RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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United States Supreme Court

Arrest, Search and Seizure, and Confessions

When Defendant's Probation Condition Authorized Warrantless Search by Probation or Law Enforcement Officer, No More Than Reasonable Suspicion Was Required Under 4th Amendment to Conduct Search [But Note G.S. 15A-1343(b1)(7)]

United States v. Knights, 122 S. Ct. 587 (10 December 2001). The defendant was on probation, which included a condition that he submit to a search at any time—with or without a search or arrest warrant or reasonable cause—by any probation or law enforcement officer. An officer who was aware of this probation condition and had reasonable suspicion that evidence of a crime was in the defendant's apartment, searched it without a search warrant. The Court ruled that no more than reasonable suspicion was required to search the defendant's apartment and thus the officer's warrantless search was reasonable under the 4th Amendment. [Note: G.S. 15A-1343(b1)(7), a special condition of probation, requires that a probationer submit to a warrantless search by a probation officer under the circumstances set out in the statute. It does not authorize a search by a law enforcement officer.]

Court Disavows 9th Circuit's Analysis for Reasonable Suspicion and Rules that Officer Had Reasonable Suspicion to Stop Vehicle for Illegal Activity

United States v. Arvizu, 122 S. Ct. 744 (15 January 2002). A Border Patrol agent stopped a vehicle in Arizona near the border with Mexico to investigate illegal drug and alien smuggling. The Court reviewed the facts and ruled that the agent had reasonable suspicion to stop the vehicle. (See the Court's discussion of the facts in its opinion.) The Court expressly disavowed the method of analysis of the Ninth Circuit Court of Appeals, which had ruled that seven of the ten factors used by the trial court in considering the legality of the stop carried little or no weight in a reasonable-suspicion analysis. The Court stated that the Ninth Circuit's approach departed sharply from the totality-of-circumstances analysis mandated by such cases as United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). The Ninth Circuit appeared to believe that each of the agent's observations that was by itself readily susceptible to an innocent explanation was entitled to no weight. The Court stated that although each of the factors alone is susceptible to innocent explanation, taken together they established reasonable suspicion to stop the vehicle.

Miscellaneous

Due Process Clause Does Not Permit Civil Commitment of Dangerous Sexual Offender Without Any Lack of Control Determination

Kansas v. Crane, 122 S. Ct. 867 (22 January 2002). The Due Process Clause does not permit a civil commitment of a dangerous sexual offender without any lack of control determination. There must be proof of serious difficulty in controlling one's behavior.

Missouri Rule on Requirements for Motion for Continuance Did Not Constitute State Ground Adequate to Bar Federal Habeas Corpus Review

Lee v. Kemna, 122 S. Ct. 877 (22 January 2002). A Missouri rule on the requirements for a motion for a continuance did not constitute a state ground adequate to bar federal habeas corpus review of the defendant's claim that he was deprived of due process by the denial of a continuance.

North Carolina Supreme Court

Criminal Offenses and Criminal Procedure

Trial Judge Properly Ruled That Prior Conviction Used in Habitual Felon Hearing Was Not Obtained in Violation of Right to Counsel—Court of Appeals Ruling Reversed

State v. Fulp, ___ N.C. ___, ___ S.E.2d ___ (1 February 2002), *reversing*, 144 N.C. App. 428, 548 S.E.2d 785 (19 June 2001). The court held that the trial judge properly ruled that a prior conviction used in a habitual felon hearing was not obtained in violation of the defendant's right to counsel. The defendant failed to meet his burden of proving by a preponderance of evidence that he had not waived his right to counsel (see G.S. 15A-980(c)). The court noted, citing State v. Heatwole, 344 N.C. 1, 473 S.E.2d 310 (1996), that a waiver of the right to counsel need not be in writing. G.S. 7A-457(a) ("may, in writing, waive") is directory, not mandatory. The court also stated that although a trial judge must consider the factors in G.S. 7A-457(a) in deciding whether a waiver of counsel is valid, the judge is not required to find and state that it considered those factors. (See the court's discussion of the particular facts in this case to support the trial judge's ruling.)

Trial Judge Did Not Abuse Discretion in Denying Defense Challenge for Cause of Prospective Juror Who Expressed Concern About Potential Financial Impact of Jury Service—Court of Appeals Ruling Reversed

State v. Reed, ___ N.C. ___, ___ S.E.2d ___ (1 February 2002), *reversing*, 143 N.C. App. 155, 545 S.E.2d 249 (17 April 2001). The court ruled, distinguishing State v. Hightower, 331 N.C. 636, 417 S.E.2d 237 (1992), that the trial judge did not abuse her discretion in denying a defense challenge for cause of a prospective juror who had expressed concern about the potential financial impact of jury service. (See the court's discussion of the particular facts in this case to support the trial judge's ruling.)

Court Comments on When Defendant Must Assert Allegation of Ineffective Assistance of Counsel on Direct Appellate Review

State v. Fair, 354 N.C. 131, 552 S.E.2d 568 (5 October 2001). The defendant was convicted of first-degree murder and sentenced to death. On direct appeal, the defendant assigned as error that he was denied the effective assistance of counsel at trial. The court stated that the defendant appeared to treat his ineffective assistance of counsel claim as an issue for preservation. Whether the defendant is in a position to litigate this claim at this time is a determination for the court on his direct appeal. Similarly, whether the defendant has waived his ineffective assistance of counsel claim for the purpose of post-conviction review is a determination for the presiding judge during a motion for a appropriate relief proceeding. (See the additional discussion of this issue in the court's opinion.)

Evidence Was Sufficient to Prove Defendant Constructively Possessed Cocaine Located Between Seat Pads of Vehicle Where Defendant Was Sitting

State v. Matias, 354 N.C. 549, 556 S.E.2d 269 (18 December 2001), *affirming*, 143 N.C. App. 445, 550 S.E.2d 1 (15 May 2001). The defendant was convicted of possession of cocaine. After smelling the odor of marijuana emanating from a car, officers removed the driver and ordered three other occupants from the car. Between the seat pad and back pad in the back right seat where the defendant was sitting, officers found a small clear plastic bag containing marijuana and balled-up tin foil containing cocaine. One officer testified that the defendant was the only person in the car who could have shoved the package containing the cocaine into the crease of the car seat. The court ruled, based on these and other facts, that the evidence was sufficient to prove the defendant's constructive possession of the cocaine to support his conviction.

Insufficient Evidence to Show Defendant Withdrew from Common Plan to Commit Armed Robbery

State v. Wilson, 354 N.C. 493, 556 S.E.2d 272 (18 December 2001). The defendant was convicted of two counts of 1st-degree murder based on premeditation and deliberation and felony murder, the underlying felony being armed robbery. The court ruled that the defendant failed to present sufficient evidence that he had withdrawn from a common plan with an accomplice to commit an armed robbery. Applying the ruling in State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966) (withdrawal from a felony based on aiding and abetting) to this acting in concert case, the court held that a defendant must renounce the common purpose and make it plain to others that he or she has done so and does not intend to participate further. The court noted that here, any withdrawal by the defendant was done silently in his own mind without any outward manifestation or communication with his accomplice. Such evidence was insufficient to withdraw from the prior common plan to commit the armed robbery.

Insufficient Evidence To Support Instruction on Voluntary Intoxication in 1st-Degree Murder Prosecution

State v. Long, 354 N.C. 534, ___ S.E.2d ___ (18 December 2001). The defendant was convicted of 1st-degree murder based on premeditation and deliberation. Although the defendant was

substantially impaired when officers found him several hours after the murder, the defendant did not present any evidence of his condition before or at the time of the murder. The court ruled, based on these and other facts, that there was insufficient evidence to support an instruction on voluntary intoxication.

