.

The court first addressed its appellate jurisdiction, noting that the defendant's various attempts to appeal the judgment did not comply with the Rules of Appellate Procedure but deciding to use its discretion to allow the defendant's petition for writ of certiorari, in part because the issue of the district court's subject matter jurisdiction to revoke her probation was one of first impression. The court then turned to the merits, first explaining that under G.S. 7A-271(e) "the superior court generally exercises exclusive jurisdiction over probation revocation hearings even when the underlying felony conviction and probationary sentence were imposed through a guilty plea in district court." The court went on to explain that notwithstanding the statute's general rule, it further provides as an exception that the district court has jurisdiction over probation revocation hearings when the State and the defendant, using the statute's term, "consent" to the district court's jurisdiction. Noting that the term "consent" is not defined in the statute and has not been construed in this context by a North Carolina appellate court, the court rejected the defendant's argument that it was necessary that her "express consent" appear in the record. Instead, the court held that the term encompasses implied consent and that the defendant's conduct in this case – fully participating in the hearing without objection and even going so far as to request additional relief from the court during the hearing – constitutes implied consent.

Court lacked jurisdiction to revoke probation when violation filed after expiration of probationary term

State v. Tincher, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019)
The defendant was serving an active sentence when he pled guilty to other felony charges. The sentencing court imposed two 20 to 24 month sentences, suspended for 36 months on the condition of supervised probation. In the event the defendant violated probation, the two sentences would be run consecutively to the then-existing sentence. In one of the new sentences, the court indicated the probation would run at the expiration of the defendant's current sentence. The other new sentence did not. The defendant violated probation and the consecutive terms were imposed. On appeal, the defendant complained that the violation report for one of the cases was filed too late—since only one judgment indicated probation was to begin at the expiration of his existing sentence, probation from the other judgment began running concurrently while the defendant was still incarcerated. The court agreed. Under G.S. 15A-1346, probation runs concurrently to any active sentence if not otherwise

specified. Because one of the judgments failed to indicate probation ran consecutive to the defendant's existing sentence, it was concurrent by default and probation began on the day of that judgment. Here, the violation was filed after that probationary period expired, and the trial court lacked jurisdiction to revoke the defendant's probation. The judgment of revocation in that case was therefore vacated.

In this embezzlement case, the trial court did not err by ordering the defendant to pay restitution.

State v. Williams, ___ N.C. App. ___, 829 S.E.2d 518 (June 4, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 206 (June 25, 2019)
On 13 February 2017, the defendant and the victim entered into a settlement agreement resolving civil claims arising from the defendant's conduct. The agreement obligated the defendant to pay the victim $13,500 and contained a release cause. Subsequently, the defendant was charged by information with embezzlement. She subsequently entered an Alford plea. As part of a plea arrangement, the State agreed, in part, to a probationary sentence to allow the defendant to make restitution payments. Both parties agreed that the trial court would hold a hearing to determine the amount of restitution. At the restitution hearing, the defendant asserted that she did not owe restitution because the release clause in the civil settlement agreement discharged her obligation. The trial court determined $41,204.85 was owed. The trial court credited the defendant for paying $13,500 under the civil agreement and set the balance of restitution at the difference. The defendant appealed, arguing that the trial court erred by ordering her to pay criminal restitution where the settlement agreement contained a binding release cause. Noting that the issue was one of first impression, the court held that the release clause in the civil settlement agreement does not bar imposition of criminal restitution.

Sex Offenders

North Carolina's satellite-based monitoring program is unconstitutional as applied to all individuals subject to mandatory lifetime SBM based solely on their status as a recidivist who have completed their prison sentences and are no longer on probation, parole, or post-release supervision

State v. Grady, ___ N.C. ___, ___ S.E.2d ___ (Aug. 16, 2019)
On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 18 (2018), the Supreme Court affirmed the Court of Appeals' decision finding satellite-based monitoring (SBM) to be an unreasonable and therefore unconstitutional search in the defendant's case. The court modified the lower court decision to apply it not just to the defendant, but also to all sex offenders subject to mandatory lifetime SBM based solely on their status as recidivists who are no longer on probation, parole, or post-release supervision. In this case, the trial judge conducting the defendant's SBM determination hearing (on remand from the Supreme Court of the United States, Grady v. North Carolina, 135 S. Ct. 1368 (2015)), considered the State's evidence of the defendant's prior sex crimes, the defendant's full criminal record, copies of G.S. 14-208.5 and -208.43, photographs of the equipment the State uses to administer the SBM program, and testimony from a probation supervisor on the operation of the SBM equipment and the nature of the program. The defendant presented statistical reports, Community Corrections policy governing SBM, and an excerpt of SBM training materials for probation staff. Based on the totality of the circumstances, the trial judge entered an order concluding that SBM was a reasonable search as applied to the defendant and that the statute is facially constitutional, and ordered the defendant to enroll in SBM for life.

On appeal, the Court of Appeals concluded that although the defendant's expectation of privacy was appreciably diminished as a sex offender, the State failed to prove that SBM was a reasonable search as applied to him under the Fourth Amendment. The State appealed as of right.

The Supreme Court declined to address the facial constitutionality of North Carolina's SBM program in its entirety, instead addressing the program as applied to the narrower category of recidivists to which the defendant belongs. The court rejected the State's argument that SBM was valid as a special needs search, because the State never identified any special need beyond the normal need for law enforcement, and because the defendant was no longer on probation or parole.

The court also found SBM unconstitutional under a reasonableness analysis, concluding that, given the totality of the circumstances, SBM's intrusion into the defendant's Fourth Amendment interests outweighed its promotion of legitimate governmental interests. As to the nature of the privacy interest, the court deemed SBM to be uniquely intrusive—presenting even greater privacy concerns than the cell-site location information at issue in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The court rejected the State's arguments that felons generally and sex offenders in particular who have fully served their sentences have a diminished expectation of privacy. Regarding the character of the complained of intrusion, the court noted the absence of front-end discretion on the part of the judge who imposes SBM and the limited relief available on the back end through the Post-Release Supervision and Parole Commission, which has thus far declined all sixteen requests to terminate SBM filed under G.S. 14-208.43. Finally, as to the nature and purpose of the search, the court noted the State's failure to provide evidence about how successfully the SBM program advances its stated purpose of protecting the public or any evidence regarding the recidivism rates of sex offenders. The court contrasted that lack of evidence with the copious evidence of student drug use the Supreme Court of the United States found critical in upholding random drug screening in Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). Balancing those factors, the court determined that the State did not meet its burden of establishing the reasonableness of SBM for recidivists who have completed their sentence. The court concluded by emphasizing the limited scope of its holding, reiterating that it does not apply to SBM enrollees in other categories (for example, those enrolled based on an aggravated offense), regardless of whether they also happen to be a recidivist, or to enrollees still on parole, post-release supervision, or probation.

