Summer 2018 Criminal Law Webinar

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ROADMAP

- Stops and Searches
- Crimes
- DWI
- Experts and Evidence
- Criminal Procedure
- Pleadings
- Defenses

STOP!

State v. Downey (NCSC), p. 3

- Stop was for traffic violation
- Officer extended stop on basis of yada, yada, yada*
- Court of Appeals, aff'd by NC Supreme Court, finds reasonable suspicion to extend stop

*nervousness, lack of eye contact, air freshener, prepaid cell phone, car registration to another person, criminal history

State v. Reed, (NC App), p. 4

- Defendant remained unlawfully seized in patrol car after warning ticket was issued
- Continued detention was not consensual or supported by RS
- Dog, dog food, and detritus were "legal activity consistent with lawful travel."

U.S. v. Bowman (4th Cir), p. 5

- ~4am speeding/weaving stop
- "Ok" in response to officer's comment to "Hang tight" was not voluntary consent under the totality of circumstances
- Factors all consistent with lawful travel and didn't support extension of stop

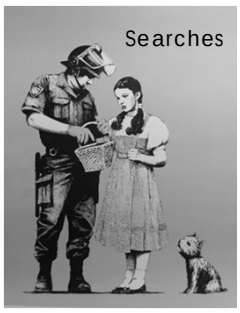
Making Sense of *Rodriguez* Cases?

Downey (RS)	*Reed (NO RS)*	*Bowman (NO RS)*
Significant Nervousness	Some Nervousness	Some Nervousness
Vague Answers	Consistent answers	Vague Answers
Air freshener, prepaid cell	Air freshener	Fast food, energy drinks, messy car
Car not registered to D.	Rental Car	New car but no job
2:00 pm	8:00 am	3:40 am
Criminal History	Criminal History	

Byrd v. U.S. (USSC), Supp. p. 3

- Unauthorized driver of rental car in lawful poss. retains privacy expectation (and has standing)
- Fraud in obtaining vehicle can tip scales to treat unauthorized driver as car thief
- Possible applications?

Searches



State v. Lewis (NC App), p. 7

- PC to search cars in driveway isn't pc to search house where parked
- Affidavit is what matters, not hearing testimony
  - "[W]e acknowledge that the warrant application is missing a key fact known to law enforcement that, if included, would have made this a far easier case."

Collins v. Virginia (USSC), Supp. p. 2

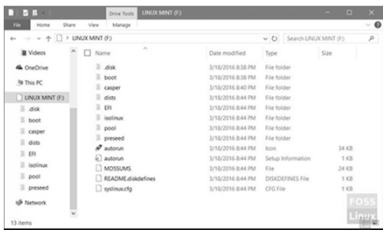
- U.S. Supreme Court holds automobile exception does not apply to searches of a vehicle within the curtilage of a residence
- Open carport next to home properly considered curtilage and warrant needed to search there

State v. Terrell (NC App), p. 9

- Private search doctrine
  - Fourth Amendment not implicated by gov.'s inspection of private effects when that inspection follows private party's search and does not exceed its scope
  - Why? Private party's search frustrates reasonable expectation of privacy
  - United States v. Jacobson, 466 U.S. 109 (1984)
- How does this apply to a flash drive turned over to the government?

State v. Terrell (NC App), p. 9

State v. Terrell (NC App), p. 9



State v. Grady, Supp. p. 10

- Satellite-based monitoring held an unreasonable search for Grady
- No showing of efficacy of program
- No showing of how program advances state's interest in monitoring
- No showing how D's privacy affected

Crimes

S v. Ditenhafer* (NC App), p. 14, 18

- Obstruction of justice, p. 14
  - Was encouraging daughter to recant obstruction?
  - Was denying law enforcement and protective services access to daughter obstruction?
- Accessory after fact to felony, p. 18
  - Principal committed felony
  - D had knowledge that principal committed the felony
  - D provided personal assistance to principal

*Die-ten-hay-fer or Dee-ten-ha-fer?