Defendant Was Not Entitled to Instruction on Self-Defense in Murder Trial

State v. Nicholson, ___ N.C. ___, ___ S.E.2d ___ (1 February 2002). The defendant was convicted of two counts of 1st-degree murder. He shot and killed his wife and a law enforcement officer who was attempting to serve an arrest warrant on him. The trial judge instructed on self-defense, and on appeal the defendant assigned as error issues concerning self-defense. The court ruled that the trial judge erred in instructing on self-defense because the evidence did not support an instruction. The court stated that there was no evidence to support a finding that the defendant in fact formed a belief that it was necessary to kill either his wife or the law enforcement officer to protect himself from death or serious injury. The defendant had testified that he felt afraid and fired two shots into the floor of the trailer as he ran outside. He asserted that he did not intend to hit anyone and denied shooting either his wife or the law enforcement officer. He further testified that he could not have caused the wounds that killed his wife, even when he was firing his weapon, and speculated that her stepfather was actually responsible for the killings.

Arrest, Search and Interrogation Issues

State Properly Cross-Examined Defendant About His Voluntary Statements to Media After His Arrest and About Whether They Were Inconsistent With His Trial Testimony

State v. Fair, 354 N.C. 131, 552 S.E.2d 568 (5 October 2001). The defendant was convicted of 1st-degree murder. The defendant was arrested, advised of his *Miranda* rights (the court assumed that he had been advised of these rights), and volunteered statements to the news media that he didn't kill anybody and hoped they would find the real killer. The defendant testified at trial that he was present when the victim was killed but he was not involved in the killing. The state cross-examined the defendant about the discrepancy between his trial testimony and his statements to the news media after his arrest, asking why he didn't tell the news media that he knew who the real killer was. The court ruled, relying on Anderson v. Charles, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980), that the cross-examination did not violate the ruling in Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (use of defendant's post-arrest silence after being given *Miranda* warnings violates due process). The *Doyle* ruling is not triggered when a defendant chooses to speak voluntarily after being given *Miranda* warnings. The court also ruled that the cross-examination was proper under the evidentiary rules about prior inconsistent statements set out in State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980).

Capital Case Issues

(1) Trial Judge Erred in Submitting Aggravating Circumstances G.S. 15A-2000(e)(7) (Murder Committed to Disrupt Exercise of Governmental Function) and G.S. 15A-2000(e)(8) (Murder Committed Against Witness While Engaged in Official Duty or Because of Exercise of Official Duty) Where They Were Based on Same Evidence
(2) Defense Counsel in Jury Argument in Capital Sentencing Hearing Was Properly Prohibited from Reading Facts from North Carolina Supreme Court Case

State v. Anthony, 354 N.C. 372, 555 S.E.2d 557 (18 December 2001). The defendant was convicted of 1st-degree murder of his wife and sentenced to death. (1) A domestic violence protective order had been issued after the murder victim filed a domestic violence complaint against the defendant. The victim was scheduled to return to court the morning after her murder. The defendant was aware of this hearing and was extremely upset about this proceeding. Although the court ruled that there was evidence to support the submission of both aggravating circumstances G.S. 15A-2000(e)(7) (murder committed to disrupt exercise of governmental function) and G.S. 15A-2000(e)(8) (murder committed against witness because of exercise of official duty as witness), the court also ruled that the trial judge erred in submitting both aggravating circumstance because they were based on the same evidence. Both circumstances referred to the domestic violence matter previously initiated by the murder victim and scheduled for hearing the day after the murder. The relationship between the defendant, the murder victim, and their children was a reason the victim had instituted the action and was to be a witness at the upcoming hearing. The court distinguished State v. Gray, 347 N.C. 143, 491 S.E.2d 491 S.E.2d 538 (1997), in which the court upheld the submission of both (e)(7) (referring to a show cause order served on defendant for accounting of marital monies in upcoming divorce) and (e)(8) (referring to a pending criminal case in which murder victim was to be witness against defendant). (2) The court ruled, relying on State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986), and other cases, that defense counsel was properly prohibited from reading facts from a North Carolina Supreme Court case on the aggravating circumstance of especially heinous, atrocious, or cruel for the purpose of urging the jury not to find this aggravating circumstance.

Trial Judge Erred in Submitting Aggravating Circumstance G.S. 15A-2000(e)(8) (Murder Committed Against Witness While Engaged in Official Duty or Because of Exercise of Official Duty); Court Articulates Two Prongs of Aggravating Circumstance (e)(8) and Disavows Language in *State v. Davis*

State v. Long, 354 N.C. 534, ___ S.E.2d ___ (18 December 2001). The defendant was convicted of 1st-degree murder of his mother and sentenced to death. She was killed five days before the defendant's trial for a charge of assault against her. The trial judge submitted aggravating circumstance G.S. 15A-2000(e)(8), which the court noted has two prongs: the murder was committed against a witness (1) while engaged in the performance of official duties (the "engaged in" prong), or (2) because of the exercise of his or her official duty (the "because" prong). The court ruled that the fact that the murder victim was waiting to testify against the defendant may be considered in making the factual determination whether the victim was a witness for either prong of the aggravating circumstance. However, this factual determination is only the first step. To submit the "because" prong, the state also must show that the defendant's

motivation for killing the victim was that she was a witness. To submit the "engaged in" prong, the state also must show that the victim was actively engaged at the time of the murder in performing a duty expected of a witness, such as swearing out a warrant, discussing the case with a prosecutor, going to court to testify, or actively testifying. The court explicitly disavowed language in State v. Gray, 347 N.C. 143, 491 S.E.2d 538 (1997), that implied that a witness is engaged in his or her official duties from the time the witness swears out a warrant until the witness completes his or her testimony. The court ruled that the trial judge erred in submitting the "engaged in" prong of (e)(8) when there was no evidence that the victim was engaged in her duties as a witness when she was murdered. The court added that despite a comment in the notes to the pattern jury instructions, nothing in its opinion is intended to suggest that the fact a victim witness has not yet testified precludes submission of the "because of" prong of this aggravating circumstance.

(1) Insufficient Evidence of Aggravating Circumstance G.S. 15A-2000(e)(9) (Especially Heinous, Atrocious, or Cruel)
(2) Trial Judge Erred in Not Submitting Peremptory Instruction for Mitigating Circumstance G.S. 15A-2000(f)(8) (Defendant Testified Truthfully for State in Prosecution of Felony)

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of 1st-degree murder and sentenced to death. (1) The defendant shot the victim four times and death was relatively rapid. The court conducted a detailed review of its cases involving the aggravating circumstance G.S. 15A-2000(e)(9) (especially heinous, atrocious, or cruel), and ruled that the evidence was insufficient to submit this aggravating circumstance. (See the court's discussion in its opinion.) (2) The court ruled that the trial judge erred in not submitting a peremptory instruction for the mitigating circumstance G.S. 15A-2000(f)(8) (defendant testified truthfully for state in prosecution of felony). The defendant's evidence in the capital sentencing hearing showed that his truthful testimony at another trial was both uncontroverted and credible.

Trial Judge Did Not Err in Submitting Mitigating Circumstance G.S. 15A-2000(f)(1) (No Significant Prior Criminal History)

State v. Parker, 354 N.C. 268, 553 S.E.2d 885 (9 November 2001). The defendant was convicted of 1st-degree murder and sentenced to death. The court ruled, relying on State v. Rowsey, 343 N.C. 603, 472 S.E.2d 903 (1996), and other cases, that the trial judge did not err in submitting mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The defendant was convicted in 1995 of sixteen counts of obtaining property by false pretenses, nonviolent crimes that arose during one brief period of the defendant's life. The court stated that a rational jury could have concluded that the defendant had no significant prior criminal history.

