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District Court Judges 2023 Summer Conference
Criminal Case Update
June 20, 2023

Cases covered include published criminal and related decisions from the North Carolina appellate courts decided between September 16, 2022 and May 12, 2023. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Arrest, Search, and Investigation

Exigent circumstances justified warrantless blood draw; evidence of impairing substances in defendant's blood represented sufficient evidence to dismiss motion.

State v. Cannon, COA22-572, ___ N.C. App. ___ (May 2, 2023). In this Edgecombe County case, defendant appealed his convictions for second-degree murder and aggravated serious injury by vehicle, arguing error in the denial of his motion to suppress a warrantless blood draw and motion to dismiss for insufficient evidence. The Court of Appeals found no error and affirmed.

In June of 2015, defendant crossed the centerline of a highway and hit another vehicle head on, causing the death of one passenger. Officers responding to the scene interviewed defendant, and noted his responses seemed impaired and the presence of beer cans in his vehicle. A blood draw was performed at the hospital, although the officer ordering the draw did not read defendant his Chapter 20 implied consent rights or obtain a search warrant before the draw. The results of defendant's blood draw showed a benzodiazepine, a cocaine metabolite, two anti-depressants, an aerosol propellant, and a blood-alcohol level of 0.02.

Reviewing defendant's argument that no exigent circumstances supported the warrantless draw of his blood, the Court of Appeals first noted that defense counsel failed to object to the admission of the drug analysis performed on defendant's blood, meaning his arguments regarding that exhibit were overruled. The court then turned to the exigent circumstances exception to justify the warrantless search, noting that the investigation of the scene took significant time and defendant was not taken to the hospital until an hour and forty-five minutes afterwards. Acknowledging Supreme Court precedent "that the natural dissipation of alcohol in the bloodstream cannot, standing alone, create an exigency in a case of alleged impaired driving sufficient to justify conducting a blood test without a warrant," the court looked for additional justification in the current case. Slip Op. at 11. Here the court found such justification in the shift change occurring that would prevent the officer from having assistance, and the delay in going to obtain a warrant from the magistrate's office that would add an

additional hour to the process. These circumstances supported the trial court's finding of exigent circumstances.

The court then turned to defendant's argument that insufficient evidence was admitted to establish he was impaired at the time of the accident. The record contained evidence that defendant had beer cans in his truck along with an aerosol can of Ultra Duster, and several witnesses testified as to defendant's demeanor and speech after the accident. The record also contained a blood analysis showing defendant had five separate impairing substances in his system at the time of the accident, "alcohol, benzyl ethylene (a cocaine metabolite), Diazepam (a benzodiazepine such as Valium), Citalopram (an anti-depressant) and Sertraline (another anti-depressant called "Zoloft")." *Id*. at 16. The court found that based on this evidence there was sufficient support for denying defendant's motion.

Officer's show of authority by blocking defendant's vehicle in a driveway and activating blue lights represented a seizure under the Fourth Amendment.

State v. Eagle, 2022-NCCOA-680, 286 N.C. App. 80 (Oct. 18, 2022). In this Orange County case, defendant appealed her conviction for impaired driving, arguing the trial court erred by denying her motion to suppress an unlawful seizure by the arresting officer. The Court of Appeals agreed with defendant and found error in the denial of her motion to suppress.

In November of 2019, an officer from the Orange County Sherriff's Department was performing checks of businesses along a road at 3:00am. The officer observed defendant's car pulling into the driveway of a closed business. Driving slowly by the driveway, the officer put the cruiser in reverse, backed up to the driveway and pulled in, blocking defendant's exit while activating the cruiser's blue lights. The officer ran defendant's plates, then approached the vehicle to ask what defendant was doing, noticing a strong odor of alcohol and glassy eyes. Defendant was charged with impaired driving; at trial, the court concluded that the encounter was voluntary up until the time that defendant gave the officer her identification card, denying her motion to suppress.

Reviewing defendant's argument, the Court of Appeals noted it was undisputed that the officer did not observe a crime before pulling in behind defendant. The only issue was when the encounter became a seizure under the Fourth Amendment. The court explained that a "show of authority" such as blocking a vehicle's exit or activating blue lights can be interpreted as a seizure, even when an officer does not physically restrain or touch the defendant. Slip Op. at 13. Emphasizing the difficult choice that the defendant had as a result of the officer's actions, the court noted "in such a situation most people would feel compelled to remain in their car and wait to speak with the officer, knowing that attempting to leave would only end in trouble and/or danger." *Id*. at 17. As a result, the court held that defendant was seized "at the point that [the officer] pulled in behind [d]efendant's car while activating her blue lights and blocked [d]efendant's available exit." *Id*. at 22.

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Seizure of marijuana was admissible when police on foot approached vehicle parked in high crime area, identified marijuana by plain view on defendant's lap; seizure of marijuana was supported by additional evidence besides smell and appearance, suggesting it was not hemp.

State v. Tabb, 2022-NCCOA-717, 286 N.C. App. 353 (Nov. 1, 2022). In this Forsyth County case, the Court of Appeals considered for a second time defendant's appeal of his guilty pleas to possession of cocaine, marijuana, and marijuana paraphernalia based upon the trial court's denial of his motion to suppress. The Court of Appeals affirmed the denial of defendant's motion to suppress.

This matter first came before the court in *State v. Tabb*, 2021-NCCOA-34, 276 N.C. App. 52 (2021) (unpublished), and the facts taken from that decision are presented in pages 2-4 of the slip opinion. The court remanded to the trial court with instructions to consider the sequence of events leading to defendant's arrest and determine if a show of force and seizure of the driver occurred, where one arresting officer approached the driver's side of the vehicle while two other officers approached the passenger's side (where defendant was seated) and noticed marijuana and cash on defendant's lap. Slip Op. at 4-5. The trial court concluded that the actions of the officers occurred almost simultaneously, and that neither defendant nor the driver would have believed they were seized until defendant was removed from the vehicle. As a result, the trial court concluded the search of defendant was constitutional and again denied his motion to suppress.

