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Criminal Law Update

2009 Summer District Court Judges Conference
(includes cases decided through June 2, 2009)

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

Search & Seizure

Grounds to Stop

Officer Did Not Have Reasonable Suspicion to Stop Vehicle When Sole Indicator of Impaired Driving Was Vehicle's Weaving Within Lane

State v. Fields, ___ N.C. App. ___, 673 S.E.2d 765 (17 March 2009), *temporary stay allowed,* ___ N.C. ___ (2 April 2009). Around 4:00 p.m., an officer followed the defendant's vehicle for about one and a half miles. On three separate occasions, the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane. The officer stopped the vehicle for impaired driving. The court ruled that the officer did not have reasonable suspicion to stop the vehicle. The vehicle's weaving within its lane, standing alone, was insufficient to support reasonable suspicion. The court noted that the facts in this case were clearly distinguishable from the circumstances in State v. Jacobs, 162 N.C. App. 251 (2004) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving within lane at 1:43 a.m. in area near bars), and State v. Watson, 122 N.C. App. 596 (1996) (reasonable suspicion of impaired driving existed when defendant's vehicle was weaving within lane and driving on dividing line of highway at 2:30 a.m. near nightclub). In this case, the officer did not see the defendant violating any laws such as driving above or significantly below the speed limit. Furthermore, the defendant's vehicle was stopped about 4:00 p.m., which is not an unusual hour, and there was no evidence that the defendant was near any places to purchase alcohol.

Officer Did Not Have Reasonable Suspicion to Stop Vehicle for Reckless or Impaired Driving Based on Content of Uncorroborated Anonymous Telephone Call to Dispatcher and Officer's Observation of Weaving Within Lane

State v. Peele, ___ N.C. App. ___, 675 S.E.2d 682 (5 May 2009), *temporary stay allowed,* ___ N.C. ___ (20 May 2009). At approximately 7:50 p.m. on April 7, 2007, an officer responded to a dispatch concerning "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the truck for about a tenth of a mile and seeing the truck weave within its lane once, the officer stopped the truck. The court ruled that the officer did not have reasonable suspicion to stop the truck. The court noted that there was no information identifying the caller, what the caller had seen, or where the caller was located. The officer's observation of the truck's weaving with a lane once did not corroborate the caller's assertion of careless or reckless driving.

Officer Had Reasonable Suspicion to Conduct Investigatory Stop Based on Information That Occupant Had Recently Committed Assault

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). An officer responded to an assault call from a motel at about 3:30 a.m. The victim told the officer that the suspect was a tall white male who left in a small dark car driven by a white female with blonde hair. The officer looked in the vicinity for about ten minutes and then saw a small, light-colored vehicle operated by a white female with blonde hair and driving away from the motel. The officer saw the vehicle enter the center turn lane and make an abrupt left turn into a parking lot and drive hastily over rough pavement. The driver was outside the vehicle when the officer approached. The officer saw a person in the passenger seat but could not determine whether the passenger was male or female. The officer directed the driver to come to his vehicle so he could ask her questions about the assault. She was eventually arrested for DWI. The court ruled, relying on State v. Allison, 148 N.C. App. 702 (2002), and distinguishing State v. Hughes, 353 N.C. 200 (2000), that the officer had reasonable suspicion to conduct an investigatory stop based on the information supplied by the assault victim and the officer's observations. The court stated that although the record did not reveal the victim's name or give details about the victim's encounter with the officer, a face-to-face encounter with a crime victim affords a higher degree of reliability than an anonymous telephone call. In addition to the victim's information, the officer saw the driver's hurried actions that indicated the driver was trying to avoid him. In addition, the car was near where the assault had occurred. The fact that the car was light-colored and not dark-colored as described by the victim did not detract from a finding of reasonable suspicion under all the circumstances.

Officer Had Reasonable Suspicion of Criminal Activity to Stop Vehicle

State v. Hudgins, ___ N.C. App. ___, 672 S.E.2d 717 (17 February 2009). An officer received a call from dispatch at approximately 2:55 a.m. informing him that a man (hereafter, caller) was driving his car and being followed by another vehicle. The caller did not identify himself but stated he was being followed by a man armed with a gun in the vicinity of a specified intersection in Greensboro. The caller described the vehicle by make, model, and color, and provided updates on the location. The officer advised the dispatcher to direct the caller to Market Street so he could intercept them. The officer arrived there and saw the two vehicles at a red light. The officer activated his lights and siren, which caused both vehicles to stop, and approached the vehicle that was following the caller. The caller did not identify himself but exited his vehicle and identified the driver of the other vehicle as the man who had been following him. The officer removed the defendant from his car. The court ruled, relying on State v. Maready, 362 N.C. 614 (2008), that the officer had reasonable suspicion of criminal activity to stop the defendant's vehicle: (1) the caller telephoned police and remained on the telephone for about eight minutes; (2) the caller provided specific information about the vehicle following him and the location; (3) the caller carefully followed the instructions of the dispatcher, which allowed the officer to intercept the vehicles; (4) the defendant followed the caller over a peculiar and circuitous route that doubled back on itself, going in and out of residential areas between 2:00 a.m. and 3:00 a.m.; (5) the caller remained on the scene long enough to identify the defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, the caller placed his anonymity at risk.