(1) No Conclusive Presumption of Prejudice When Officer Who Served as Officer or Custodian in Charge of Jury Was Prospective State's Witness But Did Not Testify
(2) Prosecutor's Jury Argument in Capital Sentencing Hearing Impermissibly Commented on Defendant's Right Not to Testify

State v. Ward, 354 N.C. 231, 555 S.E.2d 251 (9 November 2001). The defendant was convicted of 1st-degree murder and sentenced to death. (1) A law enforcement officer who was listed as a state's witness served as the officer or custodian in charge of the jury but he never testified (he was responsible for securing drivers and ensuring that jurors, who came from another county, arrived at the place of departure on time—the court noted that he was therefore a custodian or officer in charge of the jury even if he didn't serve as a driver). The court ruled that the conclusive presumption of prejudice set out in State v. Mettrick, 305 N.C. 383, 289 S.E.2d 354 (1982) (conclusive presumption of prejudice when state's witness serves as custodian or officer in charge of jury), did not apply to these facts. (2) The defendant did not testify at the trial or capital sentencing hearing. The court ruled that the prosecutor's jury argument in the capital sentencing hearing impermissibly commented on the defendant's right not to testify. The prosecutor commented that when the defendant was being evaluated at Dorothea Dix Hospital he decided to sit quietly, didn't want to say anything that would incriminate himself, and wouldn't discuss his criminality with the people at the hospital.

(1) Trial Judge Properly Admitted State's Victim Impact Evidence
(2) Trial Judge Properly Excluded Proffered Defense Evidence of How His Death Would Impact His Family
(3) Trial Judge Properly Submitted Both Aggravating Circumstances G.S. 15A-2000(e)(4) (Murder Committed to Avoid or Prevent Lawful Arrest) and G.S. 15A-2000(e)(8) (Murder Committed Against Law Enforcement Officer While Engaged in Performing Official Duty)

State v. Nicholson, ___ N.C. ___, ___ S.E.2d ___ (1 February 2002). The defendant was convicted of two counts of 1st-degree murder. He shot and killed his wife and a law enforcement officer who was attempting to serve an arrest warrant on him. (1) The court ruled that the trial judge properly admitted victim impact testimony by the mother of the defendant's wife. She described the effect of the death on the victim's children, her brother, and herself and her husband. She related how her granddaughter now lacked the mother figure on whom she had always relied. She also described the murder's effect on the victim's brother, who was an eyewitness to it—he cried constantly, could not bear to turn the lights off, and began to do poorly in school. (2) The court ruled that the trial judge properly excluded proffered defense evidence of how his death would impact his family. Such evidence does not relate to an aspect of the defendant's character or record or the circumstances of the murder. (3) Concerning the murder of the law enforcement officer, the court ruled, relying on State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981), and State v. Golphin, 352 N.C. 364, 533 S.E.2d 168 (2000), that the trial judge properly submitted both aggravating circumstances G.S. 15A-2000(e)(4) (murder committed to avoid or prevent lawful arrest) and G.S. 15A-2000(e)(8) (murder committed against law enforcement officer while engaged in performing official duty). Submission of (e)(4) addresses the defendant's subjective motivation for the murder. Submission of (e)(8) addresses the factual basis of the murder.

Prosecutor's Biblical Argument at Capital Sentencing Hearing Was Improper

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of 1st-degree murder and sentenced to death. The prosecutor recited the "Dance, Death" poem during closing argument of the capital sentencing hearing and added the following words: "Let the Judge set the date. The death penalty is the only appropriate punishment in this case for what [the defendant] did to [the victim]." The court noted that it had reluctantly ruled in this case that the prosecutor's recitation of this poem (without the additional language) during jury argument in the guilt/innocence phase did not require the trial judge's intervention ex mero motu (although the court disapproved of and cautioned prosecutors against using such an argument). The court stated: "This additional language, however, crosses the line into impropriety by linking the law enforcement powers of the State, and specifically the judge, to divine powers of God. We admonish the State against making such arguments at defendant's new sentencing proceeding."

Court Rules That Prosecutor's Jury Argument During Capital Sentencing Hearing Was Improper and Prejudicial and Orders New Sentencing Hearing; Court Offers Guidance to Lawyers and Judges Concerning Proper Jury Argument

State v. Jones, ___ N.C. ___, ___ S.E.2d ___ (1 February 2002). The defendant was convicted of 1st-degree murder and sentenced to death. The court ruled that the prosecutor's jury argument during the capital sentencing hearing was improper and prejudicial to the defendant and ordered a new sentencing hearing. The prosecutor's jury argument was improper for two reasons. First, the court stated that the prosecutor referred to the Columbine school shooting and the Oklahoma City federal building bombing in a thinly veiled attempt to appeal to the jury's emotions by comparing the defendant's crime with these two heinous acts. This argument (1) referred to events and circumstances outside the record; (2) by implication, urged jurors to compare the defendant's acts with the infamous acts of others; and (3) attempted to divert jurors from the evidence by appealing instead to passion and prejudice. Second, the court stated that the prosecutor engaged in improper name-calling: "You got this quitter, this loser, this worthless piece of . . . who's mean . . . . He's as mean as they come. He's lower than the dirt on a snake's belly." The court also offered guidance to lawyers and judges concerning proper jury arguments (see the discussion in the court's opinion).

Defense Counsel Was Properly Prohibited from Arguing Residual Doubt as Mitigating Evidence in Capital Resentencing Hearing

State v. Fletcher, 354 N.C. 455, 555 S.E.2d 534 (18 December 2001). The court ruled that defense counsel was properly prohibited from arguing residual doubt as mitigating evidence in a capital resentencing hearing, based on the facts in this case. (See the court's detailed discussion of the facts and procedural aspects of this resentencing hearing.) The court stated that just as defense counsel may not argue residual doubt about the 1st-degree murder conviction during a capital sentencing or resentencing hearing, counsel may not argue residual doubt about the basis underlying a 1st-degree murder conviction, such as premeditation and deliberation.

Evidence

Trial Judge Did Not Err in Excluding Defense Proffered Evidence That Another Person Committed Murders

State v. May, 354 N.C. 172, 552 S.E.2d 151 (5 October 2001). The defendant was convicted of two 1st-degree murders and received two death sentences. The court ruled that the trial judge did not err in excluding defense proffered evidence that another person committed the murders. The court stated, relying on State v. Rose, 339 N.C. 172, 451 S.E.2d 211 (1994), that even if this evidence indicated that the other person could have been suspected of committing the murders, the defendant failed to produce any evidence that was inconsistent with his guilt. The court noted that, on the contrary, the state's evidence showed that the other person and the defendant were both at the murder scene, and the other person's involvement was entirely consistent with the defendant's guilt. Thus, speculative evidence that the other person could have killed the victims was not relevant to whether the defendant killed the victims.

SBI Expert's Testimony, Based Partly on Examination Done by Another SBI Expert, Did Not Violate Defendant's Confrontation Rights

State v. Fair, 354 N.C. 131, 552 S.E.2d 568 (5 October 2001). An SBI expert testified at trial concerning the presence and physical location of the defendant's DNA on the murder victim's flipped-over pants pocket. Her testimony partly was based on testing of cloth samples cut from the victim's pants by another SBI expert, who was unavailable to testify. The testifying expert noted that she had looked at the victim's pants herself to determine whether the cuttings were taken from the areas indicated by the nontestifying expert in her notes. The court ruled, relying on State v. Huffstetler, 312 N.C. 92, 322 S.E.2d 110 (1984), and other cases, that this testimony did not violate the defendant's confrontation rights.

(1) Murder Victim's Statement to Defendant That She Had Killed Another Person Was Inadmissible as Defense Evidence When Defendant Relied on Accident, Not Self-Defense
(2) Jury Instruction on Defendant's Flight from Murder Scene Was Properly Admitted

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (5 October 2001). The defendant was convicted of 1st-degree murder. (1) The trial judge prohibited the defendant from testifying that the murder victim had previously told him that she had killed another person and had gotten away with it. The court ruled, relying on State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997), and other cases, that because the defendant asserted that he did not intentionally shoot the murder victim and that the shooting was accidental, the evidence was irrelevant and inadmissible under Rule 404(b) to prove the defendant's apprehension and state of mind when he drew his gun. (2) The defendant hurriedly left the murder scene without providing medical assistance to the victim. He then drove to a business to confront the victim's boyfriend and to a convenience store for a soda. He thereafter called the police department to arrange his surrender, but he did not request assistance for the victim and did not say where he could be found. He drove around for thirty minutes and then went to another convenience store to buy cigarettes and a soda. Before turning himself in, he called his mother. The court ruled, relying on State v. Beck, 346 N.C. 750, 487

S.E.2d 751 (1997), and other cases, that there was sufficient evidence of the defendant's flight from the murder scene to support the jury instruction on flight as consciousness of guilt.