Considering the current matter, the Court of Appeals first noted that defendant failed to raise the argument that the search violated Article 1, § 20 of the North Carolina Constitution in front of the trial court, dismissing this portion of his argument. The court then considered the argument that the officer who approached the driver's side of the vehicle effected a seizure without proper suspicion, violating the Fourth Amendment. Exploring the applicable precedent, the court explained "[p]olice officers on foot may approach a stationary vehicle with its engine running and its lights turned on in a known area for crimes after midnight to determine if the occupants 'may need help or mischief might be afoot' or to seek the identity of the occupants therein or observe any items in plain view without violating our Fourth Amendment jurisprudence." *Id*. at 10, citing *Brendlin v. California*, 551 U.S. 249 (2007), *Terry v. Ohio*, 392 U.S. 1 (1968), and *State v. Turnage*, 259 N.C. App. 719 (2018). The court then explained that, even if the driver was seized immediately upon the officer's "show of force," the plain view doctrine permitted discovery and admissibility of the marijuana and currency observed by the officers approaching defendant's side of the vehicle. Slip Op. at 11. The "brief period" between the show of force and the officers recognizing the items on defendant's lap did not justify granting defendant's motion to suppress. *Id*.

The court then turned to defendant's argument that the officers could not identify the unburnt marijuana as an illegal substance since industrial hemp is legal in North Carolina and is virtually indistinguishable by smell or visual identification. The court disagreed, noting that "there was more present than just the smell or visual identification . . . [t]here was the evidence of drug

distribution, the currency beside the marijuana and [d]efendant's possession of marijuana near his waistband." *Id*. at 13-14. Because of the additional evidence to support reasonable suspicion, the court overruled defendant's argument.

Reasonable suspicion that defendant was armed and dangerous justified frisk of vehicle; defendant waived right to 30-day notice of intent to prove prior record level point for offense while on parole/probation/post-release supervision.

State v. Scott, COA22-326, ___ N.C. App. ___ (Feb. 7, 2023). In this New Hanover County case, defendant appealed his conviction for possessing a firearm as a felon, arguing error in the denial of his motion to suppress and improper sentencing. The Court of Appeals found no error.

In February of 2020, a Wilmington police officer observed defendant enter a parking lot known for drug activity and confer with a known drug dealer. When defendant exited the parking lot, the officer followed, and eventually pulled defendant over for having an expired license plate. During the stop, the officer determined that defendant was a "validated gang member," and had previously been charged with second-degree murder; the officer was also aware that a local gang war was underway at that time. Slip Op. at 2. The officer frisked defendant and did not find a weapon, but defendant told the officer there was a pocketknife in the driver's door compartment. When the officer went to retrieve the pocketknife, he did not find it, but while looking around the driver's area he discovered a pistol under the seat. During sentencing for defendant, his prior record level was calculated with nine points for prior crimes and one additional point for committing a crime while on probation/parole/post-release supervision, leading to a level IV offender sentence.

Reviewing defendant's appeal, the court first noted that the initial traffic stop for an expired plate was proper. The frisk of defendant's person and vehicle required the officer to have "a reasonable suspicion that the suspect of the traffic stop is armed and dangerous." *Id*. at 7, quoting *State v. Johnson*, 378 N.C. 236 (2021). The court found the totality of the officer's knowledge about defendant satisfied this standard, as defendant had just exited a parking lot known for drug transactions, had a history of being charged with murder, was a known gang member, and was in an area experiencing a local gang war. Because the officer had a reasonable suspicion that defendant might be armed and dangerous, the frisk of the vehicle leading to the discovery of the pistol was acceptable.

Turning to defendant's sentencing, the court explained that under G.S. 15A-1340.14(b)(7), the state was obligated to provide defendant with notice of its intent to add a prior record level point by proving his offense was committed while on probation, parole, or post-release supervision. While the record did not contain evidence that defendant received the required notice 30 days before trial, the court found that the exchange between defense counsel and the trial court represented waiver for purposes of the requirement. While the trial court did not confirm the receipt of notice through the colloquy required by G.S. 15A-1022.1, the exchange between the trial court and defense counsel fell into the exception outlined in *State v. Marlow*,

229 N.C. App 593, meaning "the trial court was not required to follow the precise procedures . . . as defendant acknowledged his status and violation by arrest in open court." Slip Op. at 18.

Paved area next to fuel pumps constituted a "public vehicular area" under G.S. 20-4.01(32) for search of an automobile; smell of heroin justified search under plain-smell doctrine.

State v. Parker, 2022-NCCOA-655, 285 N.C. App. 610 (Oct. 4, 2022). In this Guilford County case, defendant appealed his attempted heroin trafficking and possession of a firearm convictions pursuant to a plea agreement that preserved his right to appeal the denial of his motion to suppress. The Court of Appeals affirmed the denial of defendant's motion.

The Guilford County Sheriff's Office conducted a narcotics investigation in May of 2019. As part of the investigation, a confidential informant made several purchases of heroin from a person who was associated with defendant. During a purchase set up by the confidential informant, the seller was observed getting into a black SUV, a vehicle later spotted by an officer at a fuel pump near the arranged buy. After spotting the black SUV officers detained defendant, who was operating the SUV, and searched the vehicle, finding heroin and a loaded firearm. At trial, defendant moved to suppress the warrantless search and seizure, which the trial court denied after finding probable cause for the search.

Reviewing defendant's appeal, the Court of Appeals first examined the challenged findings of fact related to the officers' testimony. Defendant argued that inconsistences between the testimony of the two officers meant that both could not be considered credible, and certain other findings of fact were inconsistent with the evidence presented. The court explained that slight inconsistencies between the testimony of two witnesses did not prevent both from being credible, and the trial court is tasked with evaluating the evidence and resolving inconsistencies. Because competent evidence supported the findings of fact even with the slight inconsistences, the court rejected defendant's challenges.