Justice Newby dissented, joined by Justice Morgan, arguing that the State's paramount interest in protecting children outweighed the intrusion into the defendant's diminished Fourth Amendment privacy interests, and that the SBM program is thus constitutional, both facially and as applied to the defendant.

Order imposing lifetime satellite-based monitoring was not supported by evidence of reasonableness

State v. Anthony, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 352 (Sep. 5, 2019)
The court reversed the trial court's order requiring the defendant to submit to lifetime satellite-based monitoring (SBM) on the basis that it ordered an unreasonable search. Though the State mentioned statistics and studies related to the risk of recidivism posed by sex offenders in its argument, it did not present those studies to the trial court, and they were not subject to judicial notice under Rule 201. In addition, the State presented no evidence on the efficacy of SBM to reduce recidivism.

The court vacated the trial court's imposition of lifetime SBM where the State did not produce evidence that lifetime SBM is effective to protect the public from sex offenders, as required by *State v. Griffin*

State v. Tucker, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 6, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 95 (Aug. 22, 2019)
Over a dissent in this SBM case, the court relied on State v. Griffin, ___ N.C. App. ___, 818 S.E.2d 336 (2018) to vacate the trial court's imposition of lifetime satellite-based monitoring of the defendant. Under *Griffin*, "trial courts cannot impose satellite-based monitoring unless the State presents actual evidence—such as 'empirical or statistical reports'—establishing that lifetime satellite-based monitoring prevents recidivism." Here, the State did not produce the sort of evidence required by *Griffin*. The court noted that *Griffin* and several related cases were pending in the North Carolina Supreme Court. A dissenting judge criticized *Griffin* and would have held that imposition of lifetime SBM in this case was reasonable under the circumstances and thus was reasonable under the Fourth Amendment.

State failed to meet its burden of showing the reasonableness of the SBM program as applied to the defendant by failing to produce evidence concerning the efficacy of the program

State v. Gambrell, ___ N.C. App. ___, 828 S.E.2d 749 (June 4, 2019)
In a case where the defendant was convicted of taking indecent liberties with a child, the court held that the State failed to meet its burden of showing the reasonableness of the SBM program as applied to the defendant by failing to produce evidence concerning the efficacy of the program. It thus reversed the trial court's order requiring lifetime SBM.

Speedy Trial & Related Issues

Court of Appeals refuses to recognize civil cause of action for violation of state constitutional right to a speedy trial

Washington v. Cline, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019)
The plaintiff sued the State of North Carolina, City of Durham, various people who worked for the State Bureau of Investigation, the Durham Police Department, and the Durham County District Attorney's office for a permanent injunction and money damages to redress harms allegedly suffered in connection with his pretrial detention, investigation, and prosecution. The plaintiff, then the criminal defendant, was arrested in 2002 for a home invasion involving an armed robbery and attempted sexual assault and was tried almost five years later. The Court of Appeals, in State v. Washington, 192 N.C. App. 277, vacated his conviction, finding a denial of his speedy trial rights under the United States and North Carolina Constitutions. The trial judge in this case granted the civil defendants' motion for summary judgment against the plaintiff on his claim that the defendants violated his state constitutional right to a speedy trial. The Court of Appeals recognized that a victim of a constitutional violation may sue for some constitutional violations, such as a violation of the Fourth Amendment protection against unreasonable searches and seizures under the United States Constitution, but the right to sue for damages has not been extended to the deprivation of the Sixth Amendment right to a speedy trial. The Court declined to recognize a private cause of action for the deprivation of the right to a speedy trial under the North Carolina Constitution. Noting that the plaintiff did not appeal the trial judge's decision about the causes of action alleged by the plaintiff other than his state constitutional claim, the Court declined to address the other causes of action.

Evidence

Relevancy

Majority of court of appeals finds that trial judge did not commit plain error in admitting evidence or instructing the jury in indecent liberties case

State v. Betts, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019)
The defendant was charged with three counts of indecent liberties with a child. At trial, the State offered evidence of past incidents of domestic violence by the defendant against the child and her mother. The defendant argued that the evidence was of no consequence to whether he took indecent liberties with the child. The Court found that such evidence can be permissible where the victim has delayed reporting sexual abuse out of fear or apprehension.

The State's experts and lay witnesses repeatedly used the term "disclose" or variations thereof when summarizing the child's statements to them. The defendant argued that use of this term lent credibility to the child's statements and was a comment on her credibility in violation of the prohibition on "vouching" for a witness's credibility. The Court held that the term "disclose," standing alone, does not convey believability or credibility and an unpublished opinion suggesting the contrary (State v. Jamison, ___ N.C. App. ___, 821 S.E.2d 665 (2018)), is not persuasive.

Two experts testified for the State as to the profile and characteristics of children who have been sexually abused. The defendant argued that the trial judge should have given a limiting instruction so that the jury would not have treated the testimony as substantive evidence. The Court rejected the defendant's argument because he did not request a limiting instruction.

The trial judge gave a limiting instruction to the jury on consideration of testimony about the diagnosis that the child had PTSD. The judge instructed the jury that it could consider the testimony to corroborate the child's testimony and to explain a delay in reporting. The Court rejected the defendant's argument that the second purpose was improper, finding that prior decisions had found that explaining delay was a permissible purpose of such evidence.

A dissenting judge found that the trial judge plainly erred in admitting evidence that improperly vouched for the credibility of the child, who was six years old at the time of the alleged events. He stated: "The credibility of the complainant was the sole evidence and issue before the jury. . . . The State produced no other physical evidence, eyewitness testimony or anything else to corroborate these allegations, other than improper bolstering babble restating M.C.'s allegations. The trial court plainly erred in admitting evidence that improperly vouched for the credibility of the complainant, the sole province of the jury."

Crawford Issues & Confrontation Clause

The trial court committed prejudicial error in limiting the defendant's ability to cross-examine the State's principal witness, violating the defendant's Sixth Amendment right to confront the witnesses against him

State v. Bowman, ___ N.C. ___, 831 S.E.2d 316 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 718 (2018), the Supreme Court held that the trial court violated the defendant's Sixth Amendment right to confront witnesses against him. In this murder, robbery with a dangerous weapon, and possession of a firearm by a felon case, the trial judge erred by limiting the defendant's ability to question the State's principal witness about whether she expected to receive a favorable plea offer for drug trafficking charges pending in Guilford County in exchange for her testimony against the defendant in Forsyth County. In a voir dire hearing, the defendant showed that prosecutors in the two counties had been in touch by email and discussed a possible plea deal for the witness in Guilford based on her testimony at the defendant's trial. By limiting the witness's testimony about this possible deal, the trial court prohibited the jury from considering evidence that could have shown bias on the witness's part, and thus violated the defendant's confrontation rights. The court distinguished previous cases in which it had deemed similar errors harmless, reasoning that this involved a limit on the testimony of the State's principal witness. Moreover there was no physical evidence linking the defendant to the crime and no other witness placing him at the scene. As a result, the court concluded that the trial judge's error was not harmless beyond a reasonable doubt and affirmed the Court of Appeals' decision to vacate the verdict and order a new trial.