Court Summarily Affirms, Without Opinion, Ruling of Court of Appeals That Trial Judge Erred in Allowing Expert Testimony That Children Were Sexually Abused, Based on Facts in This Case

State v. Grover, 354 N.C. 354, 553 S.E.2d 679 (9 November 2001), *affirming*, 142 N.C. App. 411, 543 S.E.2d 179 (20 March 2001). The court summarily affirmed, without an opinion, a ruling by the court of appeals. The defendant was convicted of various sexual offenses involving two children. Two experts, a clinical social worker and a pediatric nurse practitioner, were permitted to testify that the children had been sexually abused even though no physical evidence of abuse had been found. Their opinions were based solely on their interviews with the children. The court ruled, relying on State v. Bates, 140 N.C. App. 743, 538 S.E.2d 597 (2000), and other cases and distinguishing State v. Reeder, 105 N.C. App. 343, 413 S.E.2d 580 (1992), that the trial judge erred in admitting this testimony. The court noted, however, that it may be permissible for an expert to testify under these circumstances (when there is no physical evidence of abuse) that a child exhibits characteristics consistent with abused children.

North Carolina Court of Appeals

Criminal Offenses and Criminal Procedure

Double Jeopardy Did Not Bar Defendant's Convictions for Attempted 1st-Degree Murder and Assault with Firearm on Law Enforcement Officer Arising from Same Act

State v. Haynesworth, ___ N.C. App. ___, 553 S.E.2d 103 (16 October 2001). The court ruled, relying on Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), and State v. Swann, 322 N.C. 666, 370 S.E.2d 533 (1988), that the Double Jeopardy Clause did not bar the defendant's convictions for attempted 1st-degree murder and assault with a firearm on a law enforcement officer arising from the same act. Each offense requires proof of an element that is not required to be proved for the conviction of the other offense.

Double Jeopardy Doesn't Bar DWI Prosecution Against Defendant Whose Commercial Motor Vehicle License Was Subject to Pretrial 30-Day Disqualification With No Limited Privilege

State v. Reid, ___ N.C. App. ___, ___ S.E.2d ___ (5 February 2002). The court ruled, relying on State v. Evans, 145 N.C. App. 324, 550 S.E.2d 853 (2001), Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), and other cases, that a pretrial 30-day disqualification with no limited driving privilege for a commercial motor vehicle license was not punishment under the Double Jeopardy Clause to bar a later prosecution for DWI.

Habitual Felon Law Used in Conjunction with Structured Sentencing Does Not Violate Double Jeopardy

State v. Brown, ___ N.C. App. ___, 552 S.E.2d 234 (18 September 2001). The court ruled, relying on State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985), and other cases, that the habitual felon law used in conjunction with structured sentencing does not violate double jeopardy.

Defendant's Payment of Money under G.S. 1-538.2 to Owner of Property Stolen by Defendant Did Not Bar under Double Jeopardy Clause Later Prosecution of Defendant for Larceny of That Property

State v. Beckham, ___ N.C. App. ___, ___ S.E.2d ___ (15 January 2002). The defendant stole property from a business. In response to a demand for payment by the business under G.S. 1-538.2 (civil liability for larceny, shoplifting, etc.), the defendant paid $200.00 to the business. The court ruled, applying the standard set out in Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), that the payment of money to the business did not bar under the Double Jeopardy Clause his later prosecution for larceny of the property.

(1) Double Jeopardy Did Not Bar State's Appeal of Trial Judge's Granting Defendant's Motion to Dismiss DWI Charge Based on Insufficient Evidence After Jury Had Returned Guilty Verdict
(2) Evidence Was Insufficient to Support DWI Conviction

State v. Scott, ___ N.C. App. ___, 551 S.E.2d 916 (18 September 2001). A jury found the defendant guilty of DWI. The trial judge then granted the defendant's motion to dismiss the DWI charge based on insufficient evidence. (1) The court ruled, relying United States v. Wilson, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975), that double jeopardy did not bar the state's appeal of the trial judge's ruling. (2) The court ruled that the evidence was insufficient to support the DWI conviction. The state's evidence showed (a) after being signaled by an officer to pull over, the defendant brought his vehicle to a stop in an intersection; (b) the defendant stopped the vehicle, jumped out of the vehicle and approached the officer—the officer then ordered the defendant back to the vehicle, and the defendant complied; (c) the officer smelled alcohol coming from within the vehicle; (d) the officer noticed an open bottle of beer on the seat beside the defendant; (e) the bottle of beer was about one-half full; (f) after the defendant got out of the vehicle, the officer noticed an odor of alcohol coming from the defendant or his clothing; and (g) the defendant appeared to have slurred speech. The defendant did not appear to stumble or have any difficulty walking when he left his vehicle, and he was compliant, courteous, and non-combative. No field sobriety tests were conducted.

State's Failure to Disclose Phone Records of Calls Between State's Witness and Murder Victim Denied Exculpatory Evidence for Defendant and Required New Trial

State v. Barber, ___ N.C. App. ___, 554 S.E.2d 413 (6 November 2001), *temporary stay allowed by*, 354 N.C. 576, 557 S.E.2d 540 (12 November 2001). The defendant was convicted of 1st-degree murder of her husband. The defendant's defense was that the husband committed suicide while drinking and depressed. A state's witness testified that she had called the decedent

at his residence several times the night of his death in which she informed him that she planned to take out an arrest warrant against him for communicating threats against her. The witness stated that she had been drinking and could not remember her exact words to the decedent or how many times she called him. The state disclosed to the defendant after trial the existence of the witness's phone records. These records showed that the witness made eight phone calls to the decedent's residence the night of his death. The defendant argued on appeal that the phone records were exculpatory because they bolstered the witness's testimony that she threatened the decedent with arrest shortly before his death. The records also supported the defendant's assertions at trial that the decedent killed himself because he was despondent and agitated by the thought of returning to prison. The court noted that the state had cast general aspersions about this witness's credibility and ruled that the phone records were exculpatory and prejudicial (see the court's discussion in its opinion) requiring a new trial.

District Attorney's Policy of Prosecuting All Defendants Who Qualify as Habitual Felons Is Not Unconstitutional

State v. Parks, ___ N.C. App. ___, 553 S.E.2d 695 (16 October 2001). The court ruled that a district attorney's policy of prosecuting all defendants who qualify as habitual felons is not unconstitutional.

Fine of $50,000 for Corporation's Conviction of Disseminating Obscenity Was Not Constitutionally Excessive, Based on Facts in This Case

State v. Sanford Video & News, Inc., ___ N.C. App. ___, 553 S.E.2d 217 (16 October 2001). The court ruled, distinguishing United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), that a fine of $50,000 for a corporation's conviction of disseminating obscenity, a Class I felony, was not constitutionally excessive, based on the facts in this case.

Arrest Warrant Insufficiently Charged Simple Assault By Show of Violence

State v. Garcia, ___ N.C. App. ___, 553 S.E.2d 914 (6 November 2001). The court ruled that a criminal pleading charging an assault by show of violence must allege facts to support the elements of this form of assault, which are: (1) a show of violence by the defendant; (2) accompanied by the victim's reasonable apprehension of immediate bodily harm or injury; and (3) causing the victim to engage in a course of conduct that he or she would not otherwise have followed. The court ruled that the arrest warrant in this case failed to allege facts to support element (2) and thus was insufficient to allege this form of assault.