The court then reviewed the probable cause for a search of defendant's SUV and the seizure of heroin and a firearm found inside the vehicle. The court explained that the "automobile exception" to the Fourth Amendment requires that the "vehicle be in a public vehicular area and the police have probable cause." Slip Op. at 16. The first issue was whether defendant's SUV was in a "public vehicular area" when searched; defendant argued that the area next to a fuel pump did not fall under the definition provided by G.S. 20-4.01(32). The court explained that a "service station" is gas station for purposes of the statute, and although the fuel pump area may not be a "driveway, road, alley, or parking lot" as listed by the statute, this list is intended to be illustrative and not limiting. *Id*. at 19. After examining applicable precedent, the court held that "the driving or parking area adjacent to a fuel pump at a service station is a 'public vehicular area'" for purposes of G.S. 20-4.01(32).

After determining that defendant's SUV was in a public vehicular area, the court turned to the probable cause for searching the vehicle. Defendant argued that the plain view and plain smell

doctrines could not support the search of the vehicle. Regarding the plain view doctrine, the court pointed out that the vehicle was in a public vehicular area and near the location of the drug buy the officers were observing. For the plain smell doctrine, the court noted that there was no applicable precedent regarding the smell of heroin supporting a search, but ample precedent used the smell of other narcotics, such as marijuana and cocaine, to support probable cause for a search. The court saw "no reason to treat the plain smell of heroin any differently than the plain smell of marijuana or cocaine" for purposes of the plain smell doctrine and affirmed the trial court's determination of probable cause for the search. *Id*. at 29.

Officer shining a flashlight through defendant's windows during a traffic stop was not a "search" for Fourth Amendment purposes.

State v. Hunter, 2022-NCCOA-683, 286 N.C. App. 114 (Oct. 18, 2022). In this Gaston County case, defendant appealed the trial court's denial of his motion to suppress after entering a no contest plea to possession of a controlled substance and drug paraphernalia, and failure to stop at a stop sign. The Court of Appeals affirmed the trial court's judgment.

In October of 2020, police officers observed a car roll through a stop sign and pulled over the vehicle. When officers approached, defendant was behind the wheel; one officer took defendant's license and information to perform a warrant check, while the other officer stayed with defendant and shined a flashlight through the windows to observe the vehicle. After shining the light around the vehicle, the officer noticed a plastic baggie next to the driver's door, and defendant was detained while the officers retrieved and tested the baggie. The baggie tested positive for crack-cocaine.

On appeal, defendant argued that the stop was inappropriately pretextual, and that the officer shining a flashlight lacked probable cause to search his vehicle. The Court of Appeals disagreed, explaining that "[o]fficers who lawfully approach a car and look inside with a flashlight do not conduct a 'search' within the meaning of the Fourth Amendment." Slip Op. at 4-5, quoting *State v. Brooks*, 337 N.C. 132, 144 (1994). The court then turned to the stop, explaining that "both the United States Supreme Court and our North Carolina Supreme Court have ruled that an officer's subjective motive for a stop has no bearing on the Fourth Amendment analysis." *Id*. at 9, citing *Whren v. United States*, 517 U.S. 806, 813 (1996); and *State v. McClendon*, 350 N.C. 630, 635-36 (1999). Having established for Fourth Amendment analysis that the subjective motive for the stop was irrelevant and that a flashlight through defendant's window was not a search, the court affirmed the trial court's decision to deny the motion.

Driving with medically cancelled license represented a Class 2 misdemeanor justifying arrest and search of defendant.

State v. Duncan, 2023-NCCOA-5, ___ N.C. App. ___ (Jan. 17, 2023). In this Catawba County case, the state appealed an order granting defendant's motion to suppress evidence obtained after his arrest. The Court of Appeals reversed and remanded, determining that officers had reasonable suspicion to stop defendant and probable cause to arrest him and conduct a search.

In 2018, officers were surveilling a residence where drug-related activity was allegedly occurring, and they had been informed a black male with dreadlocks frequented the location. Defendant drove into the driveway of the residence to drop off a passenger and then depart; the officers observed his license plate. After accessing database information related to the license plate, officers determined defendant was driving with a medically cancelled license and pulled him over. Defendant was arrested for driving with a revoked license; during the arrest, officers searched defendant and found baggies containing methamphetamine hidden in his hair. Before trial, defendant moved to suppress the results of the search. The trial court granted his motion, finding that officers did not have reasonable suspicion to stop defendant based only upon the tip about a male with dreadlocks, and defendant's offense was no operator's license under G.S. 20-29.1, which did not constitute probable cause for arrest. Slip Op. at 4.

The Court of Appeals disagreed with the trial court's analysis, finding that officers did not need reasonable suspicion to investigate a license plate as Fourth Amendment protections do not apply where there is no reasonable expectation of privacy. *Id*. at 6-7. Once officers determined defendant had a medically cancelled license, they had reasonable suspicion based upon the traffic violation, not upon the original tip. *Id*. at 8-9. The court also examined the nature of defendant's offense, exploring whether his medically cancelled license led to an infraction (which would not support the arrest/search), or a misdemeanor (which would support the arrest/search). Looking to G.S. 20-35(a), the court found that the offense was a Class 2 misdemeanor, and none of the enumerated exceptions applied to defendant's situation. *Id*. at 15.

Criminal Procedure

District Attorney holds exclusive discretionary power to reinstate criminal charges dismissed with leave; trial court does not have authority to compel district attorney to reinstate charges dismissed with leave.

State v. Diaz-Tomas, 2022-NCSC-115, 382 N.C. 640 (Nov. 4, 2022). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision denying defendant's petition for writ of certiorari and dismissed as improvidently allowed issues related to defendant's petition for discretionary review and the denial of his petition for writ of mandamus.

This matter has a complicated procedural history as detailed on pages 4-10 of the slip opinion. Defendant was originally charged with driving while impaired and driving without an operator's license in April of 2015. Defendant failed to appear at his February 2016 hearing date; an order

for arrest was issued and the State dismissed defendant's charges with leave under G.S. 15A-932(a)(2). This meant defendant could not apply for or receive a driver's license from the DMV. Defendant was arrested in July of 2018, and given a new hearing date in November of 2018, but he again failed to appear. In December of 2018, defendant was arrested a second time, and given another new hearing date that same month. However, at the December 2018 hearing, the assistant DA declined reinstate the 2015 charges, leading to defendant filing several motions and petitions to force the district attorney's office to reinstate his charges and bring them to a hearing. After defendant's motions were denied by the district court, and his writ for certiorari was denied by the superior court and the Court of Appeals, the matter reached the Supreme Court.