State v. Bridges (NC App), p. 15

- New exception to the *Ward* Rule
- Defendant's out-of-court admission to nature of substance was sufficient to survive motion to dismiss
- Would an objection have made a difference?

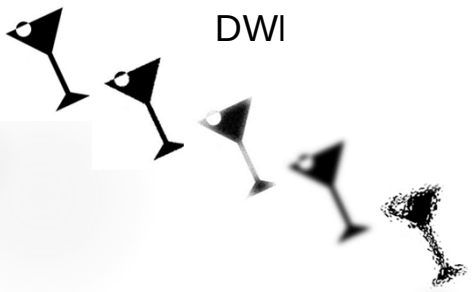
State v. Green (NC App), p. 21

- Defendant was entitled to instruction that DWLR required knowledge of revocation
- D testified that he never received revocation letters
- Said his dad (same name and address) might have received and opened them

How a Misdemeanor Turns into a Felony

- State v. Allen (NC App), p. 17, 31
  - Misdemeanor shoplifting/larceny + misdemeanor trespass = felony breaking and entering
- State v. Howell (NCSC), p. 18
  - Class 1 misdemeanor possession of marijuana + prior controlled substance violation = felony
  - Felony possession + prior felonies = habitual felony

DWI



State v. Eldred (NC App), p. 19

- Scuffed up Jeep Cherokee on side of highway appears to have run off the road and hit rock embankment
- Defendant, who owns car, found 2 miles away walking on highway
- Defendant is twitching, unsteady on feet, says he is "smoked up on meth"
- Defendant questioned at hospital, says he was involved in a wreck a couple of hours ago, says he is on meth
- Sufficient evidence of DWI?

State v. Eldred (NC App), p. 19

- No, says court of appeals
- State failed to present sufficient evidence that Eldred was impaired while he was driving
  - No evidence of when officer found Eldred
  - Officer did not determine whether impairment was from wreck or substance
  - Interviewing officer did not learn when or where Eldred consumed meth or any other substance
  - State did not demonstrate when car ran off road
  - No witness saw Eldred driving

State v. Hines (NC App), p. 39

- Defendant's car was nose-down in ditch
- Defendant smelled of alcohol and could not maintain balance
- Defendant's missing shoe was in driver's side floorboard
- Defendant said he hit the ditch when he ran a stop sign going 60 mph
- D had cut on forehead
- Passed out in bed of truck during investigation
- BAC: .33

State v. Hines (NC App), p. 39

- Sufficient independent corroborating evidence that D had been driving the wrecked vehicle while impaired
  - Car in ditch
  - Shoe
  - No one else there who could have been driving
  - D injured
  - Wreck unexplained
- And sufficient independent evidence of impairment

Experts & Evidence

Opinion Testimony (NC App)

Admissible

- Defendant's out-of-court statement that controlled substance in her possession was meth (Bridges, p. 15)
- State's expert testimony about delayed disclosure by children of sexual abuse (Shore, p. 28)

Inadmissible

- Defendant's testimony that he suffered from several mental disorders, such as ADHD (Solomon, p. 32)
- Defense expert's testimony about fight or flight reactions in self-defense case (Thomas, p. 28)

State v. Fincher (NC App), p. 27

- No foundation establishing the reliability of a Drug Recognition Expert examination is required for DRE officer to testify about conclusions
- Why? Rule 702(a1)(2) eliminates need for Daubert reliablilty review

(a1) Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance with the person's training by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances, if the witness holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services.