(1) State Was Properly Allowed to Amend False Pretenses Indictment in Its Description of Property Obtained by Defendant
(2) State Failed to Prove Property Was Valued Over $1,000 in Felonious Possession of Stolen Goods Prosecution

State v. Parker, ___ N.C. App. ___, 555 S.E.2d 609 (6 November 2001). (1) The court ruled that the state was properly allowed to amend a false pretenses indictment to substitute "Magnavox VCR" for "two (2) cameras and photography equipment." The court stated the

amendment did not substantially alter the charge. The description of the property which the defendant falsely represented as his own was irrelevant in proving the elements of false pretenses. (2) The jury charge on felonious possession of stolen goods named certain property that was allegedly stolen. The victim testified at trial that all the stolen property (which included property not named in the jury charge) had an estimate value of $5,000.00. The court ruled, relying on State v. Holland, 318 N.C. 602, 350 S.E.2d 56 (1986), that this testimony failed to prove that the property named in the jury charge was valued over $1,000 to support a conviction of felonious possession of stolen goods. The court remanded the case for entry of a verdict of guilty of misdemeanor possession of stolen goods.

Indictment Charging Obtaining Controlled Substance by Forgery under G.S. 90-108(a)(10) Was Properly Amended to Change Name of Controlled Substance

State v. Brady, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The defendant was charged with obtaining a controlled substance by forgery under G.S. 90-108(a)(10). The indictment alleged the controlled substance as Xanax, a Schedule IV substance. The court ruled that the state was properly permitted to change the name of the controlled substance to Percocet, a Schedule II substance. The court ruled that it is not necessary to allege the specific controlled substance in charging a violation of G.S. 90-108(a)(10) and therefore the amendment did not substantially alter the charge against the defendant. Thus the trial judge did not err in permitting the state to amend the indictment.

Defendant's Unexplained Absence from Habitual Felon Hearing After Court Recess Was Waiver of His Right to Be Present

State v. Skipper, ___ N.C. App. ___, 553 S.E.2d 690 (16 October 2001). The defendant was being tried in a habitual felon hearing when the court took a five-minute recess. The defendant failed to return to court, and the remainder of the hearing was conducted in the defendant's absence. The court ruled, relying on State v. Richardson, 330 N.C. 174, 410 S.E.2d 61 (1991), and State v. Miller, 142 N.C. App. 435, 543 S.E.2d 201 (2001), that the defendant's unexplained absence was a waiver of his right to be present during the hearing. The defense failed to meet its burden of explaining his absence.

Trial Judge Committed Prejudicial Error Requiring New Trial When His Remarks to Deadlocked Jury Referred to Expense of Retrial

State v. Burroughs, ___ N.C. App. ___, 556 S.E.2d 339 (18 December 2001). The court ruled, relying on State v. Lamb, 44 N.C. App. 251, 261 S.E.2d 130 (1979), that the trial judge committed prejudicial error requiring a new trial when his remarks to a deadlocked jury referred to the expense of a retrial.

Federal Drug Conviction May Support Forfeiture of Defendant's Property Under G.S. 90-112

State v. Woods, ___ N.C. App. ___, 554 S.E.2d 383 (6 November 2001). **(Note: There was a dissenting opinion, so the North Carolina Supreme Court will likely review this ruling.)** The defendant was convicted of a federal drug violation. The state had previously taken a voluntary dismissal of a state drug charge based on the same drug violation. The state then obtained the forfeiture of the defendant's property under G.S. 90-112 based on the federal drug conviction. The court ruled that a federal drug conviction may support the forfeiture. The court reasoned that the defendant's act was a violation of Article 5 of G.S. Ch. 90, and G.S. 90-112 does not require a state conviction of that violation; a federal conviction is sufficient.

Unstamped Probation Violation Report Resulted in No Jurisdiction for Trial Court to Conduct Probation Revocation Hearing After End of Probation Period

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (5 February 2002). A probation violation report in the clerk's files was not endorsed with a file stamp. The probation revocation hearing was conducted after the end of the probation period. The court ruled that the trial court did not have jurisdiction to conduct the probation revocation hearing because the probation violation report was not properly filed under G.S. 15A-1344(f)(1).

Evidence Was Insufficient to Support Two Conspiracy Convictions

State v. Tabron, ___ N.C. App. ___, 556 S.E.2d 584 (20 November 2001). **(Note: The North Carolina Supreme Court has granted the state's petition to review this ruling.)** The defendant was convicted of two conspiracies to commit common law robbery. Both convictions involved failed robbery attempts of the same victim, one occurring on December 8, 1999, the other on January 14, 2000. The court ruled that there was insufficient evidence of two separate agreements to support two conspiracy convictions; the conspiracy was not abandoned after the first failed robbery attempt. (See the court's discussion of the facts in its opinion.)

Husband and Wife Are Legally Capable of Entering Criminal Conspiracy Between Themselves

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). **(Note: There was an opinion dissenting in part, but not on the issue discussed below.)** The defendants, husband and wife, were both convicted of conspiracy to commit murder and 1st-degree murder. The court rejected the female defendant's argument that a criminal conspiracy cannot exist between a husband and wife because under the common law they are considered to be one entity. The court ruled that a husband and wife are legally capable of entering a criminal conspiracy between themselves.

BB Gun Was Not Dangerous Weapon to Support Conviction of Armed Robbery

State v. Fleming, ___ N.C. App. ___, ___ S.E.2d ___ (28 December 2001). The defendant was convicted of armed robbery. The court examined the facts and determined that the only

reasonable inference in this case was that the defendant pointed a BB gun at the robbery victim (an officer arrested the defendant minutes after the robbery and the defendant only had a BB gun). Because the state failed to show that the BB gun was capable of causing serious injury or death, the court ruled that the evidence was insufficient to support the defendant's armed robbery conviction. The court noted that it was not ruling that a BB gun can never be a dangerous weapon.

Sufficient Evidence of Restraint and Removal Separate and Apart from Acts Constituting Common Law Robbery to Support Second-Degree Kidnapping Conviction

State v. Muhammad, ___ N.C. App. ___, 552 S.E.2d 236 (18 September 2001). The defendant was convicted of common law robbery and second-degree kidnapping. Distinguishing State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981) (defendant forced employee at knife point to walk to back of store to obtain property; kidnapping conviction reversed), the court ruled that there was sufficient evidence of restraint and removal separate and apart from the acts constituting common law robbery to support the second-degree kidnapping conviction. The defendant placed the victim in a choke hold, hit him in the side three times, wrestled with him on the floor, grabbed him around the throat, pointed a gun (later determined to be a cap gun) at his head, and marched him to the front of the store—where the defendant obtained money. The court stated that these actions constituted restraint beyond what was necessary for the commission of common law robbery.

(1) Insufficient Evidence of Maintaining Dwelling for Keeping Controlled Substances
(2) Sufficient Evidence of Defendant's Constructive Possession to Support Convictions of Possession of Marijuana and Possession of Drug Paraphernalia

State v. Kraus, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The defendant was convicted of felonious possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling for keeping controlled substances. Upon entering a motel room after the defendant's friend, Henderson, opened the door, officers encountered a dense cloud of marijuana smoke and found the defendant sitting in a chair alone in the room. Both the defendant and her friend were stoned. Marijuana, marijuana seeds and stems, a box cutter, cigar wrappers, small plastic bags, and pill bottles were on a nearby table. Officers also discovered a small bag containing 85 grams of marijuana in a trash can and a quantity of crack cocaine. In a closet was a duffle bag with a tag with Henderson's name on it; in the bag were digital scales and about five pounds of marijuana. (1) The court ruled that there was insufficient evidence of the defendant's maintaining the dwelling for keeping controlled substances. Although the evidence showed that the defendant had access to a key and spent the previous night in the room, there was no evidence that the defendant bore the expense of the room or maintained it in any way. The defendant did not rent the room or otherwise finance its upkeep. Moreover, the defendant had occupied the room for less than 24 hours. The court relied on State v. Bowens, 140 N.C. App. 217, 535 S.E.2d 870 (2000), and State v. Hamilton, 145 N.C. App. 152, 549 S.E.2d 233 (2001). (2) The court ruled that the evidence was sufficient to prove the defendant's constructive possession of the marijuana and drug paraphernalia to support her convictions of possession of marijuana and possession of drug paraphernalia.