The court first established the broad discretion of district attorneys, as "[s]ettled principles of statutory construction constrain this Court to hold that the use of the word 'may' in N.C.G.S. § 15A-932(d) grants exclusive and discretionary power to the state's district attorneys to reinstate criminal charges once those charges have been dismissed with leave . . .." Slip Op. at 13. Due to this broad authority, the court held that district attorneys could not be compelled to reinstate charges. The court next turned to the authority of the trial court, explaining that "despite a trial court's wide and entrenched authority to govern proceedings before it as the trial court manages various and sundry matters," no precedent supported permitting the trial court to direct the district attorney in this discretionary area. *Id*. at 16. Because the district attorney held discretionary authority to reinstate the charges, and the trial court could not interfere with the constitutional and statutory authority of the district attorney, the court affirmed the denial of defendant's motions for reinstatement and petition for writ of certiorari.

The court also considered defendant's various petitions for writ of mandamus, noting they were properly denied under the applicable standard because "[defendant] does not have a right to compel the activation of his charges which have been dismissed with leave or to require the exercise of discretionary authority to fit his demand for prosecutorial action regarding his charges." *Id*. at 22.

State v. Nunez, 2022-NCSC-112, 382 N.C. 601 (Nov. 4, 2022). The Supreme Court affirmed per curiam the order denying defendant's petition for writ of certiorari issued by a Wake County Superior Court judge. The court allowed a petition for discretionary review prior to determination by the Court of Appeals and combined this matter with *State v. Diaz-Tomas*, 2022-NCSC-115, for oral argument. The court affirmed the order for the reasons stated in *Diaz-Tomas*.

Counsel Issues

Defendant did not "effectively waive" her right to counsel; forfeiture of counsel requires "egregious misconduct" by defendant.

State v. Atwell, 2022-NCSC-135, 383 N.C. 437 (Dec. 16, 2022). In this Union County case, the Supreme Court reversed the Court of Appeals decision that defendant effectively waived her right to counsel and remanded the case for a new trial.

Defendant was subject to a Domestic Violence Prevention Order (DVPO) entered against her in 2013; the terms of the order required her to surrender all firearms and ammunition in her position and forbid her from possessing a firearm in the future, with a possible Class H felony for violation. In 2017, defendant attempted to buy a firearm in Tennessee while still subject to the DVPO and was indicted for this violation. Initially defendant was represented by counsel, but over the course of 2018 and 2019, defendant repeatedly filed pro se motions to remove counsel and motions to dismiss. The trial court appointed five different attorneys; three withdrew from representing defendant, and defendant filed motions to remove counsel against the other two. The matter finally reached trial in September of 2019, where defendant was not represented by counsel. Before trial, the court inquired whether defendant was going to hire private counsel, and she explained that she could not afford an attorney and wished for appointed counsel. The trial court refused this request and determined defendant had waived her right of counsel. The matter went to trial and defendant was convicted in January of 2020, having been mostly absent from the trial proceedings.

Examining the Court of Appeals opinion, the Supreme Court noted that the panel was inconsistent when discussing the issue of waiver of counsel verses forfeiture of counsel, an issue that was also present in the trial court's decision. The court explained that "waiver of counsel is a voluntary decision by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate." Slip Op. at 16. Here the trial court, despite saying defendant "waived" counsel, interpreted this as forfeiture of counsel, as defendant clearly expressed a desire for counsel at the pre-trial hearing and did not sign a waiver of counsel form at that time (although she had signed several waivers prior to her request for a new attorney).

Having established that the proper analysis was forfeiture, not waiver, the court explained the "egregious misconduct" standard a trial court must find before imposing forfeiture of counsel from *State v. Harvin*, 2022-NCSC-111, and *State v. Simpkins*, 373 N.C. 530 (2020). Slip Op. at 18. The court did not find such egregious misconduct in this case, explaining that defendant was not abusive or disruptive, and that the many delays and substitutions of counsel were not clearly attributable to defendant. Instead, the record showed legitimate disputes on defense strategy with one attorney and was silent as to the reasons for withdrawal for the others. Additionally, the state did not move to set the matter for hearing until many months after the indictment, meaning that defendant's counsel issues did not cause significant delay to the proceedings.

Chief Justice Newby, joined by Justices Berger and Barringer, dissented and would have found that defendant forfeited her right to counsel by delaying the trial proceedings. *Id*. at 28.

Defendant's dismissal of two court-appointed attorneys, attempts to represent himself, and requests for assistance in trial preparation did not represent conduct justifying forfeiture of counsel.

State v. Harvin, 2022-NCSC-111, 382 N.C. 566 (Nov. 4, 2022). In this New Hanover County case, the Supreme Court affirmed the Court of Appeals majority decision vacating the judgments against defendant and ordering a new trial because he was denied his constitutional right to counsel.

In May of 2015, defendant was indicted for first-degree murder and associated robbery charges. Over the course of the next three years, defendant had several court-appointed attorneys, and then chose to represent himself with stand-by counsel. When the charges reached trial in April of 2018, defendant expressed uncertainty about his ability to represent himself, leading to an exchange with the trial court regarding his capacity and desire to continue without counsel or obtain appointed counsel from the court, as well as defendant's confusion about an ineffective assistance of counsel claim. After considering arguments from the State regarding defendant's termination of his previous counsel and delay of the proceedings, the trial court concluded that defendant had forfeited his right to counsel for the trial. Defendant was subsequently convicted on all counts.