State v. Jacobs (NCSC), p. 31

- Supreme Court reverses unanimous COA on Rule 412 issue
- Defense expert testimony showed alleged victim had 2 sexually transmitted infections that the defendant did not
- Expert testimony fell within rape shield exceptions and should have been allowed

Criminal Procedure

State v. Weldon (NC App), p. 11

- Lay ID of person in surveillance video by officer after the fact
- D changed appearance before trial
- Officer was familiar with him, although didn't personally interact with him and wasn't present at time of video

Lay ID rules:

General Rule:

Inadmissible if witness is in no better position than jury to ID; admissible if based on knowledge and perception and helpful to the jury

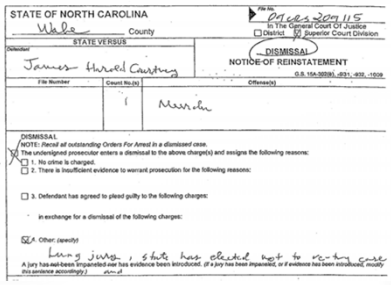
Factors:

1) Witness familiarity with D in general
2) Witness familiarity with D at time of video
3) Whether D disguised at time of video
4) Whether D altered appearance between offense and trial
5) Quality/completeness of images

Rules on Ex Parte Orders for Defendant's Records

- State v. Santifort (NC App), p. 35
- NC State Bar
  - **Officers' Applications for Investigative Orders and the Unauthorized Practice of Law** (May 7, 2018)

State v. Courtney (NC App), p. 4



STATE OF NORTH CAROLINA
Wake County
File No. 04CRS209115
In The General Court Of Justice
☐ District ☒ Superior Court Division
STATE VERSUS
Defendant: James Thrud Courtney
DISMISSAL
NOTICE OF REINSTATEMENT
G.S. 15A-931(a)(3), -931, -932, -1009

File Number	Count No.(s)	Offense(s)
	1	Murder

DISMISSAL
NOTE: Recall all outstanding Orders For Arrest in a dismissed case.
☒ The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:
☐ 1. No crime is charged.
☐ 2. There is insufficient evidence to warrant prosecution for the following reasons:
☐ 3. Defendant has agreed to plead guilty to the following charges:
in exchange for a dismissal of the following charges:
☒ 4. Other: (specify)
being jury, state has elected not to retry case
A jury has not been impaneled nor has evidence been introduced. (If a jury has been impaneled, or if evidence has been introduced, modify this sentence accordingly.) and

S. v. Courtney (NC App), Supp. p. 4

CRIMINAL CODE COMMISSION COMMENTARY

The case of *Klopfer v. North Carolina*, 386 U.S. 213, held in 1967, that our system of "nol pros" was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial. Thus we here provide for a simple and final dismissal by the solicitor. No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, or if jeopardy had attached when the first charges were dismissed.

[New charges] would be prevented . . . if jeopardy had attached when the first charges were dismissed.

S. v. Courtney (NC App), Supp. p. 4

State's Election Rule:

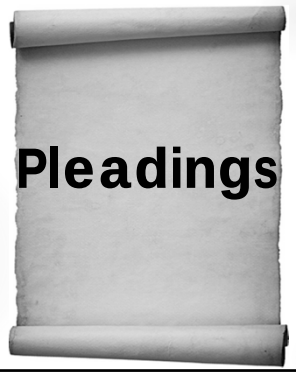
When a prosecutor announces his or her intent to seek conviction only for some of the offenses charged in the indictment or only for lesser included offenses, that announcement becomes binding on the State and is tantamount to an acquittal of charges contained in the indictment but not prosecuted at trial once jeopardy attaches.

Right to Counsel: McCoy v. Louisiana (USSC), Supp. p. 8

The rest of the country catches up with NC and *Harbison*

State v. Wyrick (NC App), p. 35

- Post-arrest "silence" by defendant was proper subject of impeachment and closing argument where defendant told his story for the first time at trial after telling officers he didn't remember the night in question before trial



State v. Brawley (NCSC), p. 23

1. The jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did

STEAL, TAKE AND CARRY AWAY TWO POLO BRAND SHIRTS BY REMOVING THE ANTI-THEFT DEVICE ATTACHED TO EACH SHIRT, THE PERSONAL PROPERTY OF BELK'S DEPARTMENT STORES, AN ENTITY CAPABLE OF OWNING PROPERTY, HAVING A VALUE OF $134.50.