Justice Ervin, joined by Justice Newby, dissented, writing that the trial judge allowed ample cross-examination of the witness about her pending charges in Guilford County, and that the limitations the court imposed were an appropriate exercise of its discretion to control the scope and extent of cross-examination to prevent confusion and eliminate undue repetition.

Substitute expert testimony on cell site data properly admitted and did not violate defendant's confrontation rights

State v. Crumitie, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019)
In this murder and attempted murder case, the trial court did not err in allowing a substitute expert witness to testify to another expert's conclusions on cell site location data connected to the defendant. The defendant complained that his rights to confront the witness were violated by the absence at trial of the expert that prepared the report. Rejecting this challenge, the court observed:

> Our courts have consistently held that an expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinion; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusions in this case.

Here, that standard was met—the substitute expert explained the process of cell site analysis and his review of the first expert's report, and he gave an independent opinion about the defendant's cell data. The defendant was able to cross-examine the substitute expert with the first expert's report. He was

also given notice ahead of trial of the State's intention to rely on a substitute expert witness. There was therefore no error in admitting the testimony, and the convictions were unanimously affirmed.

Fifth Amendment (Self-Incrimination) Issues

(1) The trial court erred when it admitted the defendant's affidavit of indigency into evidence, violating his right against self-incrimination; (2) The error was harmless beyond a reasonable doubt.

State v. Diaz, ___ N.C. ___, ___ S.E.2d ___ (Aug. 16, 2019)
(1) On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 450 (2017), the court affirmed the Court of Appeals' conclusion that the trial judge erred by admitting the defendant's affidavit of indigency into evidence over the defendant's objection to show his age, which was an element of the charged crimes in this abduction of a child and statutory rape case. The trial judge had ruled that the affidavit of indigency was admissible under Rule 902 of the Rules of Evidence as a self-authenticating document, but the Supreme Court concluded that allowing the document into evidence impermissibly compelled the defendant to surrender one constitutional right—his Fifth Amendment right against self-incrimination—in order to complete the paperwork required for him to assert his Sixth Amendment right to the assistance of counsel as an indigent defendant.

(2) The Supreme Court deemed the trial judge's error to be harmless beyond a reasonable doubt, reversing the Court of Appeals on that issue. Other trial testimony from victim—who knew the defendant sufficiently well to provide a competent opinion on his age—sufficed to prove the defendant's age to the requisite level of precision and left no reasonable possibility that the exact birth date shown on the defendant's affidavit of indigency contributed to his conviction.

Unlocking cell phone upon law enforcement request was not testimonial communication under the Fifth Amendment

U.S. v. Oloyede, 933 F.3d 302 (4th Cir., July 31, 2019). In this multi-defendant wire fraud case from the District of Maryland, one defendant moved to suppress evidence obtained from her cell phone. While police were executing a search warrant at her home, an agent discovered a locked cell phone in the defendant's bedroom. He asked the defendant, "Could you please unlock your iPhone?" Slip op. at 6. The defendant then unlocked the phone and gave it back to the agent. Her motion to suppress alleged that this was a Fifth Amendment violation of her right to remain silent, and that she should have been Mirandized before the request. The district court rejected this argument, finding that the act of unlocking her phone was not a communication subject to *Miranda*. It further found that the request was not "coercive" and that the defendant voluntarily complied. The Fourth Circuit affirmed.

The Fifth Amendment protection from self-incrimination applies to compelled testimonial communications that inculpate the defendant. A testimonial communication may consist of an act, but "the act must 'relate a factual assertion or disclose information;' it must 'express the contents of [the person's] mind.'" *Id*. at 8. Here, the agent did not ask the defendant the password; he asked her to enter it herself. The defendant did not show the agent the password and the agent did not see it when she entered it to unlock the phone. "Unlike a circumstance, for instance, in which she gave the passcode to the agent for the agent to enter, here she simply used the unexpressed contents of her mind to type the passcode herself." *Id*. This act did not qualify as a testimonial communication and was unprotected by the Fifth Amendment. Furthermore, even if the act of unlocking her phone did constitute a testimonial communication, the phone would still have been admissible: "'[T]he *Miranda* rule is a

prophylactic employed to protect against violations of the Self-Incrimination Clause' and . . . the Clause 'is not implicated by the admission into evidence of the physical fruit of a *voluntary statement*.'" *Id*. at 9, (*citing U.S. v. Patane*, 542 U.S. 630 (2004). This situation fell within the *Patane* rule, in that use of the phone evidence at trial did not create any risk that coerced statements by the defendant would be used at trial. The trial court's denial of the motion to suppress was consequently affirmed. Other challenges to evidentiary rulings, joinder of the defendants, the jury instructions, the sufficiency of the evidence, and the sentences were all likewise rejected, and the convictions unanimously affirmed.

Opinions

A DRE may testify about a driver's impairment based on information obtained from other officers

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

The defendant argued that the superior court judge erred by allowing a drug recognition expert (DRE) who was not involved in the stop to testify that in her opinion, based on her conversation with the trooper and her review of his report, the defendant was impaired by a central nervous system depressant and a narcotic analgesic. The reviewing court found no error, noting that N.C. R. Evid. 702(a1)(2) allows DREs to offer opinions regarding impairment.

Trial court did not commit plain error in allowing officer to testify about the modus operandi of the crime and similar incidents in the area

State v. Miles, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019)
An officer testified at trial, without objection by the defendant, that the modus operandi of the crime was to use a female in a car by herself to gain access to the home for the purpose of committing an armed robbery. He further testified that there had been similar incidents in the area around the same time. Rejecting the defendant's argument that the testimony was an inadmissible lay witness opinion as to the defendant's guilt, the court explained that a lay witness may testify about "details 'helpful to the fact-finder in presenting a clear understanding of [the] investigative process' as long as such details are rational to the lay witness's perception and experience." Moreover, given that the State presented substantial evidence supporting the charge of criminal conspiracy, the court of appeals concluded that the trial court did not commit plain error in admitting the testimony.

In this felony death by vehicle case, the trial court committed reversible error by admitting lay opinion testimony identifying the defendant as the driver of the vehicle, where the expert accident reconstruction analyst was unable to form an expert opinion based upon the same information available to the lay witness

State v. Denton, ___ N.C. App. ___, 829 S.E.2d 674 (June 4, 2019), *temp. stay allowed*, ___ N.C. ___, 828 S.E.2d 33 (June 14, 2019)
The defendant and Danielle Mitchell were in a car when it ran off the road and wrecked, killing Mitchell. The defendant was charged with felony death by vehicle and the primary issue at trial was whether the defendant was driving. At trial, Trooper Fox testified that he believed the defendant was driving because "the seating position was pushed back to a position where I did not feel that Ms. Mitchell would be able to operate that vehicle or reach the pedals." Fox, however, acknowledged that he was not an expert in accident reconstruction. Trooper Souther, the accident reconstruction expert who analyzed the accident, could not reach a conclusive expert opinion about who was driving. The defendant was convicted and he appealed, arguing that the trial court erred by allowing Fox, who was not an expert, to testify to his opinion that the defendant was driving. The court noted that accident reconstruction analysis requires expert testimony and it found no instance of lay accident reconstruction analysis testimony in the case law. Here, Fox based his lay opinion on the very same information used by Souther but without the benefit of expert analysis. The court concluded: "the facts about the accident and measurements available were simply not sufficient to support an expert opinion — as Trooper Souther testified — and lay opinion testimony on this issue is not admissible under Rule 701." Having found error, the court went on to conclude that it was prejudicial, requiring a new trial.