The Supreme Court majority found that defendant had not engaged in behavior justifying forfeiture of his right to counsel. The court explained that forfeiting the right to counsel is a separate concept from voluntary waiver of counsel, and generally requires (1) aggressive, profane, or threatening behavior; or (2) conduct that represents a serious obstruction of the proceedings. Slip Op. at 32-33. Although defendant cycled through four court-appointed attorneys before choosing to represent himself, two of those attorneys withdrew for reasons totally unrelated to defendant's case, and the other two withdrew at defendant's request, with leave of the court. Applying the relevant standards to defendant's conduct, the majority could not find any behavior rising to the level required for forfeiture, noting that "defendant's actions, up to and including the day on which his trial was scheduled to begin, did not demonstrate the type or level of obstructive and dilatory behavior which allowed the trial court here to permissibly conclude that defendant had forfeited the right to counsel." *Id*. at 41.

Justice Berger, joined by Chief Justice Newby and Justice Barringer, dissented and would have upheld the decision of the trial court that defendant forfeited his right to counsel. *Id*. at 43.

Pleadings

Indictment was not flawed because name of school system in indictment "imported" the legal entity of the county board of education.

State v. Edwards, 2022-NCCOA-712, 286 N.C. App. 306 (Nov. 1, 2022). In this Graham County case, defendant appealed the denial of his motion for appropriate relief (MAR) due to a flaw in

the indictment, arguing that the indictment failed to allege a legal entity capable of owning property. The Court of Appeals affirmed the denial of defendant's MAR.

The basis of defendant's argument arose from his conviction for breaking and entering, felony larceny, and felony possession of goods in 1994, after defendant stole a television, VCR, and microwave from what the indictment identified as "Graham County Schools," with the additional location identified as "Robbinsville Elementary School." When defendant was subsequently indicted in 2020 for possession of stolen goods or property and safecracking, and attaining habitual felon status, defendant filed a MAR. Defendant argued that "Graham County Schools" was not a legal entity; the trial court denied the MAR, finding that "Graham County Schools" implied the actual ownership of "Graham County Board of Education." Slip Op. at 2-3.

The court explained that North Carolina law does require identification of an entity capable of owning property, but "larceny indictments have been upheld where the name of the entity relates back or 'imports' an entity that can own property." *Id*. at 5. Referencing *State v. Ellis*, 368 N.C. 342 (2015), the court noted that a larceny indictment listing "North Carolina State University" was upheld although the statute only identifies N.C. State University as a constituent institution of the University of North Carolina. Slip Op. at 6. Here, the court found that "Graham County Schools" similarly imported the Graham County Board of Education.

Nature of location is an essential element for G.S. 14-277.2 possession of a dangerous weapon at a demonstration charge.

State v. Reavis, 2022-NCCOA-909, ___ N.C. App. ___ (Dec. 29, 2022). In this Chatham County case, the Court of Appeals overturned defendant's conviction for possession of a firearm at a demonstration, finding that the indictment failed to specify the type of land where the violation took place.

Defendant attended a protest in Hillsborough over the removal of a confederate monument in 2019. During the protest, an officer observed defendant carrying a concealed firearm. Defendant was indicted for violating G.S. 14-277.2, and at trial moved to dismiss the charges, arguing that the misdemeanor statement of charges was fatally defective for not specifying the type of location for the offense, specifically the required location of a private health care facility or a public place under control of the state or local government. Defendant's motion was denied, and she was convicted of the misdemeanor.

Reviewing defendant's appeal, the court agreed with defendant's argument that her indictment was defective. Although the state moved to amend the location in the statement of charges, and the superior court granted that motion, the Court of Appeals explained that this did not remedy the defect. The court explained that "if a criminal pleading is originally defective with respect to an essential element . . . amendment of the pleading to include the missing element is impermissible, as doing so would change the nature of the offense." Slip Op. at 8-9. The court looked to analogous statutes and determined that the specific type of location for the offense

was an essential element of G.S. 14-277.2, and that the state had failed to specify the location in either the statement of charges or the police report provided with the statement. Instead, the statement and police report simply listed the street address and described the location as "[h]ighway/[r]oad/[a]lley/[s]treet/[s]idewalk[,]" failing to specify the essential element related to the type of location. *Id*. at 16-17.

Judge Inman concurred only in the result.

Trial court failed to utilize *Waller* test or make sufficient findings of fact to support closure of courtroom; city ordinance was not properly pleaded where charging documents did not include the caption of the ordinance.

State v. Miller, COA22-561, ___ N.C. App. ___ (Feb. 21, 2023). In this Union County case, defendant appealed his convictions for attempted first degree murder, going armed to the terror of the people, possession of a handgun by a minor, and discharge of a firearm within city limits, arguing error by insufficient findings to justify closure of the courtroom and by denial of his motion to dismiss the discharge of a firearm charge. The Court of Appeals agreed, remanding the case and vacating the discharge of a firearm conviction.

In August of 2018, defendant was armed and riding in a car with other armed occupants near a neighborhood basketball court. Defendant was seated in the front passenger seat, and when the vehicle passed a group of pedestrians walking to the basketball court, defendant leaned out the window and began shooting. One bullet hit a pedestrian but did not kill him. During the trial, the prosecution moved to close the courtroom during the testimony of two witnesses, the victim and another witness who was present during the shooting, arguing this was necessary to prevent intimidation. The trial court granted this motion over defendant's objection but allowed direct relatives of defendant and the lead investigator to be present during the testimony.

The Court of Appeals found that the trial court failed to utilize the four-part test from *Waller v. Georgia*, 467 U.S. 39 (1984), and failed to make findings sufficient for review to support closing the courtroom. The *Waller* test required the trial court to determine whether "'the party seeking closure has advanced an overriding interest that is likely to be prejudiced, order closure no broader than necessary to protect that interest, consider reasonable alternatives to closing the procedure, and make findings adequate to support the closure.'" Slip Op. at 4, quoting *State v. Jenkins*, 115 N.C. App. 520, 525 (1994). In the current case, the trial court did not use this test and made no written findings of fact at all. As a result, the Court of Appeals remanded for a hearing on the propriety of the closure using the *Waller* test.