Officers Had Reasonable Suspicion to Make Investigatory Stop of Vehicle—Ruling of Court of Appeals Is Reversed

State v. Maready, 362 N.C. 614, 669 S.E.2d 564 (12 December 2008), *reversing*, 188 N.C. App. 169, 654 S.E.2d 769 (15 January 2008). The defendant was convicted of second-degree murder and other charges involving a vehicle crash in which the defendant was driving impaired. Two officers were on patrol and saw an apparently intoxicated man walking along a road. The man was staggering near the roadway, so the officers began driving toward him. As they did so, the officers saw in the opposite lane a

minivan being driven at a slow speed with its hazard lights activated. Behind the minivan was a Honda Civic. The intoxicated man ran across the roadway and got into the Honda. After passing the minivan, which had stopped, the Honda continued down the road. The officers turned around, and as they pulled alongside the minivan, its driver signaled them to get their attention. The minivan driver appeared distraught and told the officers that they needed to check on the Honda's driver because he had been driving erratically, running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, which the defendant was found to be driving. The court ruled that the officers had reasonable suspicion of criminal activity to make the stop: (1) The driver of the minivan was in a position to view the alleged traffic violations; a firsthand eyewitness report is an indicator of reliability. Her cautious driving and apparent distress were consistent with a driver having witnessed another motorist driving erratically. (2) The court gave significant weight to the minivan driver's approaching the officers in person and providing information at a time and place near the scene of the alleged traffic violations. She had little time to fabricate her allegations. She was not a completely anonymous informant because she provided the tip through a face-to-face encounter with the officers. It is inconsequential that the officers did not pause to record her license plate number or other identifying information. Not knowing whether the officers would do so, the minivan driver willingly placed her anonymity at risk. Reviewing all the evidence, including the officers' observations, the court concluded that there was reasonable suspicion to make an investigative stop of the defendant's vehicle.

Wildlife Enforcement Officer Had Subject Matter Jurisdiction to Stop Vehicle Driver for Impaired Driving and To Arrest Her For That Offense

Parker v. Hyatt, ___ N.C. App. ___, 675 S.E.2d 109 (21 April 2009). The court ruled that a wildlife enforcement officer had subject matter jurisdiction under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Scope of Actions after Stop

(1) Court Rules That Officers During Routine Traffic Stop May Frisk Driver or Passengers for Whom They Have Reasonable Suspicion To Be Armed and Dangerous; They Need Not Additionally Have Cause to Believe That Any Vehicle Occupant Is Involved in Criminal Activity

(2) Officer's Questions Into Matters Unrelated to Justification for Traffic Stop Do Not Convert Encounter Into Unlawful Seizure As Long As Those Questions Do Not Measurably Extend Duration of Stop

Arizona v. Johnson, 129 S. Ct. 781 (26 January 2009). Three officers, members of a gang task force, were on patrol near a neighborhood associated with the Crips gang. They stopped a vehicle after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation, which under Arizona state law was a civil infraction warranting a citation. There were three occupants in the vehicle: the driver, a front-seat passenger, and the defendant, a backseat passenger. When making the stop, the officers had no reason to suspect anyone of criminal activity. Each officer dealt with one of the occupants. The officer involved with the defendant had noticed on the officers' approach to the vehicle that the defendant had looked back and kept his eyes on the officers. She observed that the defendant was wearing clothing that was consistent with Crips membership. She also noticed a scanner in the defendant's back pocket, which she believed that most people would not carry in that manner unless they were involved with criminal activity or trying to evade law enforcement. The defendant answered the officer's questions (he provided his name and date of birth but had no identification; he said that he had

served time in prison for burglary) and also volunteered that he was from an Arizona town that the officer knew was home to a Crips gang. The defendant complied with the officer's request to get out of the car. Based on her observations and the defendant's answers to her questions, the officer suspected he might have a weapon and frisked him and discovered a gun. (1) The Court reviewed its case law on stop and frisk beginning with Terry v. Ohio, 392 U.S. 1 (1968), particularly noting Pennsylvania v. Mimms, 434 U.S. 106 (1977) (officer may automatically order driver out of lawfully stopped vehicle); Maryland v. Wilson, 519 U.S. 408 (1997) (applying *Mimms* to passengers); and Brendlin v. California, 551 U.S. 249 (2007) (when vehicle is stopped, passengers as well as driver are seized). The Court stated that the combined thrust of these three cases is that an officer who conducts a routine traffic stop may frisk the driver and any passenger for whom they have reasonable suspicion to be armed and dangerous. They need not additionally have cause to believe that any vehicle occupant is involved in criminal activity. (2) An Arizona state appellate court had ruled that while the defendant initially was lawfully seized, before the frisk occurred the detention had evolved into a consensual conversation about his gang affiliation because the officer's questioning was unrelated to the traffic stop. The Arizona court concluded that the officer did not have the right to frisk the defendant—even if she had reasonable suspicion that he was armed and dangerous—absent reasonable suspicion that the defendant had engaged, or was about to engage, in criminal activity. The United States Supreme Court rejected that view and concluded that the seizure of the defendant during this traffic stop was continuous and reasonable from the time the vehicle was stopped to when the frisk occurred. A traffic stop of a vehicle communicates to a reasonable passenger that he or she is not free to terminate the encounter with law enforcement and move about at will. Nothing occurred in this case that would have conveyed to the defendant that before the frisk, the traffic stop had ended or that he was otherwise free to depart without the officer's permission. The officer was not constitutionally required to give the defendant an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Citing Muehler v. Mena, 544 U.S. 93 (2005) (questioning of the plaintiff about her immigration status did not violate the Fourth Amendment because the plaintiff's detention during the execution of the search warrant was not prolonged by the questioning), the Court stated that an officer's questions about matters unrelated to the justification for a traffic stop do not convert the encounter into an unlawful seizure, as long as the questions do not measurably extend the duration of the stop.

(1) Officer Had Reasonable Suspicion of Criminal Activity to Detain Defendant After Vehicle Traffic Stop Had Concluded
(2) Length of Detention of Defendant Was Reasonable Under Fourth Amendment
(3) Defendant-Driver Lacked Standing to Contest Passenger's Consent Search and, Alternatively, Evidence of Passenger's Statement Giving Consent Was Not Inadmissible Hearsay