State v. Brawley (NCSC), p. 23

- An allegation that the merchant is a legal entity capable of owing property is sufficient.
- See also *State v. Mostafavi* (NCSC), p. 24
  - Indictment charging defendant with obtaining property by false pretenses sufficiently identified transactions at issue even though it did not specify amount of $$ obtained

Lofton (NC App), p. 25

Pleading and Proving Manufacturing under 90-87(15)

- "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means . . .
- except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use . . . ."

D  S

New Statutory Self-Defense Cases

- S v. Crump (NC App), p. 40, 37
  - Court applies felony disqualification literally
    - **The Statutory Felony Disqualification for Self-Defense** (June 7, 2016)
    - **A Lose-Lose Situation for "Felonious" Defendants Who Act in Self-Defense** (May 1, 2018)
- S v. Lee (NCSC), p. 43
  - Defendant has right to stand ground in any place where "right to be"
    - **Self-Defense and Retreat from Places Where the Defendant Has a "Lawful Right to Be"** (Aug. 29, 2017)

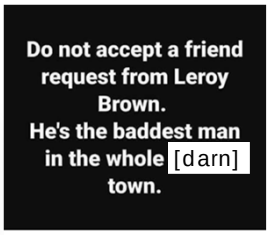
State v. Miller (NC App), p. 42

- Necessity
  - Defendant took reasonable action
  - To protect life, limb or heath of a person
  - No other acceptable choice was available
- Duress
  - Actions caused by reasonable fear that defendant would suffer
  - Immediate death or serious bodily injury
  - If the defendant had not so acted
  - Defendant had no reasonable opportunity to avoid doing the illegal act without undue exposure to death or serious bodily harm

State v. Miller (NC App), p. 42

- Defendant punched baddest [man] in the bar
- Man pulls out gun
- Defendant and wife leave in golf cart, drive down U.S. 1
- Trial court: No evidence of actual fear, so I'm not giving instruction
- Ct of appeals: New trial. Evidence supported both defenses.
- Jury could have concluded that
  - Display of gun presented immediate threat of death or serious bodily injury
  - Driving golf cart on highway was reasonable action to protect life, limb, health
  - Miller had no other acceptable choice to escape danger
  - Also, that defendant was afraid for his life or the lives of others present and that this fear was objectively reasonable

State v. Miller (NC App), p. 42



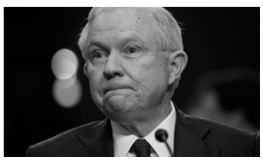
Bonus Material!

S v. Stanley (NC App), Supp. p. 3

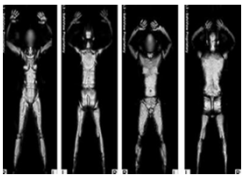
- Knock and Talk at back door violated the 4th Amendment
- Follows *FL v. Jardines* case from U.S. Supreme Court, and *State v. Huddy* from COA last year
- Only in "unusual circumstances" will a back or side door be ok

State v. Smith (NC App), p. 51

- Error to order recusal of entire DA's office *sua sponte* without notice to State
- Standard: Actual Conflict
- Normally includes only specific DA with the conflict



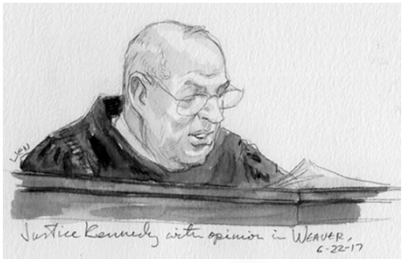
Invasive Searches



- State v. Fuller (NC App), p. 10
  Search incident to arrest that involved viewing the defendant's genital area reasonable under the circumstances; not a roadside strip search
- Contrast with Sims v. Labowitz (4th Cir), p. 8
  Sexual search of minor invalid even with search warrant

State v. Boderick (NC App), p. 46

- Waiver of jury trial where bench trial unavailable = structural error
- New Trial



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THE END