Miscellaneous Cases

The State did not violate the defendant's due process rights by knowingly presenting false testimony; the defense did not show that the state knew the witness would testify differently from her prior statements, or that the testimony was material.

State v. Kimble, __ N.C. App. __ (Oct. 1, 2019)
The defendant was convicted of murder for shooting and killing the victim in the parking lot of a dance club. Before trial, a witness to the shooting met with prosecutors to review her 35-page statement to the police and prepare her trial testimony. During that interview, the witness stated that she did not see the shooting but she saw the defendant holding a gun and running towards the victim. The state provided notes from that interview to the defense. At trial, however, the witness testified that she saw the defendant stand over the victim and shoot him. The defense asked the court to instruct the state to enter into a stipulation or make a statement to the jury explaining that the witness had not previously claimed she saw the shooting. The state responded that it had no knowledge the witness would testify inconsistently with her prior statement, it had complied with the discovery rules by turning over the prior statement and interview notes, and any discrepancies should be addressed on cross-examination. The trial court did not order the state to enter a stipulation or address the jury, and instead offered the defense an opportunity to conduct additional cross-examination, which the defense declined. The Court of Appeals affirmed the trial court's ruling and rejected the defendant's argument that the state knowingly presented false testimony in violation of defendant's due process rights. Even if the witness's trial testimony was false, the defendant failed to show that: (1) the testimony was material; and (2) the state knowingly and intentionally used that false testimony to convict the defendant. First, the

defendant did not show that the testimony was material because other witness testimony and circumstantial evidence established that the defendant shot the victim. Second, the defendant did not show that state deliberately used false testimony because the state was not aware that the witness would testify inconsistently with her prior statement and pretrial interview. Any discrepancies between the witness's prior statements and her trial testimony were matters of credibility, and they were properly addressed through impeachment on cross-examination.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

The trial courts' findings of fact failed to support the legal conclusion that the investigating officer lacked the probable cause needed to place defendant under arrest for impaired driving

State v. Parisi, ___ N.C. ___, 831 S.E.2d 236 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, State v. Parisi, ___ N.C. App. ___, 817 S.E.2d 228 (2018) (discussed in an earlier blog post by Shea Denning, https://nccriminallaw.sog.unc.edu/got-probable-cause-for-impaired-driving/), the Supreme Court held that the trial court erred by granting the defendant's motion to suppress in this impaired driving case. The Supreme Court considered whether the trial courts' findings—which are conclusive on appeal if supported by competent evidence—supported the ultimate conclusions of law. Here, where the trial court made findings that the defendant admitted to consuming three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that the defendant exhibited multiple indicia of impairment while performing various sobriety tests, the Supreme Court had "no hesitation" in concluding that those facts sufficed, as a matter of law, to support the officer's decision to arrest the defendant for impaired driving.

A detailed anonymous tip regarding bad driving may provide reasonable suspicion of impaired driving

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

The defendant argued that the stop was not supported by reasonable suspicion as it was based on an anonymous tip and was not corroborated by any observation of bad driving. The court of appeals disagreed, noting some tension between prior North Carolina case law emphasizing the need to corroborate anonymous tips and *Navarette v. California*, 572 U.S. 393 (2014), which found reasonable suspicion of impaired driving based on an anonymous caller's report that a vehicle had nearly run the caller off the road. The court stated that it "need not resolve the apparent tension between our previous case law and *Navarette*" because the tip in this case involved a very timely report of multiple driving incidents and so was sufficiently reliable to provide reasonable suspicion.

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

State v. Ellis, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019), *temp. stay allowed*, ___ N.C. ___, 831 S.E.2d 347 (Aug. 29, 2019)
While assisting a stalled motorist, a trooper observed the defendant gesture towards him "in an up-and-down pumping motion with his middle finger extended," which caused the trooper to pursue the defendant's vehicle and pull it over. The trooper was unclear as to whether the defendant was gesturing to him or someone in a nearby vehicle. After he stopped the vehicle, the trooper asked the defendant for his identification but the defendant refused to comply. Over a dissent, the court held that the traffic stop was justified based on reasonable suspicion. The court concluded that "[w]hile it may be reasonable for the trooper to suspect that the gesturing was, in fact, meant for him, and therefore maybe constitutionally protected speech, it was also objectively reasonable for the trooper to suspect that the gesturing was directed toward someone in another vehicle and that the situation was escalating." The court explained that such a "continuous and escalating gesturing directed at a driver in another vehicle, if unchecked, could constitute the crime of 'disorderly conduct.'"

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

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

State v. Cabbagestalk, ___ N.C. App. ___, 830 S.E.2d 5 (June 18, 2019)
In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00pm. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving "normally"—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial. The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting sample cases), but observed that "when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion." Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State's argument that the defendant's past criminal history for driving while license revoked and open container supplemented the officer's suspicions: "Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument." Despite the lack of

objection at trial, the court found the trial court's finding of reasonable suspicion to be an error which had a probable impact on the jury's verdict, reversing the denial of the motion and vacating the conviction under plain error review.

Identification of Defendant

Identification by officer was not subject to EIRA and suppression properly denied

State v. Crumitie, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019)
In this murder and attempted murder case, an officer responded to the shooting at the victim's apartment. Upon arrival, he saw a man running with a towel in his hands and gave chase. The officer could not catch the man and instead found one of the victims, the defendant's ex-girlfriend. She was able to describe the assailant and provide his name. The officer then located a DMV picture of the suspect and identified the defendant as the person he saw running earlier. The defendant sought to suppress this identification as a violation of the Eyewitness Identification Reform Act ("EIRA"). Specifically, the defendant argued the officer failed to conduct the "show-up" in accord with EIRA procedure. The trial court denied the motion and the court of appeals affirmed. The EIRA applies to "live lineups, photo lineups, and show-ups." "Here, the inadvertent out-of-court identification of defendant, based on a single DMV photo accessed by an investigating officer, was neither a lineup or a show-up under the EIRA, and thus not subject to those statutory protections." Even if the identification was suggestive, there was no substantial likelihood of misidentification under the facts of the case, and the denial of the motion was affirmed.