Sufficient Evidence to Support Element of "Purpose of Arousing or Gratifying Sexual Desire" in Delinquency Adjudication of Juvenile for Indecent Liberties under G.S. 14-202.2

In re T.C.S., ___ N.C. App. ___, ___ S.E.2d ___ (15 January 2002). The juvenile, eleven years old, was adjudicated delinquent of indecent liberties under G.S. 14-202.2 with a child who was five years old. Distinguishing In re T.S., 133 N.C. App. 272, 515 S.E.2d 230 (1999), the court ruled that the evidence was sufficient to prove the element of "the purpose of arousing or gratifying sexual desire." In discussing the facts supporting this element, the court noted the age disparity between the juvenile and victim, the juvenile's control over the victim, the location and secretive nature of their actions, and the juvenile's maturity.

Arrest, Search, and Interrogation Issues

DWI Checkpoint Did Not Violate G.S. 20-16.3A(2) in Failing to Designate in Advance a Pattern for Requesting Drivers to Submit to Alcohol Screening Tests

State v. Colbert, ___ N.C. App. ___, 553 S.E.2d 221 (16 October 2001). Law enforcement agencies collaborated in establishing a DWI checkpoint under G.S. 20-16.3A. An officer stopped the defendant's vehicle at the checkpoint. Pursuant to the checkpoint plan, the officer (1) requested the defendant to produce his driver's license, (2) observed the defendant's eyes for signs of impairment, (3) conversed with the defendant to determine if he had the odor of alcohol on his breath and if his speech pattern indicated impairment, and (4) observed the defendant's clothing. The checkpoint plan provided that an Alco-Sensor test would be used only when an officer had reasonable suspicion that the driver had committed an implied consent offense. After these observations, the officer instructed another officer to conduct an Alco-Sensor test on the defendant. Based on the test results, the officer arrested the defendant for DWI. The court ruled that the checkpoint did not violate G.S. 20-16.3A(2) in failing to designate in advance a pattern for requesting drivers to submit to alcohol screening tests. The court stated that the fact that an officer must make a judgment whether there is reasonable suspicion does not vitiate the plan's validity nor offend the requirement that individual officers not exercise unbridled discretion under G.S. 20-16.3A(2). The court noted that the term "alcohol screening test" in G.S. 20-16.3A(2) is not limited to the administration of the Alco-Sensor test, but also includes the four procedures in the plan, discussed above, that was administered to every driver who passed through the checkpoint. The court found that the checkpoint plan was constitutionally reasonable under Michigan Department of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990).

Driver's License Checkpoint Was Conducted in Constitutional Manner

State v. Tarlton, ___ N.C. App. ___, 553 S.E.2d 50 (2 October 2001). Two State Highway Patrol (SHP) officers were on preventive patrol and decided to establish a driver's license checkpoint. One officer called his supervisor and received permission to establish the checkpoint. The officers were aware that SHP policy required the checkpoint to be conducted by at least two officers, by a non-random method, and a blue light to be on. During the checkpoint, they checked every vehicle in both directions except when they were writing citations. Blue lights were operating on both vehicles. The court ruled that the checkpoint was constitutionally

valid. The court stated that (1) supervisory approval of a driver's license checkpoint is not constitutionally required, and (2) written guidelines setting out a driver's license checkpoint are not constitutionally required.

Anonymous Tip and Officer's Corroboration Provided Reasonable Suspicion to Make Investigative Stop

State v. Young, ___ N.C. App. ___, ___ S.E.2d ___ (5 February 2002). A Western Union office was robbed twice in two weeks. Witnesses described the perpetrator similarly. A week after the second robbery, a female caller to 911, who would not identify herself because she feared for herself and her child, said that she knew who had committed both robberies. She said he was currently in the vicinity of a Wendy's restaurant near the Western Union and was driving a white 1998 Buick Century. Her description matched the descriptions provided by the witnesses. She also described his clothing and said that he was very dangerous and armed with a pistol. An officer went to Wendy's and saw a vehicle driven by a person matching the caller's description. The officer followed the defendant and observed him drive the wrong way down a one-way street. After the defendant pulled into a parking lot, the officer stopped him. The court ruled that because the officer had probable cause that the defendant violated G.S. 20-165.1 (willfully driving wrong way on one-way street), the stop was justified. The court also ruled, relying on State v. Bone, 354 N.C. 1, 550 S.E.2d 842 (2001), that the anonymous information and corroboration by the officer established reasonable suspicion to stop the defendant for the armed robberies.

(1) Vehicle Stop Was Supported by Reasonable Suspicion That Driver Had Revoked License
(2) Defendant Consented to Additional Questioning After Detention Had Ended for Traffic Stop
(3) *Miranda* Warnings Were Not Required During Consensual Questioning

State v. Kincaid, ___ N.C. App. ___, 555 S.E.2d 294 (6 November 2001). An officer saw the defendant driving a vehicle, attempting to conceal his face from the officer. The officer stopped the vehicle because he knew that the defendant's license had been revoked for two to three years. Previously, the officer had seen the defendant travel either as a passenger in a car or riding a moped, but never driving a car. The defendant gave his license to the officer. The officer allowed the defendant to enter a convenience store while he ran a license check. After determining that the license was valid, the officer returned it and the registration to the defendant. The officer then asked the defendant if he could answer some questions concerning another matter. The defendant consented. After asking the defendant if he had anything in the car that the officer needed to be concerned about, the defendant admitted that he had marijuana under the front seat. (1) The court ruled that the officer had reasonable suspicion to stop the vehicle based on his information about the defendant and his driver's license, despite the fact that the information turned out to be incorrect. (2) The court noted that the ground for the detention ended when the officer learned that the license was valid. However, the defendant consented to questions after the officer had returned the driver's license and registration. The court ruled that a reasonable person would have felt free to leave when the documents were returned. The court noted that the officer was not prohibited from simply asking the defendant to consent to additional questioning or from

questioning the defendant after receiving his consent. Based on the totality of circumstances, the court ruled the defendant was not seized under the 4th Amendment after the officer had returned the documents to him. (3) *Miranda* warnings were not required during the officer's questioning because the defendant was not in custody.

Warrantless Search of Defendant's Vehicle Was Proper Incident to Arrest of Occupant under *New York v. Belton*

State v. Logner, ___ N.C. App. ___, ___ S.E.2d ___ (28 December 2001). The defendant was convicted of possession of cocaine found in a search of her vehicle. Parker was in a vehicle when an officer developed probable cause to arrest her. Parker managed to leave the vehicle she was in and get into one that the defendant was driving. The officer arrested Parker while she was in the defendant's vehicle. The officer conducted a warrantless search of the defendant's vehicle incident to Parker's arrest. The court ruled that the warrantless search was permitted under New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).

(1) Drawing Weapons and Using Handcuffs Did Not Exceed Scope of Stop
(2) Temporary Resident in a House Did Not Have Reasonable Expectation of Privacy in Place in House Where Officers Conducted Search

State v. Sanchez, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The defendant was convicted of cocaine trafficking offenses. (1) Based on information from an informant that supplied reasonable suspicion and also revealed that the defendant might be heavily armed, officers conducted an investigatory stop of a vehicle in which they drew their guns and handcuffed the defendant and other passengers. The handcuffing occurred for no more than five minutes. The court ruled, citing United States v. Hensley, 469 U.S. 491, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), that the use of weapons and handcuffs were permissible during the stop. (2) The defendant was temporarily residing in a living area of another's house. The living area was located in a basement that was connected to the garage and laundry room. The laundry room was separated by a door to the basement and garage area. The cocaine was found under the stairwell located in the laundry room. The court ruled, distinguishing Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990), that the defendant did not prove that he had a reasonable expectation of privacy concerning the cocaine under the stairwell, which was a common area of the house.

