

RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE

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United State Supreme Court

Sixth Amendment Right to Counsel

Court Extends Sixth Amendment Right to Counsel to a Misdemeanor When the Punishment Includes a Suspended Sentence

Alabama v. Shelton, 122 S. Ct. ___, ___ L. Ed. 2d ___, 71 Crim. L. Rep. 226 (20 May 2002). Before discussing the ruling in this case, the following prior Court rulings are summarized: A defendant has a Sixth Amendment right to counsel for a misdemeanor trial in which actual imprisonment is imposed, but not when a fine is the only punishment. *See* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). A defendant has a Sixth Amendment right to counsel for all felony trials, regardless of the punishment imposed on conviction. See the discussion in *Alabama v. Shelton* of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and later cases.

The Court ruled in *Alabama v. Shelton* that a defendant has a Sixth Amendment right to counsel at a misdemeanor trial in which the sentence on conviction includes a suspended sentence. Thus, a judge may not impose a suspended sentence after a trial without counsel for a misdemeanor unless (1) an indigent defendant has waived his or her right to the assistance of counsel and the right to appointed counsel, or (2) a non-indigent defendant has waived the right to the assistance of counsel.

Effect of ruling. For all misdemeanor convictions, including traffic misdemeanors such as speeding over 15 miles over the speed limit, a judge may not constitutionally impose a suspended sentence unless the defendant had counsel or properly waived counsel. A judge does not violate a defendant's Sixth Amendment right to counsel if the judge orders a fine, costs, or restitution without counsel or waiver of counsel—as long as a suspended sentence is not imposed.

Of course, a defendant who currently has a suspended sentence obtained in violation of *Alabama v. Shelton* may not have that suspended sentence revoked and activated. *See also* *State v. Neeley*, 307 N.C. 247 (1982).

This ruling may also affect: (1) prosecuting other offenses, such as habitual misdemeanor assault and habitual impaired driving, in which prior misdemeanor convictions are offered to prove an element of these offenses, (2) impeaching a defendant at trial, or (3) sentencing the defendant. If a conviction was obtained in violation of *Alabama v. Shelton*, then it will be inadmissible at trial or sentencing. A defendant must prove the invalidity of the conviction under the procedures set out in G.S. 15A-980. (Whether a conviction may be “saved” by excising the suspended sentence—as was done by the Alabama Supreme Court in *Alabama v. Shelton* on direct appeal of the conviction—is an issue for future litigation.)

Issues not decided in *Alabama v. Shelton*. The Court did not decide whether a defendant's Sixth Amendment right to counsel would be violated if a defendant was held in

contempt of court and an active sentence imposed for failing to pay a fine, costs, or restitution for a misdemeanor conviction in which the defendant did not have counsel or waive counsel. The Court also did not decide whether its ruling is retroactive to invalidate prior misdemeanor convictions obtained in violation of the ruling.

To Demonstrate Sixth Amendment Violation When Trial Court Failed to Inquire Into Potential Conflict of Interest About Which It Knew or Reasonably Should Have Known, Defendant Must Establish That Conflict of Interest Adversely Affected Counsel's Performance

Mickens v. Taylor, 122 S. Ct. 1237, ___ L. Ed. 2d ___, 71 Crim. L. Rep. 20 (27 March 2002). The Court ruled that to demonstrate a Sixth Amendment violation when a trial court failed to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that the conflict of interest adversely affected the counsel's performance.

Defense Counsel's Decision To Not Present Mitigating Evidence and To Waive Final Argument in Capital Sentencing Hearing Was Governed by *Strickland v. Washington*, Not *United States v. Cronin*, and State Appellate Court's Ruling That Counsel Was Not Ineffective Was Neither Contrary to, Nor an Unreasonable Application of, Clearly Established Federal Law

Bell v. Cone, 122 S. Ct. ___, ___ L. Ed. 2d ___, 71 Crim. L. Rep. 255 (28 May 2002). The defendant's counsel decided to not present mitigating evidence and to waive final argument in a capital sentencing hearing. After reviewing the facts in this case, the Court ruled that the defendant's assertion that his counsel was ineffective was governed by *Strickland v. Washington*, 466 U.S. 668 (1984) (two-part test for determining ineffective assistance of counsel), not *United States v. Cronin*, 466 U.S. 648 (1984) (certain actions of defense counsel are automatically prejudicial without considering effect on trial or sentencing hearing), and the state appellate court's ruling that counsel was not ineffective was neither contrary to, nor an unreasonable application of, clearly established federal law.

Miscellaneous

Court Overrules Prior Case and Rules That Defective Indictment in Federal Court System Does Not Deprive Federal Court of Jurisdiction Over Criminal Case

United States v. Cotton, 122 S. Ct. ___, ___ L. Ed. 2d ___, 71 Crim. L. Rep. 223 (20 May 2002). The Court overruled *Ex Parte Bain*, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887), and ruled that a defective indictment in the federal court system does not deprive a federal court of jurisdiction over a criminal case. [Author's note: This ruling only applies to criminal cases in the federal court system and does not affect North Carolina appellate court rulings (see, e.g., *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326 (2000), that an indictment invalid on its face deprives a trial court of its jurisdiction. However, North Carolina appellate courts often give weight to United States Supreme Court rulings in deciding or reconsidering similar issues.)]