Knock & Talk

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

State v. Ellis, ___ N.C. App. ___, 829 S.E.2d 912 (June 18, 2019)
After discovering stolen property at a home across the street, officers approached the front door of the defendant's residence after being informed by a witness that the person who stole the property was at the residence. No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan and an officer looked between the fan slats, where he observed marijuana plants. A search warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the

home by the front path, knock promptly, and then (absent invitation to linger longer) leave." (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

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

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

Search Warrants

(1) A judge who denies a motion to suppress without explaining why fails to provide adequate conclusions of law; (2) A search warrant was not supported by probable cause where it was based on a reliable informant's claims of having purchased drugs from the defendant at some point in the past plus a middleman's recent purchase of drugs from "the general area of defendant's home."

State v. Williams , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 17, 2019)
Officers obtained a search warrant to search the defendant's house. They executed the warrant, found drugs, and charged the defendant with drug offenses. The defendant moved to suppress, arguing that the warrant contained material misrepresentations and did not provide probable cause to support the issuance of the warrant. A superior court judge denied the motion, and the defendant was convicted and appealed. The court of appeals reversed. (1) The trial judge did not set forth adequate conclusions of law. Although formal findings of fact are not required when the evidence regarding a motion to suppress is not in conflict, a judge must still provide conclusions of law, i.e., must explain the reason for the judge's ruling. In this case, the defendant made multiple challenges to the warrant and the trial judge merely denied the motion without further explanation. (2) The warrant was not supported by probable cause. The application was based on information from a confidential and reliable informant. The informant claimed to have purchased drugs from the defendant in the past, but reported that the defendant had become more cautious recently and now would sell drugs only through a specific middleman. The informant reported that she had recently picked up the middleman, dropped the middleman off in "the general area of defendant's home" and picked him up shortly thereafter in possession of drugs. The court of appeals concluded that this did not provide probable cause as the middleman was of unknown reliability and no one had observed him entering the defendant's home. A dissenting judge would have found that the informant's history of purchasing drugs from the defendant, plus what amounted to an imperfectly controlled purchase by the middleman, provided probable cause.

Facts alleged in detective's application for a search warrant established probable cause that evidence of unlawful drug activity would be found in the residence ordered searched

State v. Bailey, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019)
Carteret County Sheriff's deputies observed what they believed to be a drug transaction in the parking lot of an apartment complex. Two individuals known to one of the detectives to have previously been involved in the sale of unlawful drugs drove into the parking lot in a blue Jeep. After they arrived, a woman got out of a white Mercury parked in the lot, got into the blue Jeep for 30 seconds, and then walked back to the Mercury. Both cars then quickly left the parking lot. The Jeep traveled back to the apartment complex where the driver and passenger lived. Officers stopped the Mercury for traffic violations shortly after it left the parking lot. During the stop, the female driver said she had purchased a $20 bag of heroin from the male passenger in the Jeep that she snorted while driving down the road. A search warrant to search the apartment where the occupants of the blue Jeep lived was issued based on an affidavit setting forth these facts.

Over a dissent, the court held that the affidavit established "more than a fair probability" that evidence of illegal drug activity would be discovered at the apartment. The affidavit alleged that the occupants of the Jeep traveled directly from the scene of the alleged drug transaction to the apartment. The magistrate could reasonably have inferred that the twenty dollars the woman paid for the heroin would be in the apartment and that the two known "drug dealers whom the investigators had just observed deal heroin" would have additional drugs or paraphernalia stored there.

The dissent viewed the case as controlled by *State v. Campbell*, 282 N.C. 125 (1972) (invalidating search warrant for known residence of drug dealers that was issued based on an affidavit that failed to establish probable cause that unlawful drugs were possessed or sold in or about the residence).

Defendant was not an occupant of the premises so as to justify his detention during the execution of a search warrant under *Michigan v. Summers*, 452 U.S. 692 (1981)

State v. Thompson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019)
The defendant was cleaning his car in the street adjacent to his girlfriend's apartment when several law enforcement officers arrived to execute a search warrant for the apartment. Before entering the apartment, a law enforcement officer approached the defendant and asked for his driver's license. Officers remained outside with the defendant while the search warrant was executed. Defendant later consented to a search of his vehicle, where officers found marijuana, paraphernalia, and a firearm. He was charged with drug crimes and possession of firearm by a felon.

The defendant moved to suppress the evidence seized from the search of his vehicle on the basis that the officers obtained the evidence as a result of an unlawful, suspicionless seizure. The court of appeals in *State v. Thompson*, ___ N.C. App. ___, 809 S.E.2d 340 (2018) (*Thompson I*) determined, over a dissent, that the trial court's order denying the defendant's suppression motion did not resolve a pivotal issue of fact. Thus, the court vacated the judgment and remanded for further findings.

The North Carolina Supreme Court vacated *Thompson I* and remanded for reconsideration in light of *State v. Wilson*, 371 N.C. 920 (2018). *Wilson* addressed the authority of law enforcement officers to detain a person who arrives on the scene while a search warrant is being executed. *Wilson* held that pursuant to the rule announced by the United States Supreme Court in *Michigan v. Summers*, 452 U.S. 692 (1981), a search warrant authorizes the detention of (1) occupants, (2) who are within the

immediate vicinity of the premises to be searched, and (3) who are presented during the execution of a search warrant for the premises. An occupant is a person who poses a real threat to the safe and efficient execution of a search warrant.

On remand, and again over a dissent, the court of appeals held that the defendant was not an occupant of the searched premises. The court noted that he remained inside his vehicle and did not attempt to approach the apartment or otherwise interfere with the search. Thus, the court found no circumstances to indicate that the defendant posed a threat to the safe and efficient execution of the search. The court therefore again vacated the trial court's judgment and remanded the matter to the trial court for resolution of material factual disputes, pursuant to *Thompson I*.

The dissent would have held that the defendant was an occupant of the premises as he was within the line of sight of the apartment being searched and was a threat to enter or attempt to enter the premises.

Searches

Warrantless search of a probationer's residence, conducted by law enforcement officers acting in coordination with probation officers, was permissible since it was "directly related" to probation supervision based on the defendant's risk assessment, suspected gang affiliation, and positive drug screen.

State v. Jones, __ N.C. App. __ (Oct. 1, 2019)
The defendant was on probation for a conviction of possession of a firearm by a convicted felon, and he was classified by his probation officer as "extreme high risk" for supervision purposes. Officers from several law enforcement agencies, working in conjunction with probation officers, conducted warrantless searches of the residences of high risk probationers in the county, including the defendant. Officers found drugs and paraphernalia during the search of defendant's residence, and he was charged with several drug-related felonies. The defendant moved to suppress the evidence from the warrantless search, arguing that it was illegal because it was not "directly related" to his probation supervision, as required by G.S. 15A-1343(b)(13). The appellate court disagreed and affirmed the denial of the defendant's suppression motion. The facts of this case were distinguishable from *State v. Powell*, __ N.C. App. __, 800 S.E.2d 745 (2017). In *Powell*, a U.S. Marshals task force conducted warrantless searches of random probationer's homes as part of an ongoing operation for its own purposes and did not even notify the probation office. The *Powell* court held that those warrantless searches were not "directly related" to probation supervision. By contrast, the defendant in this case was selected for the enforcement action by his probation officer based on "his risk assessment, suspected gang affiliation, and positive drug screen," and the "purpose of the search was to give the added scrutiny and closer supervision required of 'high risk' probationers such as the Defendant." The search was therefore directly related to his supervision.