State v. Hodges, ___ N.C. App. ___, 672 S.E.2d 724 (17 February 2009). Vice detectives were conducting drug surveillance at a residence and also had information from confidential informants about specific drug sellers and drug sales there. They believed that a vehicle leaving the residence contained a buyer of drugs and followed it to Interstate 40. They saw the vehicle apparently speeding and asked an officer on routine patrol on the interstate to make his own observations about the vehicle's speed or another traffic violation and make a vehicle stop if a violation occurred. The officer followed the vehicle, saw it speeding, and turned on his lights to stop the vehicle. One of the detectives in their vehicle noticed the passenger look back at the officer's vehicle and appeared to conceal something underneath the passenger's seat. He radioed the officer that he believed the passenger was hiding either drugs or a weapon under the seat and warned him to be careful. After stopping the vehicle, the officer spoke with the driver (the defendant) and the passenger. The defendant stated that the passenger was his neighbor and identified his first name, which was inconsistent with the passenger's driver's license. The officer issued a verbal warning to the defendant for speeding. The officer further detained both the defendant and passenger and eventually the passenger consented to a search of the vehicle. The court ruled that based on these and other facts set out in its opinion that the officer had reasonable suspicion of criminal activity

(specifically, drugs or other contraband in the vehicle) to detain them after the traffic stop had concluded. (2) The court ruled that the five-minute detention after the traffic stop had concluded was reasonable under the Fourth Amendment. (3) When the officer asked the defendant-driver for consent to search the vehicle, the defendant gave the officer a rental contract in the passenger's name and told the officer that he would have to ask the passenger for consent to search, who then gave a statement that he consented to a search. The defendant argued on appeal that the passenger's statement was inadmissible hearsay. The court first ruled that the defendant waived any standing he may have had to challenge the passenger's consent to search the vehicle. The court noted that the defendant-driver did not assert any ownership interest in the vehicle nor in the items inside. Alternatively, the court ruled that the passenger's statement was not hearsay because it was not offered to prove the truth of the matter asserted. Instead, the statement explained why the officer believed he could conduct the search and his subsequent conduct. [Author's note: Hearsay is admissible in a suppression hearing. See Robert L Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003) at pages 21, 26, and 83. And most courts that have considered the issue have ruled that Crawford v. Washington, 541 U.S. 36 (2004), does not apply to suppression or preliminary hearings. See, e.g., People v. Felder, 129 P.3d 1072 (Colo. App. 2005); Gresham v. Edwards, 644 S.E.2d 122 (Ga. 2007); Sheriff v. Witzenburg, 145 P.3d 1002 (Nev. 2006); State v. Watkins, 190 P.3d 266 (Kan. App. 2007); Vanmeter v. State, 165 S.W. 3d 68 (Tex. App. 2005).]

(1) Officer Had Reasonable Suspicion to Make Investigative Stop of Defendant for Armed Robbery and To Frisk Him for Weapons

(2) Court Remands to Trial Court to Apply Correct Legal Standard in Determining Whether Officer's Seizure of Cocaine During Frisk Satisfied Plain Feel Doctrine Under Fourth Amendment

State v. Williams, ___ N.C. App. ___, 673 S.E.2d 394 (3 March 2009). An officer heard a radio report of an armed robbery that had just occurred at an Hispanic store. Due to language barriers between the victims and law enforcement, there were two conflicting descriptions of the robber. The first described him as a white male wearing a hood and gloves and carrying a silver firearm. The second as an African-American male about six feet tall with a medium build, wearing a green hooded jacket with gloves and carrying a silver gun. Just minutes later, the officer saw the defendant—an African-American male approximately six feet tall with a medium build—a block or two from the robbery location, walking in the same direction that the robber was reportedly traveling, although he was walking down the middle of the street blocking traffic. The defendant was wearing a "blue-green" jacket made of a material that changed colors. He had his hands in his pockets, hood up, and was wearing wrap-around glasses. The officer approached the defendant and asked him to take his hands out of his pockets. The defendant stopped walking, kept his hands in his pockets, and did not say anything. After again ordering the defendant to show his hands, the defendant took them out but also started to empty his pockets. As he was doing so, the officer saw the top of a plastic baggie in one of the pockets. When the officer frisked the defendant, he patted the defendant's front pocket and felt something hard to the touch, round, and possibly a quarter of an inch thick. Based on its feel, the officer believed the object to be a "crack cookie" and removed it. (1) The court ruled, distinguishing State v. Cooper, 186 N.C. App. 100 (2007), that the officer had reasonable suspicion to make an investigative stop of the defendant for armed robbery and to frisk him for weapons. (2) The court remanded to the trial court to apply the correct legal standard in determining whether the officer's seizure of cocaine during the frisk satisfied the plain feel doctrine under Fourth Amendment. The correct standard is whether the officer had probable cause to believe that the object felt during the frisk was an illegal substance, not reasonable suspicion—the standard applied by the trial court in this case. The court cited Minnesota v. Dickerson, 508 U.S. 366 (1993); State v. Shearin, 170 N.C. App. 222 (2005); and State v. Briggs, 140 N.C. App. 484 (2000). [Author's note: If the object had felt like a weapon, then the officer could have removed it without needing to satisfy a probable cause standard.]

Grounds to Arrest

Defendant's Flight from Officer Who Had Ordered Defendant to Stop and for Whom Officer Had Reasonable Suspicion to Make Investigative Stop Provided Probable Cause to Arrest Defendant for Resisting, Delaying, or Obstructing Officer Under G.S. 14-223

State v. Washington, ___ N.C. App. ___, 668 S.E.2d 622 (18 November 2008). Officers were conducting surveillance of a house. The defendant drove his vehicle to the house and another person got into the vehicle as a passenger. The defendant then drove away. Officer A ran a license check of the vehicle and determined that its registration had expired and the vehicle was not covered by liability insurance. The vehicle stopped in the parking lot. Officer A arrested the passenger, for whom there were outstanding felony arrest warrants. Officer B approached the defendant, who had left the vehicle and was walking toward a gasoline station. The officer identified herself and told the defendant that she needed to speak with him. The defendant asked why, and she replied that they had warrants for the passenger's arrest. The officer told the defendant to stop at least three times, but the defendant ran away. The officer did not have the opportunity to explain to the defendant that she needed to speak to him about the expired registration and insurance. The defendant was eventually stopped and then arrested for resisting, delaying, or obstructing an officer under G.S. 14-223 (he was not arrested for the registration and insurance offenses because it was determined before the arrest that the vehicle did not belong to the defendant), and a search incident to arrest discovered illegal drugs. The defendant contended on appeal that the search was unlawful because the arrest was not valid. The court ruled that the officer had reasonable suspicion to make an investigative stop of the defendant for the registration and insurance violations and when the defendant failed to stop when ordered by the officer, there was probable cause to arrest the defendant for a violation of G.S. 14-223; the court relied on the ruling in State v. Lynch, 94 N.C. App. 330 (1989). The court rejected the defendant's argument that the officer's failure to identify to the defendant the reason for her lawful investigative stop rendered the stop unlawful. The court noted that reasonable suspicion is determined by the officer's knowledge before the stop, not the defendant's. The court stated, however, that the officer did not have reasonable suspicion to stop the defendant merely because he was in a vehicle with another person for whom the officers had outstanding arrest warrants.