North Carolina Supreme Court

Criminal Law and Procedure

Evidence Was Sufficient to Prove Intent-to-Permanently-Deprive Element in Armed Robbery Involving Theft of Car

State v. Mann, ___ N.C. ___, 560 S.E.2d 776 (5 April 2002). The defendant was convicted of first-degree murder, armed robbery involving the theft of the murder victim's car, and other offenses. The evidence showed that the defendant lured the victim from her place of employment to the defendant's apartment, beat her there, transported her to various ATM locations to make withdrawals, forced her into the trunk of her car, and eventually shot and killed her. The victim's car was found later in a subdivision near the location of the victim's body. The court ruled, relying on *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986), that evidence the defendant took and later abandoned the car was sufficient to prove the intent-to-permanently-deprive element of armed robbery. This element may be inferred when a defendant shows a complete lack of concern whether the owner ever recovers his or her property.

Court Affirms, Per Curiam and Without Opinion, Court of Appeals Ruling That Evidence Was Insufficient to Support Theory of Second-Degree Kidnapping Alleged in Indictment

State v. Morris, ___ N.C. ___, ___ S.E.2d ___ (10 May 2002), *affirming*, 147 N.C. App. 247, 555 S.E.2d 353 (20 November 2001). The court affirmed, per curiam and without an opinion, the court of appeals ruling that the evidence was insufficient to support the theory of second-degree kidnapping alleged in the indictment—the defendant kidnapped the victim for the purpose of facilitating a felony. The defendant raped the victim in an apartment and then took her to an outside storage room and left her there. The court of appeals noted that all the elements of rape were committed before the defendant removed her to the storage closet, and the continuous transaction doctrine does not apply because the two acts were not inseparable or concurrent. The court of appeals also noted that the defendant's acts may have supported the theory of kidnapping for the purpose of facilitating flight, but that theory was not alleged in the indictment.

Court Comments on Trial Judges' Excusal During Voir Dire of Prospective Jurors Who Are 65 or Older

State v. Rogers, ___ N.C. ___, ___ S.E.2d ___ (10 May 2002). The court ruled that the trial judge during jury voir dire did not abuse his discretion in granting the requests of two jurors, ages 68 and 69, to be excused. The court then commented that, in light of the statutory admonition contained in G.S. 9-6(a) (jury service is solemn obligation of all qualified citizens), "we remind the trial courts that excusing prospective jurors present in the courtroom who are over the age of sixty-five must reflect a genuine exercise of judicial discretion. Defendant correctly points out that such jurors often bring to the jury pool both a wealth of experience and a willingness to serve."

Arrest, Search, and Confession Issues

Court Affirms, Per Curiam and Without Opinion, Court of Appeals Ruling That Officers Did Not Have Exigent Circumstances to Enter Residence to Seize Marijuana

State v. Nowell, 355 N.C. 273, 559 S.E.2d 787 (7 March 2002), *affirming*, 144 N.C. App. 636, 550 S.E.2d 807 (17 July 2001). The court affirmed, per curiam and without an opinion, the court of appeals ruling that officers did not have exigent circumstances to enter a residence to seize marijuana, based on the following facts. A drug courier working with law enforcement officers and wearing a “body wire” delivered approximately fifty pounds of marijuana to a residence where the purchaser and his accomplice were waiting for the delivery of the marijuana. When an officer heard through a radio transmitter that the purchaser and his accomplice were about to roll a marijuana cigarette from the marijuana and smoke it, law enforcement officers entered the residence without a search warrant.

Court Affirms Trial Judge’s Ruling That Defendant Was in Custody Under *Miranda*, Based on Facts in This Case

State v. Buchanan, 355 N.C. 264, 559 S.E.2d 785 (7 March 2002). On remand to determine whether the defendant was in custody to require *Miranda* warnings under the appropriate standard for custody [see *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001)], the trial judge ruled that the defendant was in custody when, after admitting to officers that he had participated in a murder, the interrogating officers accompanied him to the bathroom with an officer staying with him at all times. The court affirmed the trial judge’s ruling.

Capital Case Issues

Prosecutor’s Improper Cross-Examination of Defense Expert Psychiatrist and Improper Jury Argument in Capital Sentencing Hearing Sufficiently Prejudiced Defendant to Require New Capital Sentencing Hearing

State v. Rogers, ___ N.C. ___, ___ S.E.2d ___ (10 May 2002). The court ruled that the prosecutor’s improper cross-examination of a defense expert psychiatrist and improper jury argument in a capital sentencing hearing sufficiently prejudiced the defendant to require a new capital sentencing hearing. The court stated that the prosecutor ascribed the basest of motives to the defendant’s expert. He also indulged in ad hominem attacks, disparaged the expert’s field of expertise, and distorted his testimony. (See the discussion of the facts in the court’s opinion.) The court also stated: “We admonish counsel to refrain from arguing that a witness is lying solely on the basis that the witness has been or will be compensated for his or her services. We also instruct trial judges to be prepared to intervene ex mero motu if such arguments continue to be made.”