(1) Law Enforcement Officers Properly Interacted with Probation Officer Who Sought to Enforce Warrantless Search Condition of Drug Defendant's Probation
(2) Officer Was Lawfully on Property When Officer Smelled Marijuana Odor
(3) Independent Source Doctrine Supported Seizure of Evidence With Search Warrant Even If Officers Had Previously Made Illegal Warrantless Entry of House
(4) Probable Cause Supported Search Warrant

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (5 February 2002). A law enforcement officer received anonymous information that the defendant was growing marijuana in his house. About 15 months earlier, an officer had searched the defendant's residence and found marijuana. After receiving the anonymous information, an officer spoke with the defendant's probation

officer, who said that the defendant was on probation from the earlier drug offense. The probation included a condition consenting to warrantless searches of the defendant's person and residence. The probation officer went to the defendant's house to enforce the warrantless search condition. When the defendant refused, the probation officer arrested him. After law enforcement officers were informed of the arrest, they went to the defendant's house. Although no one answered, the officers had learned from the probation officer that the defendant's girlfriend was there. From the driveway, one of the officers (while the others were knocking on the door) smelled a strong odor of marijuana emanating from the house and saw movement inside. The officers left and telephoned the defendant's girlfriend, who refused to consent to a search of the house. The officers returned to the house and knocked on the door. When they received no answer, they broke in, conducted a security sweep, and restrained the girlfriend. After an officer obtained a search warrant, they searched the house, finding marijuana. The court ruled: (1) the law enforcement officers properly interacted with probation officer who later sought to enforce the warrantless search condition of drug defendant's probation—the court cited State v. Church, 110 N.C. App. 569, 430 S.E.2d 462 (1993), and United States v. Knights, 122 S. Ct. 587, ___ L. Ed. 2d ___ (10 December 2001); (2) the officers were lawfully on the defendant's driveway, on the way to the front door, when they smelled the odor of marijuana—see State v. Prevette, 43 N.C. App. 450, 259 S.E.2d 595 (1979); (3) the independent source doctrine [Segura v. United States, 468 U.S. 796, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984); State v. Wallace, 111 N.C. App. 581, 433 S.E.2d 238 (1993)] supported the seizure of the marijuana with a search warrant even if the officers had previously made an illegal warrantless entry of house—no evidence from the assumed illegal entry was used in the search warrant; and (4) all the information described above supplied probable cause to support the search warrant.

Motel Room Visitor Did Not Have Reasonable Expectation of Privacy in Room

State v. McMillian, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The court ruled, relying on United States v. Grandstaff, 813 F.2d 1353 (9th Cir. 1987), and United States v. Maddox, 944 F.2d 1223 (6th Cir. 1991), that a visitor to a motel room did not have a reasonable expectation of privacy to challenge a search there. The evidence showed that the room was rented to another person, the defendant did not have any luggage there, and the defendant had not spent the night there or planned to do so.

(1) State Could Argue Different Ground for Admissibility of Seized Evidence Before Second Judge, Based on First Judge's Limited Grounds for Suppression of Evidence
(2) Inevitable Discovery Doctrine Supported Seizure of Heroin from Apartment

State v. Woolridge, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). Officers received information from a confidential informant that the defendant was selling heroin from his apartment. An officer set up surveillance of the apartment and saw the defendant walk out of his apartment, sit briefly on a porch chair, and go inside. He then saw the defendant and Miller leave in a vehicle. Officers conducted a vehicle stop because they believed that the defendant was wanted for a parole violation. They took the defendant and Miller to the police station where they determined that the defendant was in fact wanted for a parole violation. Miller told the officers that he lived in the defendant's apartment and sold heroin for the defendant. Based on this information, officers began the process of obtaining a search warrant for the defendant's

apartment. Meanwhile, other officers continued surveillance of the apartment. After watching a person act suspiciously with chairs on the porch, an officer conducted a warrantless search of the chairs and seized heroin from the bottom of one. Later, officers arrived with a search warrant and searched the apartment. The officer who had seized the heroin from the porch chair gave it to the executing officers. Before trial, a judge granted the defendant's motion to suppress the heroin because the warrantless search of the chair violated the 4th Amendment, but specifically stated that his ruling did not affect any later search based on the warrant. The state later successfully moved before a second judge to admit the heroin into evidence based on the inevitable discovery doctrine. (1) The court ruled that the second ruling was procedurally proper because that the first judge did not address the inevitably discovery doctrine. (2) The court ruled, relying on State v. Garner, 331 N.C. 491, 417 S.E.2d 502 (1992), that the heroin was properly admitted under the inevitably discovery doctrine. An officer testified that he would have definitely have searched the chairs when executing the search warrant based on the interest shown in the chairs during the original surveillance. The court noted that under *Garner*, any bad faith by the officer who conducted the warrantless search was irrelevant in determining application of the inevitable discovery doctrine.

4th Amendment's Reasonableness Standard in *New Jersey v. T.L.O.* Applied When Law Enforcement Officers Acted in Conjunction with School Principal in Dealing with Students from Another School Who Were on Parking Lot of Principal's School

In re D.D., ___ N.C. App. ___, 554 S.E.2d 346 (2 October 2001), *appeal dismissed and review denied by,* 354 N.C. 572, -- S.E.2d – (18 December 2001). The juvenile was adjudicated delinquent of possessing a knife on educational property. A teacher told the principal about overhearing some students saying that a group of girls was coming to the school's campus to fight at the end of the school day; the students named one student who would be involved in the fight. The principal "gathered" three law enforcement officers, one of whom was the school resource officer. The other two were off-duty officers, one of whom was assigned to the school as a security officer. In the school's parking lot, the principal confronted a student of his school and three girls who were from another school in the city. There were additional encounters with these students, which included the finding of a box cutter in the purse of one of the students (not the juvenile). The principal and the officers then took them to the principal's office. The principal ordered the girls to empty their pockets. The juvenile had a knife in her pocket. After reviewing case law in other jurisdictions, the court ruled that the 4th Amendment's reasonableness standard in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (searches by school officials generally may be conducted without a warrant or probable cause—that is, with reasonable suspicion), applied in this case when the officers acted in conjunction with the school principal to maintain a safe and educational environment and to report truants from other schools. The court also ruled that the search of the juvenile was reasonable under *T.L.O.*

13-Year-Old's Confession Was Admissible Because His Aunt Was His "Guardian" under Juvenile Rights Provisions in G.S. 7A-595(b) [Now, G.S. 7B-2101(b)]

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The defendant, a thirteen-year-old who was subjected to custodial interrogation in his aunt's presence, was tried as

an adult and convicted of several felonies. The court ruled that the custodial interrogation complied with G.S. 7A-595(b) [now, G.S. 7B-2101(b)] because his aunt was a "guardian" under the juvenile rights provisions. The court noted that the term "guardian" is not defined in the juvenile code and rejected the defendant's argument that a guardian means only someone who is court appointed. The court ruled that a guardian under G.S. 7A-595(b) means a person upon whom the government has conferred any authority over the juvenile. Because both the department of social services and the local school system had given authority over the defendant to the aunt, the court ruled that she was a "guardian" under G.S. 7A-595(b). [Author's note: This ruling would clearly also apply to G.S. 7B-2101(b).]

Evidence

Murder Victim's Hearsay Statement Was Properly Admitted Under Rule 803(3) (Declarant's Then Existing State of Mind)

State v. Patterson, ___ N.C. App. ___, 552 S.E.2d 246 (18 September 2001), *review denied by,* 354 N.C. 578, -- S.E.2d – (18 December 2001). The defendant was convicted of 1st-degree murder. The court ruled that a hearsay statement of the murder victim was properly admitted under Rule 803(3) (declarant's then existing state of mind). The court noted that the victim's statement that the defendant wanted to move in with him, that the victim had told the defendant that he did not want the defendant to move in, and that the defendant did not like it, are arguably mere recitations of facts. However, the court, relying on State v. Brown, 350 N.C. 193, 513 S.E.2d 57 (1999), stated that these facts tend to show the victim's state of mind about his relationship with the defendant and therefore the statement was admissible under the rule. The victim did not want the defendant to move in with him, and the victim was aware that the defendant did not like that.