Scope of Actions after Arrest

Court Rules That Officers May Search Vehicle Incident To Arrest Only If (1) Arrestee Is Unsecured and Within Reaching Distance of Passenger Compartment When Search Is Conducted; or (2) It Is Reasonable To Believe That Evidence Relevant To Crime of Arrest Might Be Found in Vehicle

Arizona v. Gant, 129 S. Ct. 1710 (21 April 2009). The Court ruled that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For an analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf.

Exclusionary Rule

Court Rules That Exclusionary Rule Did Not Bar Admission of Evidence Seized Pursuant to an Arrest Based on Officer's Reasonable Belief There Was an Outstanding Arrest Warrant, Although a Law Enforcement Agency Had Negligently Failed to Enter Warrant's Recall in Its Computer Database

Herring v. United States, 129 S. Ct. 695 (14 January 2009). An officer arrested the defendant based on an outstanding arrest warrant listed in a neighboring county sheriff's computer database. A search incident to arrest discovered drugs and a gun, which formed the basis for criminal charges. However, there was a mistake about the arrest warrant. A court had recalled the arrest warrant, but a law enforcement official had negligently failed to record that fact, although the official did not act recklessly or deliberately in doing so. For the purpose of deciding this case, the Court accepted the parties' assumption that a Fourth Amendment violation had occurred. The Court reviewed its prior case law on the Fourth Amendment's exclusionary rule and discussed it in the context of this case as follows: (1) The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence. The benefits of deterrence must outweigh the costs. (2) The extent to which the exclusionary rule is justified by deterrence principles varies with the culpability of law enforcement conduct. The abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led the Court to initially adopt the rule. And since United States v. Leon, 468 U.S. 897 (1984), the Court has never applied the rule to exclude evidence obtained in violation of the Fourth Amendment when law enforcement conduct was no more intentional or culpable than involved in this case. (3) To trigger the exclusionary rule, law enforcement conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the criminal justice system. The rule serves to deter deliberate, reckless, or grossly negligent conduct or, in some circumstances, recurring or systemic negligence. The error in this case did not rise to that level. The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of law enforcement officers. (4) The Court stated that it did not suggest that all recordkeeping errors by law enforcement are immune from the exclusionary rule. If law enforcement has been reckless in maintaining a warrant system or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified should such misconduct cause a Fourth Amendment violation. But there was no evidence in this case that errors in the computer database were routine or widespread. (5) The Court, in light of its repeated prior rulings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, concluded that when law enforcement mistakes are the result of negligence such as occurred in this case (rather than systemic error or reckless disregard of constitutional requirements), any marginal deterrence does not require application of the exclusionary rule.

Offenses

Domestic Violence

Temporary Restraining Order Entered Under Rule 65(b) of Rules of Civil Procedure Was Not Valid Domestic Violence Protective Order to Authorize Enhanced Sentence Under G.S. 50B-4.1(d)—Ruling of Court of Appeals Is Reversed

State v. Byrd, ___ N.C. ___, 675 S.E.2d 323 (1 May 2009), *reversing*, 185 N.C. App. 597 (2007). The defendant's wife filed a civil complaint seeking divorce from bed and board. She filed with the complaint

a motion for a preliminary injunction under Rule of Civil Procedure 65(a) and also sought a temporary restraining order (TRO) under Rule 65(b). Her complaint and affidavit alleged that the defendant had assaulted her on many occasions. A district court judge on March 11, 2004, issued an ex parte order granting her request for a TRO (ordering the defendant not to assault his wife) and set a hearing date for March 15, 2004. The TRO was properly served on the defendant on March 12, 2004. The defendant moved for a continuance on March 15, 2004, and the hearing and TRO were both continued until March 24, 2004. On March 23, 2004, the defendant shot his wife in the head with a rifle, resulting in serious injury. The defendant was convicted of a Class C felony assault for this act. During the sentencing phase for this conviction, the jury found that the defendant knowingly violated a valid protective order in the same course of conduct involving the felony assault. Based on the jury's finding, the conviction was elevated under G.S. 50B-4.1(d) from a Class C felony to a Class B2 felony for sentencing purposes. The court ruled: (1) the TRO was not a valid protective order under the definition in G.S. 50B-1(c) and rejected the state's argument that the TRO was the functional legal equivalent of a valid protective order under G.S. 50B-2; and (2) even if the TRO had been entered under Chapter 50B, it failed to meet the definition in G.S. 50B-1(c) because it was not entered "upon hearing by the court or consent of the parties." Merely putting the defendant on notice that a TRO had been entered against him did not satisfy the hearing requirement to permit the sentence enhancement. The court stated that in addition to the statutory hearing requirement, due process required a hearing at which the defendant had an opportunity to be heard about the allegations of domestic violence against him.