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

State v. Terrell , ___ N.C. ___, 831 S.E.2d 17 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E. 2d 719 (2018) (discussed in an earlier blog post by Shea Denning, https://nccriminallaw.sog.unc.edu/state-v-terrell-private-search-doctrine/), the Supreme Court affirmed the Court of Appeals' decision that an officer's warrantless search of a defendant's USB drive following a prior search by a private individual violated the defendant's Fourth Amendment rights. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her 9-year-old granddaughter sleeping, exposed from the waist up. Believing the image was inappropriate, the defendant's girlfriend contacted the sheriff's office and gave them the thumb drive. Later, a detective conducted a warrantless search of the thumb drive to locate the image in question, during which he discovered other images of what he believed to be child pornography before he found the photograph of the granddaughter. At that point the detective applied for and obtained a warrant to search the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The initial warrant application relied only on information from the defendant's girlfriend, but after the State Bureau of Investigation requested additional information, the detective included information about the images he found in his initial search of the USB drive. The SBI's forensic examination turned up 12 images, ten of which had been deleted and archived in a way that would not have been viewable without special forensic capabilities. After he was charged with multiple sexual exploitation of a minor and peeping crimes, the defendant filed a pretrial motion to suppress all of the evidence obtained as a result of the detective's warrantless search. The trial court denied the motion, finding that the girlfriend's private viewing of the images frustrated the defendant's expectation of privacy in them, and that the detective's subsequent search therefore did not violate the Fourth Amendment. After his trial and conviction, the defendant appealed the trial court's denial of his motion to suppress.

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

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

Criminal Offenses

Assaults

(1) Evidence was sufficient to support a conviction of discharging a weapon into occupied property; (2) Defendant cannot be convicted of two assault offenses based on a single assault

State v. Jones, ___ N.C. App. ___, 829 S.E.2d 507 (June 4, 2019)
The defendant argued that the evidence was insufficient to show that the defendant knew that the property was occupied when he shot into the house. Here, an eyewitness testified that before discharging his firearm, the defendant loudly "called out" individuals inside the home, challenging them to come outside, and an individual was standing in the doorway just minutes earlier when the defendant slowly drove past, looking at the dwelling.

A defendant cannot be convicted of two assault offenses (here, assault by pointing a gun and assault with a deadly weapon) based on a single assault. For a defendant to be charged with multiple counts of assault, there must be multiple assaults; this requires evidence of a distinct interruption in the original assault followed by a second assault. Here, the charges arose from actions that occurred in rapid succession without interruption.

Threats & Related Offenses

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

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

Sexual Assaults & Related Offenses

Defendant was guilty of taking indecent liberties with a minor for attempting to send an 11-year-old girl a letter asking her to have sex with him

State v. Southerland, ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2019)
The defendant, a 69 year-old male, wrote a letter to an 11 year-old girl and asked her grandmother to deliver the letter. The grandmother read the letter, in which the defendant asked the girl to have sex with him to make him "feel young again," and called the police. The defendant was charged and convicted of engaging in indecent liberties with a minor under G.S. 14-202.1(a)(1). A person is guilty of this offense if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with

any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]"

On appeal, the defendant argued that it was error to deny his motion to dismiss at trial because there was insufficient evidence to show that he was ever "with" the minor as contemplated by the statute, or that he took any steps beyond mere preparation sufficient to constitute an "attempt" under the statute. The Court of Appeals rejected both arguments, citing to similar facts and holdings in *State v. McClary*, 198 N.C. App. 169 (2009). The statute does not require actual physical touching to constitute a taking or attempted taking of indecent liberties, and the delivery of the letter in this case was sufficient evidence of an attempt. Additionally, the letter itself provided adequate circumstantial evidence of the defendant's unlawful purpose.

Larceny, Embezzlement & Related Offenses

The evidence presented at trial concerning defendant's possession of goods was sufficient to support defendant's conviction under the doctrine of recent possession

State v. McDaniel , ___ N.C. ___, 831 S.E.2d 283 (Aug. 16, 2019)
On appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 817 S.E.2d 6 (2018), the Supreme Court determined that the evidence presented at trial supported the defendant's conviction under the doctrine of recent possession. Pursuant to a tip, a detective discovered stolen property from the victim's house at another house on nearby Ridge Street. Several days later, another detective saw the defendant across from the Ridge Street house, sitting in a white pickup truck. The truck matched the description of one that had reportedly been used to deliver the previously discovered property to the Ridge Street house, and now contained more items from the victim's house. After the trial judge denied the defendant's motion to dismiss for insufficiency of the evidence and instructed the jury on the doctrine of recent possession, the jury found the defendant guilty of felony breaking or entering and felony larceny for the first incident, and guilty of felony larceny for the second incident.

On appeal, the defendant argued that the evidence was insufficient to send the charges to the jury as to both her culpable possession of the items allegedly stolen in the first incident and the recency of her possession of those items. Considering the trial court ruling on a motion to dismiss de novo and with all evidentiary conflicts resolved in favor of the State, the court determined that the defendant's acknowledgment that she had been in control of the victim's items found at the Ridge Street house two weeks after the first incident brought her within the doctrine of recent possession. Though she claimed to have been acting at the direction of another man—a co-defendant also charged in connection with the initial offense—"exclusive possession" within the meaning of the doctrine of recent possession can, the court said, include joint possession of co-conspirators or persons acting in concert. As a result, the court concluded that there was substantial evidence of exclusive possession, and that the Court of Appeals majority erred by holding to the contrary and vacating the defendant's convictions. The court thus reversed the decision of the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.

Justice Earls dissented, writing that the evidence to support the defendant's conviction was insufficient in that the defendant was never found in possession of the items allegedly stolen in the first incident. To the contrary, she only admitted to having the items at the behest of her employer (the co-defendant), and her possession was therefore not that of herself but of her employer.

Frauds

Trial court did not err in instructing the jury with respect to the identity theft charges that a person's name, date of birth, and address are personal identifying information

State v. Miles, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 20, 2019)
When the defendant was treated at the hospital for gunshot wounds he sustained in his altercation with the victim, he provided another person's name, date of birth, and address. A warrant for his arrest was issued under this false identity, and he was subsequently charged with identity theft. The trial court instructed the jury that a person's name, date of birth, and address "would be personal identifying information" under the identity theft statute.