Turning to defendant's motion to dismiss, the court found that the arrest warrant and indictment were both defective as they did not contain the caption of the relevant ordinance. Under G.S. 160A-79(a), "a city ordinance . . . must be pleaded by both section number and caption." *Id*. at 8. Here, the charging documents only reference the Monroe city ordinance by

number and failed to include the caption "Firearms and other weapons." The court found the state failed to prove the ordinance at trial, and vacated defendant's conviction for the discharge of a firearm within city limits charge.

Specific description of lawful duty being performed by officer not necessary for charge of speeding to elude arrest.

State v. McVay, 2022-NCCOA-907, ___ N.C. App. ___ (Dec. 29, 2022). In this Mecklenburg County case, the Court of Appeals found no error by the trial court when denying defendant's motion to dismiss for insufficient evidence.

In November of 2016, a Charlotte-Mecklenburg police officer received a call from dispatch to look out for a white sedan that had been involved in a shooting. Shortly thereafter, the officer observed defendant speed through a stop sign, and the officer followed. Defendant continued to run stop signs, and after the officer attempted to pull him over, defendant led officers on a high-speed pursuit through residential areas until he was cut off by a stopped train at a railroad crossing. Defendant was indicted and eventually convicted for felonious speeding to elude arrest.

On appeal, defendant argued that the trial court erred by failing to dismiss the charge, because the state did not admit sufficient evidence showing the officer was lawfully performing his duties when attempting to arrest defendant. The crux of defendant's argument relied on the language of the indictment, specifically that the officer was attempting to arrest defendant for discharging a firearm into an occupied vehicle. Although defendant argued that evidence had to show this was the actual duty being performed by the officer, the court explained that the description of the officer's duty in the indictment was surplusage. Although the state needed to prove (1) probable cause to arrest defendant, and (2) that the officer was in the lawful discharge of his duties, it did not need to specifically describe the duties as that was not an essential element of the crime, and here the court found ample evidence of (1) and (2) to sustain the conviction. Slip Op. at 9-10. The court also found that defendant failed to preserve his jury instruction request on the officer's specific duty because the request was not submitted in writing.

Evidence

Trial court properly admitted recording of defendant's voice after authentication by sergeant familiar with PayTel system.

State v. Steele, 2022-NCCOA-686, 286 N.C. App. 136 (Oct. 18, 2022). In this Forsyth County case, defendant appealed his convictions for intimidating or interfering with witnesses and obtaining

habitual felon status, arguing that the trial court erred by admitting a recording of his phone call. The Court of Appeals disagreed, finding no error.

Defendant was indicted for calling a witness while he was being held at the Forsyth County Detention Center and attempting to convince her not to testify, even though she had been subpoenaed. The State offered a disc containing a recording made by the detention center's PayTel system of a call from defendant to the witness, and authenticated the disc through the testimony of a sergeant familiar with the operation of the system who created the disc. The system automatically recorded calls and matched them with a number assigned to each detainee. The State then offered the testimony of two other officers who were familiar with the voice of defendant to support that it was his voice on the recording.

Reviewing defendant's argument, the court noted that the exhibit was admitted after being authenticated by the sergeant familiar with its creation. Defendant argued that the State had offered insufficient testimony to identify his voice. This was a confused argument, the court explained, as the recording was admitted, along with PayTel spreadsheet information regarding defendant's ID number, before the testimony of the officer in question. Because the recording was admitted by the trial court before the testimony attempting to identify defendant's voice, defendant's basis for challenging the admission of the recording was irrelevant and had no bearing on the propriety of the trial court's decision to admit the exhibit. Slip Op. at 10. As such, the trial court did not abuse its discretion admitting the recording and committed no error.

Judge Tyson concurred in the result by separate opinion, noting defendant did not show "any basis or prejudice to reverse the trial court's judgment." *Id*. at 12.

Prior breaking and entering incident was sufficiently similar, held probative value for defendant's intent, and was not too remote in time for admission under Rule 404(b); video surveillance tape was properly authenticated by investigating officer's testimony.

State v. Jones, COA22-151, ___ N.C. App. ___ (March 21, 2023). In this New Hanover County case, defendant appealed his convictions for possession of burglary tools and attempted breaking and entering, arguing error in admitting evidence of a 2018 breaking and entering incident. The Court of Appeals found no error.

In November of 2020, defendant entered the backyard of a Wilmington home and attempted to open the door of a storage shed. The homeowner's security camera alerted the homeowner, who then called 911. Defendant was later found by police in a neighbor's yard with bolt cutters and a box cutter with a screwdriver head. During the trial, the prosecution introduced evidence of a 2018 incident where defendant pleaded guilty to breaking and entering a residential shed using a small knife. Despite defendant's objections, the trial court admitted evidence of defendant's guilty plea to the 2018 incident, as well as testimony from the investigating officer and surveillance video from the 2018 incident.

On appeal, defendant first argued error by the trial court in admitting the testimony and video evidence of the 2018 incident. The Court of Appeals disagreed, finding that the testimony and evidence were relevant and admissible under Rule 404(b) and not unfairly prejudicial under Rule 403. The court first examined defendant's argument that the 2018 incident was not sufficiently similar to the 2020 incident to justify admitting the evidence. Using *State v. Martin*, 191 N.C. App. 462 (2008) as a guiding example, the court noted that here the similarities of breaking into a shed, after midnight, using similar tools, clearly met the Rule 404(b) requirement of similarity. Slip Op. at 12-13. The court also found the other two elements of Rule 404(b) were satisfied by the 2018 incident, as the prior incident had probative value for defendant's intent to break into the shed, and the gap in time between the two incidents was not unusually long based on applicable precedent. After establishing admissibility under Rule 404(b), the court performed the Rule 403 analysis, finding no abuse of discretion in the trial court's weighing of the danger of unfair prejudice verses probative value, and noting that the trial court carefully handled the process.

Defendant's second argument on appeal was that the 2018 video surveillance evidence was not properly authenticated. The court again disagreed, noting that under Rule of Evidence 901, tapes from surveillance cameras can be authenticated as "the accurate product of an automated process" as long as "[e]vidence that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process" is admitted to support the video. *Id*. at 21, quoting *State v. Snead*, 368 N.C. 811, 814 (2016). Here the court found that the investigating officer's testimony in support of the video satisfied the requirements for authentication. Additionally, the court noted that even if the video was not properly authenticated, defendant could not show prejudice due to the large amount of evidence supporting his conviction.