Assaults

(1) Sufficient Evidence to Prove Defendant's Hands and Fists Were Deadly Weapon and That Serious Injury Was Inflicted to Support Felonious Assault Conviction
(2) Sufficient Evidence to Prove Larceny of Motor Vehicle When Defendant Took Victim's Vehicle to Virginia and Abandoned It There

State v. Allen, ___ N.C. App. ___, 667 S.E.2d 295 (21 October 2008). The defendant was convicted of assault with a deadly weapon inflicting serious injury and larceny of a motor vehicle. (1) The court ruled, relying on State v. Harris, 189 N.C. App. 49 (2008), that there was sufficient evidence to prove that the defendant's hands and fists were a deadly weapon and that serious injury was inflicted to support the felonious assault conviction. The defendant was 25 years old, seven inches taller and 40 pounds heavier than the victim, who was 38 years old. The defendant struck repeated blows to the victim's head and face with his hands and fists. The victim suffered traumatic head injuries and extreme facial bruising and swelling, as well as bleeding from her left ear and nose. Her left eye was swollen shut for over a month, and the insides of her ear and mouth were damaged. She lost consciousness and remained disoriented after she awoke. (2) The court ruled, relying on State v. Kemmerlin, 356 N.C. 446 (2002), that there was sufficient evidence that the defendant committed larceny of the assault victim's motor vehicle. After assaulting the victim, the defendant drove her vehicle to Norfolk, Virginia and abandoned it there. The defendant's abandonment of the vehicle placed the vehicle beyond his power to return it to the victim and showed his indifference whether she ever recovered it.

Sufficient Evidence to Prove Fists and Tree Limbs Used to Assault Victim Were Deadly Weapons

State v. Wallace, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009). The defendant and an accomplice, both female, assaulted a male with fists and tree limbs. The two females individually, but not collectively, weighed less than the male victim, and both were shorter than him. They both were convicted of assault with a deadly weapon inflicting serious injury. The court ruled that the evidence was sufficient to prove that the fists and the tree limbs were deadly weapons.

Sexual Assaults

Assault Is Not Lesser-Included Offense of Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (21 April 2009). The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

Rape and Sexual Offense Indictments Were Not Fatally Defective When They Identified Victim Solely By Her Initials, "RTB"

State v. McKoy, ___ N.C. App. ___, 675 S.E.2d 406 (5 May 2009). The court ruled that rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The indictments tracked the statutory language of rape and sexual offense statutes and G.S. 15-144.1 and 15-144.2. The court noted that the record on appeal demonstrates that the defendant had notice of the identity of the victim. The arrest warrants served on the defendant listed the victim by her initials, "R.T.B.," with periods after each letter. The defendant admitted to law enforcement that he knew R.T.B. The defendant did not argue on appeal that he had difficulty preparing his case because of the use of "RTB" instead of the victim's full name. Thus, it appears that the defendant was not confused concerning the identity of the victim, and therefore the use of "RTB" in the indictments provided the defendant with sufficient notice to prepare his defense. The defendant did not argue on appeal that the use of "RTB" placed him at risk of being subjected to double jeopardy. In any event, the victim testified at trial and identified herself in court. Thus, the defendant was protected from double jeopardy.

(1) Insufficient Evidence to Support Conviction of First-Degree Sexual Offense When State's Evidence Failed to Satisfy Corpus Delecti Rule—Ruling of Court of Appeals Is Affirmed
(2) Trial Judge Did Not Commit Plain Error in Jury Instruction on Indecent Liberties, and Sufficient Evidence Supported Conviction When State's Evidence Satisfied Corpus Delecti Rule—Ruling of Court of Appeals Is Reversed

State v. Smith, 362 N.C. 583, 669 S.E.2d 299 (12 December 2008), *affirming in part and reversing in part*, ___ N.C. App. ___, 660 S.E.2d 82 (6 May 2008). The defendant was convicted of first-degree sexual offense and indecent liberties. (1) The court ruled, distinguishing State v. Parker, 315 N.C. 222 (1985), that there was insufficient evidence to support the defendant's conviction of first-degree sexual offense when the state's evidence failed to satisfy the corpus delecti rule. There was not substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.) (2) The court ruled that the trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge; the court cited State v. Hartness, 326 N.C. 561 (1990). The court also ruled that there was sufficient evidence to support the indecent liberties conviction because there was substantial evidence independent of the defendant's confession. (See the court's discussion of the evidence in its opinion.)

Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That There Was Sufficient Evidence of Dangerous or Deadly Weapon to Support First-Degree Rape Conviction

State v. Lawrence, 363 N.C. 118, ___ S.E.2d ___ (20 March 2009), *affirming*, ___ N.C. App. ___, 663 S.E.2d 898 (5 August 2008). The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that there was sufficient evidence that the defendant possessed a

dangerous or deadly weapon to support his conviction of first-degree rape. The defendant grabbed the victim and told her that he was going to kill her. The victim testified that he then reached into his pocket. She did not see if it was a knife or a gun. She just saw something shiny and silver that she thought was a knife.

Sufficient Evidence of Sexual Act to Support Convictions of First-Degree Sexual Offense

State v. Crocker, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009). The defendant was convicted of three counts of first-degree sexual offense and other offenses. The victim was nine years old when the offenses occurred and eleven years old when she testified. She said that on three separate occasions the defendant reached beneath her shorts and touched between the "the skin type area" in "[t]he area that you pee out of." Also, the defendant rubbed against a pressure point causing her pain and made her feel as if she was about to pass out. The examining pediatrician testified that "with extreme pressure and friction on the outside [of the labia majora] or also on the inside coupled with the complaint of pain, it would be more suggestive of touching these structures on the inside." The court ruled that this evidence was sufficient to prove that the defendant committed a sexual act involving penetration.

Defendant's Cross-Examination of State's Medical Expert Opened Door to Permit Expert's Answer Even Though It Would Otherwise Have Been Inadmissible on Direct Examination

State v. Crocker, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009). The defendant was convicted of three counts of first-degree sexual offense and other offenses. On cross-examination of a state's medical expert, a pediatrician, the defendant asked whether the pediatrician had ever asked the victim if she was telling the truth. The pediatrician responded, "I did not specifically ask her. I felt like what she was telling me was the truth." The court ruled the defendant's cross-examination opened the door to permit the expert's answer even though it would otherwise have been inadmissible on direct examination.