G.S. 14-113.20 sets forth fourteen examples of "identifying information," none of which specifically reference the appropriation of a person's name, date of birth, and address. A catch-all category incorporates "[a]ny other numbers or information that can be used to access a person's financial resources." The court rejected the notion that identifying information under the identity theft statute includes only the types of information listed by example. It also concluded that even if the list was exclusive, the defendant's use of another person's name, date of birth, and address would fall under the catch-all category. Thus, the court found no error in the trial court's jury instruction.

Disorderly Conduct

(1) A juvenile petition was sufficient to allege disorderly conduct where the State followed the "true and safe rule" by substantially employing the terminology of the statute in the petition; (2) Evidence that the juvenile threw a chair at his brother in a high school cafeteria where other students were present was sufficient to withstand a motion to dismiss

In Re T.T.E., ___ N.C. ___, 831 S.E.2d 293 (Aug. 16, 2019)
(1) On appeal from a divided panel of the Court of Appeals, ___ N.C. ___, 818 S.E.2d 324 (2018), the court, over a dissent, reversed the Court of Appeals' conclusion that there was insufficient evidence to send a charge of disorderly conduct, based upon the juvenile's act of throwing a chair in a school cafeteria, to the jury. The court first addressed the question of whether the juvenile delinquency petition sufficiently alleged a violation of G.S. 14-288.4. Finding that the State followed the "true and safe rule" by substantially employing the terminology of the statute in the petition, the court found it sufficient to confer subject matter jurisdiction to the district court. Though the petition did not specifically cite the subdivision of the statute that the juvenile was alleged to have violated, the court found that the petition's allegation that the juvenile had thrown a chair toward another student "averred that the juvenile was delinquent for a violation of [G.S. 14-288.4(a)(1)]." Subsection (a)(1) describes a form of disorderly conduct that occurs when a person "engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence."

(2) Having found the petition sufficient, the court went on to conclude that evidence that the juvenile threw a chair at his brother across the cafeteria where other students were present, when viewed in the light most favorable to the State, was substantial evidence that the juvenile "engag[ed] in violent conduct" in violation of the statute.

A dissenting judge said that the evidence could "fairly be said to raise a suspicion that [the juvenile] engaged in violent conduct, but no more than a suspicion." The dissenting judge would have held that the evidence was insufficient to send the charge to the jury.

Weapons Offenses

A defendant who fires one shot into a moving vehicle occupied by two people may be charged and convicted for two offenses under G.S. 14-34.1, but judgment must be arrested on the lesser of the two counts.

State v. Miller, __ N.C. App. __ (Oct. 1, 2019)
After getting into an argument at a holiday party, the defendant fired a warning shot from a rifle into the air and then fired a single shot into a moving vehicle occupied by two people, striking one of them in the neck and seriously injuring him. Defendant was subsequently convicted and sentenced for four felonies related to the shooting, including charges for both: (1) discharging a weapon into an occupied vehicle in operation inflicting serious bodily injury, a Class C felony under G.S. 14-34.1(c) (for the injured victim); and (2) discharging a weapon into an occupied vehicle in operation, a Class D felony under G.S. 14-34.1(b) (for the second occupant). On appeal, the defendant argued that the trial court should have arrested judgment on the lesser of the two charges for firing into an occupied vehicle, because he could not be sentenced twice for the single act of firing one shot. The Court of Appeals agreed and held that although the defendant could be indicted and tried for both charges, upon conviction the trial court should have arrested judgment for the lesser offense. This case was distinguishable from other cases in which multiple judgments were supported because the defendant fired multiple shots or fired into multiple vehicles. In this case, where there was only one shot fired into one vehicle, the relevant inquiry under the statute is only whether the vehicle was occupied; the number of occupants is immaterial. To the extent that the presence of additional occupants in the vehicle increases the risk of injury or enhances the culpability of the act, that factor is accounted for by the ascending levels of punishment prescribed under the statute.

Obstruction of Justice and Related Offenses

(1) Flight from unlawful investigatory stop did not constitute resisting, delaying, or obstructing an officer; (2) Because defendant voluntarily abandoned gun before he submitted to officer's authority, gun was not obtained as result of unlawful seizure and was admissible at trial

State v. Holley , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019)
The defendant was charged with possession of a firearm by a person previously convicted of a felony and resisting, delaying, or obstructing an officer. The State dismissed the resisting charge before trial, and the defendant filed a motion to suppress the firearm. The trial judge denied the motion to suppress, the defendant did not object to the introduction of the firearm at trial, and the defendant was convicted. Because the defendant failed to object to the firearm at trial, the Court of Appeals applied plain error review to the denial of his suppression motion.

(1) The evidence showed that the police chief received a call about possible drug activity involving two black males outside a store and radioed the information to patrol officers. A patrol officer saw two men who matched the description walking on the sidewalk, and he parked his marked patrol car. The patrol officer testified that the two men saw him and continued walking. When the officer yelled for the

defendant to stop, he looked at the officer and then ran. Another officer eventually located the defendant and arrested him for resisting, delaying, or obstructing an officer.

The Court of Appeals found that the evidence did not support the trial judge's findings of fact in its denial of the defendant's suppression motion. Thus, the trial judge found the area had been the scene of several drug investigations and shootings in the previous months, but the police chief testified that for approximately seven years he could recall three arrests for drugs and marijuana and did not testify that they took place in the past several months. The patrol officer testified that he had responded to one shooting in the area but didn't indicate when the shooting occurred and since then had responded to loitering and loud music issues. The trial judge also found that the defendant walked away "briskly" when he first saw the patrol officer, but the officer testified that the defendant was just walking down the sidewalk. The officer's later testimony at trial that the defendant kept walking away faster and faster was not before the judge at the suppression hearing and could not be used to support the judge's findings of fact. The Court found next that the trial judge's supported findings of fact did not support his conclusion that the officer had reasonable suspicion to stop the defendant initially or probable cause to arrest for resisting. Thus, even assuming the incident took place in a high crime area, the defendant's presence there and his walking away from the officer did not provide reasonable suspicion to stop. (The Court noted that the patrol officer was unaware of the tip received by the police chief and therefore did not consider the tip in measuring the reasonableness of the stopping officer's suspicion.) Because the officer did not have reasonable suspicion to stop, the Court found that the defendant was not fleeing from a lawful investigatory stop and the trial judge erred in concluding that there was probable cause to arrest the defendant for resisting.

(2) When the second officer detained the defendant, the defendant did not have a firearm on him. Rather, a K-9 unit recovered the firearm underneath a shed along the defendant's "flight path." The Court of Appeals found that the defendant voluntarily abandoned the firearm before he was seized by law enforcement officers. The evidence was therefore not the fruit of an unlawful seizure, and the Fourth Amendment did not bar its admission at trial.