Admission of police officers' lay opinion on defendant's appearance in surveillance footage was not error.

State v. Taylor, 2022-NCCOA-910, ___ N.C. App. ___ (Dec. 29, 2022). In this Nash County case, defendant appealed his convictions for discharging a weapon into occupied property inflicting serious injury and possession of a firearm by a felon, arguing that the trial court erred by (1) allowing lay opinion testimony by police officers, (2) denying defendant's motion to dismiss the discharging a firearm charges, and (3) admitting testimony that defendant was not cooperative during the investigation. The Court of Appeals found no error.

Defendant was convicted for the 2017 shooting of a home in Rocky Mount that injured the homeowner. The homeowner and victim of the injuries provided police with surveillance video from the home that showed a man matching the appearance of defendant, as well as a vehicle police later found defendant driving. At trial, the state offered testimony from several police officers identifying defendant in the surveillance footage. Defendant objected but the trial court overruled these objections. Defendant did not object to the testimony from one officer that defendant did not answer questions from a detective.

The Court of Appeals reviewed issue (1) in light of Rule 701, using the rubric from *State v. Belk*, 201 N.C. App. 412 (2009), explaining that the testimony was admissible as the officers had encountered defendant before and the quality of the video was low, so the identifying features highlighted by the officers weighed in favor of admissibility. Slip Op. at 8-9. Turning to issue (2), defendant argued that the state failed to put forward evidence showing a bullet he fired struck the victim; the court disagreed, noting that surveillance footage showed a person identified by witnesses as defendant standing near the home and firing shots in the direction of the house. The only other person visible on the footage did not appear to fire a shot, meaning evidence supported the inference that defendant fired a bullet that hit the victim. Finally, considering (3), the court did not find plain error, as the prosecutor did not ask the witness to comment on defendant's lack of answers, and did not rely on the testimony to establish any element of the crime or defendant's ultimate guilt.

Admission of arresting officer's testimony regarding specific blood alcohol concentration as a result of HGN test was harmless error due to overwhelming evidence supporting intoxication; admission of non-testifying expert's report was proper as the basis of testifying expert's opinion.

State v. Watson, 2022-NCCOA-687, 286 N.C. App. 143 (Oct. 18, 2022). In this Robeson County case, defendant appealed his conviction for driving while impaired, arguing the trial court erred by admitting a toxicology report without authentication and allowing the arresting officer to testify to defendant's specific blood alcohol concentration. The Court of Appeals found no prejudicial error by the trial court.

In September of 2018, defendant was stopped by an officer due to a partially obstructed license plate; after stopping defendant, the officer noticed glassy eyes and slurred speech, leading to a horizontal gaze and nystagmus ("HGN") test. Defendant performed poorly on the test, and a later toxicology blood test found that defendant's blood alcohol concentration was 0.27. At trial, the arresting officer testified about the results of the HGN test, saying "[t]here's a probability that he's going to be a .08 or higher, 80% according to the test that was done." Slip Op. at 3. Also, during the trial, the SBI agent responsible for preparing the report on defendant's toxicology test was not available to testify, so another agent performed an administrative and technical review of the report and was permitted to testify as an expert about the results. The report was admitted despite defendant's objection.

Reviewing defendant's appeal, the court first noted that Rule 703 of the North Carolina Rules of Evidence does not require the testifying expert to be the person who performed the test, explaining "[a]n expert may properly base his or her opinion on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field." *Id*. at 5, quoting *State v. Fair*, 354 N.C. 131, 162 (2001). Here the report was admitted as the basis of the testifying expert's opinion, not as substantive evidence, within the scope of applicable precedent around Rule 703. The court also noted that defendant had ample opportunity to

cross-examine the expert on the basis of her opinion and her credibility in front of the jury, avoiding any confrontation clause issues.

The court found that admitting the arresting officer's testimony regarding defendant's specific blood alcohol level after conducting an HGN test was error, but harmless error. There are two bases under G.S. 20-138.1 to convict a defendant for impaired driving; subsection (a)(1) and (a)(2) are distinct and independent grounds for conviction of the same offense. *Id*. at 10, citing *State v. Perry*, 254 N.C. App. 202 (2017). The court noted that overwhelming evidence of both prongs was present in the record, and specifically the second prong, driving with an alcohol concentration of 0.08 or more, was supported by expert testimony unrelated to the officer's testimony. Finding no reasonable possibility the jury could have reached a different conclusion, the court upheld the verdict.

Criminal Offenses

Clear and positive evidence of each element of larceny justified denial of defendant's requested jury instruction on attempted larceny.

State v. Sisk, 2022-NCCOA-657, 285 N.C. App. 637 (Oct. 4, 2022). In this McDowell County case, defendant appealed his conviction for felony larceny, arguing the trial court erred by denying his request for a jury instruction on the lesser included offense of attempted larceny. The Court of Appeals found no error with the trial court.

In September of 2018, defendant placed several items in a shopping cart at a Tractor Supply store, then pushed the items through the anti-shoplifting alarms and out into the parking lot to a vehicle, disregarding staff who yelled after him that he had not paid for the items. When defendant reached the waiting car, he loaded the items into the back seat; however, after an argument with the driver, defendant threw the items out of the car into the parking lot and the vehicle drove away with defendant inside. When the matter reached trial, defendant was convicted of felony larceny under G.S. 17-72(b)(6) because had previously been convicted of four misdemeanor larceny offenses.

The court examined the trial court's denial of the instruction on attempted larceny, noting that in North Carolina a judge must submit a lesser included offense to the jury unless "the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense." Slip Op. at 6-7, quoting *State v. Peacock*, 313 N.C. 554, 558 (1985). Outlining each element of common law larceny, the court explained that it consisted of (1) taking of property, (2) carrying it away, (3) without the owner's consent, and (4) with the intent to deprive the owner of the property. The court then walked through each element, as the defendant clearly took the property out the doors of the Tractor Supply store, disregarding the anti-shoplifting alarms and warnings from staff, and proceeded

to a waiting car in the parking lot. Although defendant argued that leaving the items in the parking lot showed only an attempt at larceny, the court disagreed, explaining "the larceny was completed *before* Defendant removed the items from the vehicle and abandoned them." *Id*. at 10. Because the evidence in the record clearly showed each element of larceny, the court held that an instruction on attempted larceny was not required.