Drug Offenses

Court, Per Curiam and Without Opinion, Reverses Ruling of North Carolina Court of Appeals for Reasons Stated in Dissenting Opinion That Trial Judge Erred in Allowing Detective to Offer Lay Opinion That White Powder Was Cocaine

State v. Llamas-Hernandez, 363 N.C.8 (6 February 2009), *reversing for reasons stated in dissenting opinion*, 189 N.C. App. 640 (15 April 2008). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder seized by officers was cocaine. The substance was not subject to preliminary testing. The identification of the powder was based solely on the detective's visual observations. There was no testimony why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. There also was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

Sufficient Evidence That Defendant Constructively Possessed Cocaine To Support Conviction of Possession of Cocaine—Ruling of Court of Appeals Is Reversed

State v. Miller, 363 N.C. 96, ___ S.E.2d ___ (20 March 2009), *reversing*, ___ N.C. App. ___, 661 S.E.2d 770 (17 June 2008). The court ruled that there was sufficient evidence that the defendant constructively possessed cocaine to support his conviction of possession of cocaine. The court reviewed its case law and stated that the two factors frequently considered in analyzing constructive possession were the defendant's proximity to the drugs and indicia of the defendant's control over the place where the drugs

are found. The court found the following evidence sufficient to support constructive possession: Officers found the defendant in a bedroom of a home where two of his children lived with their mother. When first seen, the defendant was sitting on the same end of the bed where the cocaine was recovered. Once the defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. The defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other person in the room was not near any of the cocaine. Even though the defendant did not exclusively possess the premises, these incriminating circumstances permitted a reasonable inference that the defendant had the intent and capability to exercise control and dominion over cocaine in that room.

(1) Sufficient Evidence to Prove Defendant's Knowing Possession of Marijuana Found in Vehicle
(2) Sufficient Evidence to Support Defendant's Conviction of Conspiracy to Traffic in Marijuana
(3) Trial Judge Did Not Err in Not Instructing on Lesser Included Trafficking Offenses Based on Lesser Amounts of Marijuana

State v. Robledo, ___ N.C. App. ___, 668 S.E.2d 91 (4 November 2008). The defendant was convicted of (i) trafficking in 50 pounds or more but less than 2,000 pounds of marijuana, and (ii) conspiracy to traffic by possessing 50 pounds or more but less than 2,000 pounds of marijuana. Officers intercepted a box (box A) at a UPS store that contained 43.8 pounds. They repackaged it and waited for someone to pick it up. The defendant arrived at the store in a Pontiac Grand Am to pick up another box (box B). Box B was not addressed to the defendant, but he had an authorization note from his niece to receive the box. About a half hour later, the defendant returned to the store in the same vehicle with an alleged co-conspirator (not his niece). The co-conspirator entered the store and requested box A, produced an authorization note from the defendant's niece, and with the defendant's and a store employee's assistance loaded box A into the Pontiac. Officers stopped the Pontiac as it left the store. Box B as well as box A were in the Pontiac. Box B contained 44.1 pounds of marijuana, for a total of 87.9 pounds of marijuana in both boxes. Both boxes had identical packaging inside containing Styrofoam for padding and laundry detergent to prevent detection of the marijuana. The defendant told an officer that he and his niece had previously lived at the same residence and she had received many packages from UPS. He also acknowledged he knew that he would be collecting two boxes that day. Changing the amounts during the interview, he stated that he was expecting to be paid $50, $100, or $200 just for delivering the boxes. (1) The court ruled that there was sufficient evidence to prove the defendant's knowing possession of marijuana found in the two boxes in the vehicle. The evidence supported an inference that the defendant was aware of what the boxes contained, which in turn proved the defendant's knowing possession of the marijuana. (2) The court ruled that there was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana. The court stated that the state's voluntary dismissal of the conspiracy charge against the co-conspirator was irrelevant in determining the sufficiency of evidence to support the defendant's conspiracy conviction. (3) The court ruled that the trial judge did not err in not instructing on lesser included trafficking offenses based on lesser amounts of marijuana. The court noted that the defendant did not present conflicting evidence to suggest that the defendant possessed only one of the two boxes of marijuana to require a lesser-included offense instruction based on an amount less than 50 pounds.

(1) Sufficient Evidence to Support Conviction of Possessing Cocaine
(2) Sufficient Evidence to Support Conviction of Possession of Firearm by Felon
(3) Insufficient Evidence to Support Conviction of Maintaining Dwelling for Purpose of Keeping or Selling Cocaine

State v. Fuller, ___ N.C. App. ___, 674 S.E.2d 824 (21 April 2009). The court ruled: (1) there was sufficient evidence to support the defendant's conviction of possessing cocaine by showing the defendant's constructive possession of the cocaine; (2) there was sufficient evidence to support the

defendant's conviction of possession of a firearm by felon by linking the defendant to the trailer in which the weapon was found; and (3) there was insufficient evidence to support the defendant's conviction of maintaining a dwelling for the purpose of keeping or selling cocaine; the state failed to show that the defendant "maintained" the dwelling where the cocaine was found.

Impaired Driving

(1) State Did Not Have Right to Appeal to North Carolina Court of Appeals a Superior Court's Order Involving a District Court's Preliminary Finding Granting Defendant's Pretrial Motion to Dismiss DWI Under G.S. 20-38.6
(2) Court Rejects Defendant's Constitutional and Other Challenges to District Court DWI Procedures Set Out in G.S. 20-38.6(a), 20-38.6(f), and 20-38.7(a)
(3) Court Offers Interpretations of Statutory Issues
(4) Court Sets Parameters of Remand to Superior Court