Evidence of Chain of Custody of Cocaine Was Sufficient

State v. Greenlee, ___ N.C. App. ___, 553 S.E.2d 916 (6 November 2001). A law enforcement officer seized crack cocaine from the defendant. The officer sealed it in an evidence envelope with date, initials, etc., completed an SBI request for examination form, and placed it in the drop box in his agency's property control room. Two other people were involved in the transfer of the envelope to the SBI chemist. Each person upon receipt and delivery signed their names in the chain of custody section of the request form. Only the officer and SBI chemist testified at trial. The chemist testified that the envelope was still sealed when he received it. Both the officer and chemist testified that the substance appeared to be in the same condition as when they had last seen it. The court ruled that this was sufficient evidence of the chain of custody of the crack cocaine, and the state was not also required to comply with G.S. 90-95(g1) to prove a chain of custody. The court also ruled that the SBI chemist's trial testimony properly authenticated his report to introduce it into evidence, and it was irrelevant that the state did not comply with G.S. 90-95(g).

Expert Who Had Provided Therapy to Child Could Testify That Child Had Been Sexually Abused

State v. Ramer, ___ N.C. App. ___, 553 S.E.2d 238 (16 October 2001). The defendant was convicted of 1st-degree statutory sexual offense. The court ruled, relying on State v. Youngs, 141 N.C. App. 220, 540 S.E.2d 794 (2000), that the expert—a licensed clinical social worker—was properly permitted to testify that the child victim had been sexually abused. The expert had provided therapy to the child for several months before the trial. The court noted, distinguishing State v. Stancil, ___ N.C. App. ___, 552 S.E.2d 212 (18 September 2001) (expert is precluded from offering opinion that child had been sexually abused if child's statement was only foundation for opinion), that this testimony was admissible even though the expert testified that he based his opinion partly on statements that the child made during the therapy.

In Child Abuse Case, Expert Could Testify That Delayed and Incomplete Disclosures By Children Are Not Unusual and Children Sometimes Continue to Associate with Alleged Abuser

State v. Carpenter, ___ N.C. App. ___, 556 S.E.2d 316 (4 December 2001). The defendant was convicted of several sex offenses with a child. The state's expert witness was a licensed clinical social worker and properly qualified in child sex abuse evaluations and interviews based on her extensive experience, training, and education. The court ruled, relying on State v. Bailey, 89 N.C. App. 212, 365 S.E.2d 651 (1988), State v. Richardson, 112 N.C. App. 58, 434 S.E.2d 657 (1993), and State v. Bowman, 84 N.C. App. 238, 352 S.E.2d 437 (1987), that the trial judge did not err in admitting the expert's testimony that delayed and incomplete disclosures by children are not unusual and children sometimes continue to associate with the alleged abuser. The court noted that the expert did not offer an opinion about the victim's credibility.

(1) Child Sexual Abuse Victim's Statements to Licensed Professional Counselor Were Properly Admitted under Residual Hearsay Exception, Rule 804(b)(5)
(2) Child Sexual Abuse Victim's Statements to Pediatric Nurse and Examining Physician Were Properly Admitted under Rule 803(4) (Medical Diagnosis or Treatment); Evidence Satisfied *Hinnant* Test

State v. Isenberg, ___ N.C. App. ___, ___ S.E.2d ___ (28 December 2001). The defendant was convicted of several sexual offenses with a child. The child refused to testify at trial. (1) The court ruled that the child's statements to a licensed professional counselor were properly admitted under the residual hearsay exception, Rule 804(b)(5). (See the court's discussion of the facts supporting its ruling.) (2) The court ruled that the child's statements to a pediatric nurse and a physician who conducted a physical examination of the child were properly admitted under Rule 803(4) (medical diagnosis or treatment). The evidence satisfied the test for admissibility under State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). (See the court's discussion of the facts supporting its ruling.)

Court Disapproves of Judicial Official Offering Opinion Testimony of Defendant's Impaired Condition When Defendant Had Appeared Before Official

State v. Lewis, ___ N.C. App. ___, 555 S.E.2d 348 (20 November 2001). The defendant was convicted of DWI. The magistrate before whom the defendant had appeared after his arrest testified at the trial that the defendant was impaired. The court stated that it disapproves of a judicial official offering opinion testimony of a defendant's impaired condition when the defendant had appeared before that official.

Sentencing

Trial Judge Properly Found as Aggravating Factor Defendant's Use of Weapon of Mass Destruction in Sentencing for Armed Robbery Conviction

State v. McMillan, ___ N.C. App. ___, ___ S.E.2d ___ (18 December 2001). The defendant was convicted of armed robbery in which he used a sawed off shotgun. The court ruled that the trial judge properly found as an aggravating factor in sentencing that the defendant used a weapon of mass destruction. The finding of this aggravating factor did not violate the provision in G.S. 15A-1340.16(d) that evidence necessary to prove an element of an offense may not be used to prove an aggravating factor.

(1) Judge Who Imposes Enumerated Special Probation Condition Is Not Required to Find That It Is Reasonably Related to Defendant's Rehabilitation
(2) Probation Condition That Defendant Not Engage in Practice as Paralegal or Private Investigator Was Valid

State v. Lambert, ___ N.C. App. ___, 553 S.E.2d 71 (2 October 2001). The defendant was convicted of the unauthorized practice of law and placed on probation. (1) The trial judge imposed as a specific probation condition under G.S. 15A-1343(b1)(3c) that the defendant remain under a curfew and not be away from his residence from 7:00 p.m. until 6:00 a.m. The court ruled that G.S. 15A-1343(b1)(10) (judge may impose any other conditions reasonably related to the defendant's rehabilitation) does not require a judge who imposes an enumerated special probation condition [see subdivisions (b1)(1) through (9a)] to find that the condition is reasonably related to the defendant's rehabilitation. Thus the probation condition was validly imposed. (2) In the defendant's first appeal, the court of appeals in an unpublished opinion ruled that a probation condition that the defendant not engage in the practice as a paralegal or private investigator was valid (because the condition bore some relation to the offense and was aimed at preventing the defendant from engaging in similar offenses). In this appeal, the court ruled that it was bound by the prior ruling that the condition was valid because one panel of the court of appeals cannot overrule a prior panel's ruling unless it has been overturned by a higher court.

Defendant Whose Suspended Sentence Is Activated Is Not Entitled to Credit Against Prison Term for Time Spent in IMPACT During Probation

State v. Hearst, ___ N.C. App. ___, 555 S.E.2d 357 (20 November 2001). **(Note: The North Carolina Supreme Court has granted the defendant's petition to review this ruling.)** The

court, after analyzing the 1998 legislative changes to IMPACT (Intensive Motivational Program of Alternative Correctional Treatment), ruled that a defendant whose suspended sentence is activated is not entitled to credit against his or her prison term for time spent in IMPACT during probation.

Juvenile Probation May Be Extended After Expiration of Probationary Period When Motion for Review Was Filed Before End of Probationary Period

In re T.J., ___ N.C. App. ___, 553 S.E.2d 418 (16 October 2001). The court ruled that G.S. 7B-2510(d) and (e) authorize the extension of juvenile probation after the expiration of the probationary period when the motion for review was filed before the end of the probationary period. [Note: Although the case was decided when former Chapter 7A was effective, the court made clear that its analysis also applied under G.S. 7B-2510.]

Department of Correction Has No Authority to Modify Illegal Sentence, But Department Must Notify Trial Court and Parties That Sentence and Judgment Are Not in Accordance With State Law and Must Be Vacated

Hamilton v. Freeman, ___ N.C. App. ___, 554 S.E.2d 856 (20 November 2001). This case involved a lawsuit by several prisoners against the Department of Correction concerning the department's modifications of their sentences that disadvantaged them. The department determined that a prisoner, who was sentenced to CYO (Committed Youthful Offender) status under the Fair Sentencing Act, did not qualify for that status and refused to consider her for immediate parole. The department determined that two prisoners who received concurrent sentences were ineligible for concurrent sentences and informed them that their sentences would run consecutively. The court, distinguishing State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998), upheld the trial court's ruling that the Department of Correction has no authority to modify an illegal sentence, but the department must notify the trial court and parties that the sentence and judgment are not in accordance with state law and must be vacated.