Testimony by officer in pursuit of defendant was sufficient evidence to support conviction with aggravating factor of speeding in excess of 15 mph over the speed limit.

State v. Chisholm, COA22-659, ___ N.C. App. ___ (May 2, 2023). In this Cabarrus County case, defendant appealed her convictions for felony speeding to elude arrest, arguing error in denial of her motion to dismiss for insufficient evidence of speeding in excess of 15 mph over the speed limit. The Court of Appeals found no error.

In September of 2018, defendant was pulled over by officers for an expired plate. During the traffic stop, defendant failed to provide a license or registration, and gave the officers an incorrect name, but the officers determined her correct name through a search on their computer terminal. The officers asked defendant to confirm her name 20-30 times, but she refused; after this exchange, one of the officers struck the window attempting to remove defendant from the vehicle, and at that point defendant sped off from the traffic stop. The officers pursued defendant, and although she initially eluded them by driving at a high rate of speed, she eventually crashed and was discovered by the officers. Two aggravating factors elevated defendant's offense to a felony, (1) speeding in excess of 15 mph over the speed limit, and (2) driving with a revoked license.

The only issue on appeal was whether sufficient evidence was admitted to show speeding in excess of 15 mph over the speed limit, as defendant stipulated that her license was revoked at the time of the incident. The Court of Appeals examined three elements, whether the prosecution admitted sufficient evidence of: (1) the posted speed limit on the relevant highway, (2) defendant's speed eluding arrest, and (3) the officers' precise speed in pursuit of defendant. Examining (1), the court explained that testimony from one of the officers regarding the posted speed limit established substantial evidence that the limit was 45 mph. Turning to (2), the court noted that testimony from one of the officers regarding an estimated speed for the defendant was adequate to support the allegation that defendant was traveling in excess of 15 mph over the speed limit. The court found the officer had a "reasonable opportunity" to observe the speed of defendant's vehicle, and any question about the credibility of the officer's testimony was one for the jury, not a matter of admissibility. Slip Op. at 13-14. Finally, considering (3), the court found that while no direct testimony established the speed of the officers in pursuit, sufficient evidence of guilt was present, including a photograph of the serious wreck of defendant's car, and the testimony offered by the officer regarding her excessive speed. As a result, the court found sufficient evidence to support each element of the offense and no error.

Subjective element of "true threat" for communicating threats charge was satisfied by charging document and jury instructions tracking language of G.S. 14-277.1, including "willfully threaten."

State v. Guice, 2022-NCCOA-682, 286 N.C. App. 106 (Oct. 18, 2022). In this Buncombe County case, defendant appealed his conviction for communicating threats, arguing that his words did not constitute a true threat and the trial court erred by denying his motion to dismiss and request for a jury instruction on true threats. The Court of Appeals found no error by the trial court.

In May of 2020, a resident at an Asheville apartment complex called security because she heard a disturbance in the neighboring apartment. When security arrived to investigate, defendant opened the apartment door and was aggressively hostile to the security officer, getting into the officer's face and threatening to beat him. At trial, the security officer testified that he believed defendant was going to carry out the threat due to his body language and anger during the interaction. Defendant was subsequently convicted by a jury of the communicating threats charge.

The Court of Appeals first considered whether the charging document contained sufficient facts to allege a "true threat" unprotected by the First Amendment, explaining that there are "objective and subjective" elements to the true threat analysis. Slip Op. at 6. Because the charging document tracked the text of G.S. 14-277.1 and contained "willfully threaten," the court found the subjective element present and sufficient to support the offense charged. *Id*. at 8. The court then turned to the motion to dismiss, finding that the testimony in the record was sufficient to support the conclusion that defendant had the specific intent to make a threat against the security guard. The court last turned to the requested jury instruction and applied a similar analysis from the charging document. The court concluded that the jury instruction contained all elements of the offense, noting "[t]he subjective component, or specific intent, of true threats is covered by defining the phrase of willfully threaten as 'intentionally or knowingly' 'expressi[ng] . . . an intent or a determination to physically injure another person.'" *Id*. at 12.

Sentencing

Order of restitution was not abuse of discretion where defendant presented no evidence of her inability to repay; G.S. 15A-1340.36(a) does not specify procedure for hearing from defendant regarding ability to pay restitution.

State v. Black, COA22-426, ___ N.C. App. ___ (Feb. 21, 2023). In this Buncombe County case, defendant argued error by the trial court when ordering that she pay restitution of $11,000. The Court of Appeals found no error and affirmed the judgment.

The current opinion represents the second time this matter came before the Court of Appeals; previously defendant appealed her convictions of possession of a stolen motor vehicle and attempted identify theft after pleading guilty, arguing mistakes in calculating her prior record level and error in ordering a civil judgment for attorney's fees without permitting defendant to be heard. In *State v. Black*, 276 N.C. App. 15 (2021), the court found error by the trial court on both issues and remanded for resentencing while vacating the attorney's fees. After the trial court's hearing on remand, defendant brought the current appeal, arguing that the trial court erred because it did not hear from her or consider her ability to pay before ordering the $11,000 restitution.

The Court of Appeals disagreed with defendant, noting that defendant did not present evidence of her inability to pay the restitution, and the burden of proof was on her to demonstrate an inability to pay. The applicable statute, G.S. 15A-1340.36(a), requires the trial court to consider the defendant's ability to pay restitution, but does not require any specific testimony or disclosures from defendant. Looking at the record, the court found no abuse of discretion by the trial court, explaining that defendant even conceded "she previously stipulated to the $11,000 restitution amount set out in the May 2019 Restitution Worksheet." Slip Op. at 6.