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). The defendant was charged with DWI. He made a pretrial motion in district court under G.S. 20-38.6(a) alleging that the arresting officer lacked probable cause to arrest him. The district court entered a preliminary finding granting the pretrial motion under G.S. 20-38.6(f) and ordered dismissal of the DWI charge. The state gave notice of appeal to superior court under G.S. 20-38.7(a). The superior court entered an order finding that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. The superior court further concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded the matter to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. The defendant filed a motion to dismiss the state's appeal. (1) The court ruled that the state did not have a right to appeal the superior court's order to the North Carolina Court of Appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. The legislature did not provide the state with the right to appeal to North Carolina Court of Appeals under these circumstances. However, the court granted the state's petition for certiorari to review the issues in this case. (2) The court rejected the defendant's constitutional and other challenges to G.S. 20-38.6(a) (requires defendant to submit motion to suppress or dismiss pretrial), 20-38.6(f) (requires district court to enter written findings of fact and conclusions of law concerning defendant's pretrial motion and prohibits court from entering final judgment granting the defendant's pretrial motion until after state has opportunity to appeal to superior court), and 20-38.7(a) (allows state to appeal to superior court from district court's preliminary finding indicating it would grant defendant's pretrial motion). See the court's extensive analysis of these issues. (3) In the course of the court's rejection of the defendant's challenges, discussed in (2) above, the court offered its interpretation of other statutory issues. For example, the court recognized that the statutes cited above do not expressly preclude the state from appealing motions to suppress or dismiss made by the defendant during trial based on newly discovered facts. However, the court stated that the legislature's intent was to grant the state a right to appeal to superior court only from a district court's preliminary determination indicating that it would grant a defendant's pretrial motion to suppress evidence or dismiss DWI charges which (i) is made and decided before jeopardy has attached to the proceedings (author's note: before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning any element of the offense or to the defendant's guilt or innocence. The court opined that the legislature intended pretrial motions to suppress evidence or dismiss charges under G.S. 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations on a defendant's access to witnesses, and challenges to chemical test results. On another issue, the court noted that G.S. 20-38.7(a) does not specify a time by which the state must appeal the district court's preliminary finding to grant a motion to suppress or to

dismiss. The court indicated that an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. (4) The court noted that the district court entered a preliminary finding granting the defendant's pretrial motion to dismiss the DWI charge, based on its conclusion that the arresting officer did not possess probable cause to arrest and charge the defendant with DWI. The court stated that a court document showed, however, that a pretrial motion to suppress had been granted. The court inferred that the district court not only considered whether the officer had probable cause to arrest defendant but, further, preliminarily determined whether there was sufficient evidence for the state to proceed against the defendant for DWI (the court noted that a motion to dismiss for insufficiency of evidence cannot be made pretrial). Because there was no indication that the state had an opportunity to present its evidence, the superior court erred when it concluded that it appeared that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in the district court's order. Accordingly, the court remanded the case to superior court with instructions to remand the case to district court to enter a final order granting the defendant's motion to suppress evidence of his arrest for lack of probable cause. Only after the state has had an opportunity to establish a prima facie case may a motion to dismiss for insufficient evidence be made by the defendant and considered by the trial court, unless the state elects to dismiss the DWI charge. When the district court enters its final order on remand granting the defendant's pretrial motion to suppress, the state will have no further right to appeal from that order.

State's Notice of Appeal to Superior Court of District Court's Preliminary Notice of Intention to Grant Defendant's Motion to Suppress in DWI Case Was Properly Perfected

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). The court examined the facts and ruled that the state's notice of appeal to superior court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009), in noting that the procedures in G.S. 15A-1432(b) are a guide but are not binding; instead, an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. See the court's discussion of the facts concerning the state's notice of appeal in this case.

Right to Counsel

Court Overrules *Michigan v. Jackson*, 475 U.S. 625 (1986) (When Defendant Requests Counsel at Arraignment or Similar Proceeding, Officer Is Thereafter Prohibited Under Sixth Amendment from Initiating Interrogation)

Montejo v. Louisiana, ___ S. Ct. ___, ___ L. Ed. 2d ___ (26 May 2009). The Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986) (when defendant requests counsel at arraignment or similar proceeding, officer is thereafter prohibited under Sixth Amendment from initiating interrogation). For an analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/Montejoruling.pdf.

Defendant's Incriminating Statement to Jailhouse Informant, Assumed to Have Been Obtained in Violation of Defendant's Sixth Amendment Right to Counsel, Was Admissible on Rebuttal to Impeach Defendant's Trial Testimony That Conflicted With Statement

Kansas v. Ventris, 129 S. Ct. 1841 (29 April 2009). The Court ruled that the defendant's incriminating statement to a jailhouse informant, assumed to have been obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony that conflicted with statement. [Author's note: The statement would not have been admissible during the

state's presentation of evidence in its case-in-chief.]

Court Remands Case to Trial Court for Consideration Under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), Whether Trial Judge Should Have Exercised Discretion to Deny Defendant's Request to Represent Himself

State v. Lane, 362 N.C. 667, 669 S.E.2d 321 (12 December 2008). The defendant was convicted of first-degree murder and sentenced to death. The court remanded the case to the trial court for consideration under Indiana v. Edwards, 128 S. Ct. 2379 (2008) (United States Constitution does not prohibit states from requiring counsel to represent defendants competent to stand trial but who suffer from severe mental illness to extent that they are not competent to represent themselves at trial) whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. The court outlined two issues that the trial court must decide on remand of this case.

Delay Caused By Appointed Defense Counsel or Public Defender Is Not Attributable To State in Determining Whether Defendant's Sixth Amendment Right to Speedy Trial Was Violated, Unless Delay Resulted From Systemic Breakdown in Public Defender System

Vermont v. Brillon, 129 S. Ct. 1283 (9 March 2009). The Court ruled that delay caused by appointed defense counsel or a public defender is not attributable to the state in determining whether a defendant's Sixth Amendment right to a speedy trial was violated, unless the delay resulted from a systemic breakdown in the public defender system. Assigned counsel are not state actors in determining the speedy trial issue.