Drug Offenses

The lack of a scientifically valid chemical analysis of a substance identified by officers as heroin did not require the trial court to grant the defendant's motion to dismiss for insufficiency of the evidence

State v. Osborne, ___ N.C. ___, 831 S.E.2d 328 (Aug. 16, 2019)
On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 821 S.E.2d 268 (2018), the Supreme Court concluded that the Court of Appeals misapplied *State v. Ward*, 356 N.C. 133 (2010), when it held that the absence of a scientifically valid chemical analysis meant that the State had not established beyond a reasonable doubt that the seized substance was heroin, and that the trial court therefore erred when it denied the defendant's motion to dismiss for insufficiency of the evidence. *Ward*, the Supreme Court clarified, was a case about the admissibility of evidence under Rule of Evidence 702, not sufficiency. In this case, the defendant did not object to officers' trial testimony that they found the defendant with syringes, spoons, and a rock substance that officers visually identified and twice field tested as heroin. An officer also testified without objection that when the defendant regained consciousness, she confirmed that she had ingested heroin. The Supreme Court concluded that the Court of Appeals erred by applying *Ward*'s high bar for the admissibility of evidence relating to the identity of a controlled substance to a motion to dismiss for insufficiency of the evidence. The court emphasized that

> [F]or purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question.

The court also disapproved of language in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), which had suggested that expert testimony is required to establish the identity of a controlled substance in the context of a motion to dismiss.

Applying the appropriate standard of review, and assuming without deciding that some of the evidence might have been excluded if the defendant had objected to its admission, the court determined that there was ample evidence showing that the substance the defendant allegedly possessed was heroin. The court therefore reversed the Court of Appeals and remanded the case for consideration of the defendant's remaining arguments.

Justice Earls wrote a concurring opinion questioning whether the Good Samaritan law in G.S. 90-96.2, which came into effect in 2013, placed a limit on the trial court's jurisdiction to prosecute the defendant in this case.

The evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances

State v. Alvarez, ___ N.C. ___, 828 S.E.2d 154 (June 14, 2019)

The Court per curiam affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 818 S.E.2d 178 (2018), finding no error in the trial court's denial of the defendant's motion to dismiss a felony maintaining a vehicle for keeping or selling controlled substances charge based on insufficient evidence.

The Court of Appeals had held, over a dissent, that the evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances. The defendant argued that the State presented insufficient evidence that he kept or maintained the vehicle over a duration of time. The court disagreed. The determination of whether a vehicle is used for keeping or selling drugs depends on the totality of the circumstances and a variety of factors are relevant, including occupancy of the property, possession over time, the presence of large amounts of cash or paraphernalia, and the defendant's admission to selling controlled substances. Here, the totality of the circumstances supports a reasonable inference that the defendant knowingly kept or maintained the vehicle for the purposes of keeping or selling cocaine. Although the vehicle was registered in his wife's name, the defendant described it as his truck. He admitted that it was his work vehicle, that no one else used it, and that he built the wooden drawers and compartments located in the back of the vehicle. When searching the vehicle, officers discovered a hidden compartment in the truck bed floor containing 1 kg of cocaine. The cocaine was packaged to evade canine detection. The defendant does not challenge the sufficiency of the evidence supporting his related trafficking convictions arising from the same incident. Additionally, evidence shows that the defendant knowingly participated in a drug transaction in a Walmart parking lot immediately before his arrest and that this was not an isolated incident. Specifically, evidence indicated that if the transaction worked out, further drug sales could occur in the future. The court concluded:

> [T]he evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine—an amount consistent with trafficking, not personal use— was discovered . . . ; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck.

Motor Vehicle Offenses

Evidence was sufficient to support speeding to elude arrest where law enforcement was performing lawful duty of office at time of traffic stop

State v. Mahatha , ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019)
The defendant was charged with driving while license revoked, not an impaired revocation; assault on a female; possession of a firearm by a person previously convicted of a felony; attempted robbery with a dangerous weapon; and habitual felon status. The State proceeded to trial on the charges of speeding to elude arrest and attaining habitual felon status, dismissing the other charges. The defendant was found guilty of both, and the trial judge sentenced the defendant to 97 to 129 months' imprisonment.

The defendant argued that the trial judge erred in failing to dismiss the speeding to elude arrest charge. According to the defendant, at the time the law enforcement officer activated his blue lights and siren to initiate a traffic stop, the officer did not have reasonable suspicion to stop the defendant and therefore was not performing a lawful duty of his office. The Court of Appeals rejected this argument, holding that the circumstances before and after an officer signals his intent to stop a defendant determine whether there was reasonable suspicion for a stop. Here, after the officer put on his lights and siren, the defendant accelerated to speeds of 90 to 100 miles per hour, drove recklessly by almost hitting other cars, pulled onto the shoulder to pass other cars, swerved and fishtailed across multiple lanes, crossed over the double yellow line, and ran a stop sign before he parked in a driveway and took off running into a cow pasture, where the officers found him hiding in a ditch. These circumstances gave the officer reasonable suspicion of criminal activity before he seized the defendant.

Statute of Limitations

Statute of limitations was tolled by filing of charges in district court, so presentment and indictment obtained more than two years after the date of the offense were not time-barred

State v. Stevens, ___ N.C. App. ___, 831 S.E.2d 364 (July 2, 2019), *temp. stay allowed*, ___ N.C. ___, 829 S.E.2d 907 (Aug. 1, 2019)
Defendant was charged with two counts of misdemeanor death by motor vehicle by citation on December 24, 2013. On December 21, 2015, the state filed a misdemeanor statement of charges alleging the same offenses. While those charges were pending in district court, the grand jury issued a presentment for the offenses on March 7, 2016, and the state obtained a corresponding indictment on March 21, 2016. The defense filed a motion to dismiss, arguing that the superior court indictments were obtained after the two-year statute of limitations for the offense had run. The trial court granted the motion.

The Court of Appeals reversed and remanded. Pursuant to *State v. Curtis*, 371 N.C. 355 (2018), the citation and misdemeanor statement of charges filed in district court tolled the statute of limitations. The court rejected the defendant's argument that the presentment and indictment "annulled" the original district court prosecution, thereby making the new charges in superior court untimely. The original charges were still pending in district court at the time the state obtained the indictment, and "[i]f an action in District Court was properly pending, as it was here, the statute of limitations continued to be tolled."

Judicial Administration

Contempt

Error to hold defendant in contempt without an opportunity to respond

State v. Tincher, ___ N.C. App. ___, ___ S.E.2d ___ (July 16, 2019)
At the conclusion of a probation revocation hearing, the defendant yelled vulgarities within earshot of the court. The trial court found the defendant in criminal contempt and sentenced him to an additional 30 days, consecutive to his other sentences. The trial court did not give the defendant an opportunity to respond to the alleged contempt, in violation of G.S. 5A-14(b). The judge also struck language from the contempt order that would normally document the fact that the defendant was warned and given an opportunity to be heard. "'[T]he judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard' and without that finding, the trial court's findings do not support the imposition of contempt." The contempt order and judgment were therefore reversed.