Pleadings

Court, Per Curiam and Without Opinion, Summarily Affirms Ruling of Court of Appeals That: (1) Description of Weapon in Charge of Carrying Concealed Weapon Was Surplusage, and (2) Even Assuming Trial Court Erred in Instructing on Weapon Not Alleged in Charge, Court Did Not Commit Prejudicial Error

State v. Bollinger, ___ N.C. ___, 675 S.E.2d 333 (1 May 2009), *affirming*, ___ N.C. App. ___, 665 S.E.2d 136 (19 August 2008). The defendant was charged with carrying a concealed weapon, a metallic set of knuckles. The evidence showed that an officer discovered knives on the defendant's person in addition to the metallic knuckles. The trial court instructed the jury concerning the weapon element as follows: "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that (1) the language in the charge for a carrying concealed weapon describing the weapon as "a Metallic set of Knuckles" was unnecessary and thus surplusage; and (2) even assuming the trial court erred in instructing on a weapon not alleged in the charge, the trial court did not commit prejudicial error to require a reversal of the defendant's conviction. The court noted that in this case there was evidence of knives concealed on the defendant's person.

(1) Indictment Charging Larceny of Church Was Fatally Defective Because It Did Not Indicate That Church Was Legal Entity Capable of Owning Property
(2) Doctrine of Possession of Recently-Stolen Property Was Properly Applied to Charge of Breaking or Entering of Church

State v. Patterson, ___ N.C. App. ___, 671 S.E.2d 357 (6 January 2009). The defendant was convicted of felonious breaking or entering of a church, larceny of property pursuant to the breaking or entering, and felonious possession of stolen goods pursuant to the breaking or entering. The trial judge arrested

judgment for the conviction of possession of stolen goods. (1) The court ruled, relying on State v. Thornton, 251 N.C. 658 (196), and State v. Cathey, 162 N.C. App. 350 (2004), that the indictment charging larceny of the church (alleged as "First Baptist Church of Robbinsville") was fatally defective because it did not indicate that the church was a legal entity capable of owning property. The court noted that this ruling did not apply to the offense of possession of stolen goods. (2) The evidence showed that property stolen from the church—as well as other stolen property and tools often used for breaking and entering—were found in the defendant's exclusive control twenty-one days after the church break-in. The defendant argued on appeal that twenty-one days was not "recent" for application of the doctrine of possession of recently-stolen property, which permits an inference of guilt. The court ruled, distinguishing State v. Hamlet, 316 N.C. 41 (1986), that the doctrine was properly applied to the breaking and entering charge and there was sufficient evidence to support the conviction.

Fatal Variance Existed Between Felonious Larceny Indictment and Evidence Showing Ownership of Stolen Property Did Not Belong to Victim as Alleged in Indictment

State v. Gayton-Barbosa, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). The defendant was convicted of two counts of felonious assault, first-degree kidnapping, felonious larceny, and other offenses. The court ruled that there was a fatal variance between the felonious larceny indictment and evidence showing ownership of stolen property. The victim alleged in the indictment neither owned nor had a special property interest in the stolen property.

Indictment Charging Injury to Real Property, Which Incorrectly Described Lessee of Real Property As Its Owner, Did Not Create Fatal Variance With Evidence Presented at Trial

State v. Lilly, ___ N.C. App. ___, 673 S.E.2d 718 (17 March 2009). The court ruled that an indictment charging injury to real property, which incorrectly described the lessee of the real property as its owner, did not create a fatal variance with the evidence presented at trial. The court relied on the case law concerning larceny indictments, such as the ruling in State v. Liddell, 39 N.C. App. 373 (1979) (no fatal variance when indictment named owner of stolen property and evidence disclosed that person, although not the owner, lawfully possessed the property when the larceny was committed).

Variance Between Period of Time Alleged in Statutory Rape Indictments Within Which Rapes Occurred and Evidence Introduced at Trial Was Not Material and Did Not Deprive Defendant of Opportunity to Adequately Present Defense

State v. Hueto, ___ N.C. App. ___, 671 S.E.2d 62 (20 January 2009). The defendant was indicted on six counts of statutory rape for having sex with the victim: two counts each for the months of June, August, and September 2004. The court ruled, assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July. The variance between the period of time alleged in the indictment within which the offenses occurred and the state's evidence at trial was not material and did not deprive the defendant of the opportunity to adequately present his defense.

Sentencing and Probation

PJC With Certain Conditions Constituted Conviction

State v. Popp, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). The court ruled that a PJC for possession of a handgun on educational property was a conviction because the following conditions were

beyond a requirement to obey the law: the defendant was ordered to abide by a curfew, complete high school, enroll in an institution of high learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology.

Prosecutor's Unsworn Statement Was Insufficient by Itself to Support Award of Restitution

State v. Swann, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009). The court ruled that the trial court erred in ordering the defendant to pay restitution because the award was not supported by competent evidence. The prosecutor presented a restitution worksheet without any supporting documentation. The victim did not testify. The defendant did not stipulate to the award. The prosecutor's unsworn statement about the reason for restitution was insufficient by itself to support the award of restitution.

***Apprendi v. New Jersey* and Later Rulings Do Not Provide Sixth Amendment Right to Jury Trial Under Oregon Law That Requires Findings of Fact to Support Judge's Decision to Impose Consecutive Sentences**

Oregon v. Ice, 129 S. Ct. 711 (14 January 2009). The Court ruled that Apprendi v. New Jersey, 530 U.S. 466 (2000), and later rulings do not provide a Sixth Amendment right to jury trial under an Oregon law that requires findings of fact to support a judge's decision to impose consecutive sentences. [Author's note: North Carolina statutory law does not require a judge to make findings of fact to impose consecutive sentences. The Court made clear that states such as North Carolina are not required to provide a defendant with a jury trial concerning a judge's consecutive sentence decision.]

Trial Court Was Without Jurisdiction to Conduct Probation Revocation Hearing After Probation Term Had Expired Because State Failed to Comply With G.S. 15A-1344(f)

State v. Black, ___ N.C. App. ___, ___ S.E.2d ___ (2 June 2009). (1) The court ruled that the trial court was without jurisdiction to conduct a probation revocation hearing after the probation term had expired because the state failed to comply with the version of G.S. 15A-1344(f) applicable to this case—specifically, the state failed to make reasonable efforts to notify the probationer and to conduct the hearing earlier. [Author's note: S.L. 2009-129, effective for probation revocation hearings conducted on or after December 1, 2008, deleted the state's duty to make reasonable efforts to notify the probationer and to conduct the hearing earlier.]