Evidence

- (1) Court Notes That Under Rule 806 Defendant Should Have Been Permitted on Cross-Examination to Ask State's Witness, Who Had Testified About Hearsay Statements of Nontestifying Witnesses, Impeachment Questions That Would Have Been Proper If Witnesses Had Testified**
- (2) State Violated Constitutional Duty to Provide Exculpatory Evidence**
- (3) Trial Judge Erred in Failing to Either Suppress Testimony of State's Firearm Expert or Order State to Retest Weapon When State Lost Test-Fired Bullets**

State v. Canady, 355 N.C. 242, 559 S.E.2d 762 (7 March 2002). The defendant was convicted of two counts of first-degree murder and other offenses. (1) The court noted that under Rule 806 the defendant should have been permitted on cross-examination to ask a state's witness, who had testified about hearsay statements of nontestifying witnesses, impeachment questions that would have been proper if the witnesses had testified. [Author's note: The court ruled in this case that the trial judge had erred in admitting the hearsay statements, but the court also noted that this error was compounded by the additional error in not allowing the defendant to ask questions under Rule 806.] (2) The trial judge denied the defendant's motions that the state disclose the name of the informant who implicated five other people as being involved in the murders and the name and address of the person returned from Mississippi by officers who had named a person, not the defendant, who had arranged the murders. The court ruled that the defendant needed access to these people to interview them and develop leads [*State v. Taylor*, 344 N.C. 31, 473 S.E.2d 742 (1996) ("to make effective use of the evidence")], and there was a reasonable possibility that such information could have resulted in different verdicts. (3) The state's firearm expert test fired a gun recovered from a river, and the spent bullets were compared to those found at the murder scene. The expert testified that the gun appeared to be the murder weapon. The state lost the spent bullets. The defendant requested that the state either retest the gun and provide the defendant with the new tested bullets or that the expert's testimony be excluded. The trial judge denied the motion. The court ruled that the trial judge erred in failing to either suppress the testimony of the state's firearm expert or order the state to retest the weapon.

Expert May Not Offer Opinion in Child Sexual Abuse Case That Sexual Abuse Had In Fact Occurred Absent Physical Evidence Supporting Diagnosis of Sexual Abuse

State v. Stancil, 355 N.C. 266, 559 S.E.2d 789 (7 March 2002), *modifying and affirming*, 146 N.C. App. 234, 552 S.E.2d 212 (18 September 2001). The court ruled, citing *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *affirmed per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001), that an expert may not offer an opinion in a child sexual abuse case that sexual abuse had in fact occurred absent physical evidence supporting a diagnosis of sexual abuse. However, an expert may testify, with a proper foundation, about the profiles of sexually-abused children and whether a particular child has symptoms or characteristics consistent with such profiles—the court cited *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992); *State v. Aguillo*, 322 N.C. 818, 370 S.E.2d 676 (1988); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987).

- (1) Defense Counsel Was Properly Barred from Asking State’s Witness a Question that Asked Witness to Vouch for Veracity of Another Witness**
- (2) Defense Counsel Was Properly Barred from Asking State’s Witness Whether Another Nontestifying Witness Did Not Identify Anyone, Because Question Improperly Called for Hearsay Response**

State v. Robinson, ___ N.C. ___, ___ S.E.2d ___ (5 April 2002). (1) Defense counsel was not permitted by the trial judge to ask state’s witness Baker, “But, if he [the detective] testified that you told him that, he would be telling the truth, wouldn’t he, Ms. Baker?” Defense counsel was also not permitted to ask state’s witness Bullock, “And, if Jesse Hill testified that he saw you at 6:00 on Monday afternoon, he would be mistaken then?” The court ruled that these questions were improper because defense counsel sought to have the witnesses vouch for the veracity of another witness—a lay opinion that is impermissible under Rule 701. The court noted that defense counsel may, for example, question the detective about the statements made by Baker to the detective and then argue to the jury about any inconsistencies in the statements and testimony (and the same with inconsistencies between Bullock and Hill). (2) Defense counsel sought to elicit information from Steve Gardner whether Jennifer Aycock, who did not testify at trial, had identified anyone when shown mug shot books. Defense counsel was not permitted by the trial judge to ask Gardner, “Ms. Aycock didn’t identify anyone, did she?” The court ruled that the defense counsel’s question called for a hearsay response, citing *State v. Satterfield*, 316 N.C. 55, 340 S.E.2d 52 (1986), and was properly barred from asking the question.

Sentencing

Trial Judge in Noncapital Sentencing Hearing Improperly Found Aggravating Factor Under G.S. 15A-1340.16(d)(15) (Defendant Took Advantage of Position of Trust or Confidence to Commit Offense)

State v. Mann, ___ N.C. ___, 560 S.E.2d 776 (5 April 2002). The court ruled that the trial judge improperly found in noncapital sentencing the aggravating factor under G.S. 15A-1340.16(d)(15) (defendant took advantage of position of trust or confidence to commit offense). The defendant lured the victim to lunch to talk about a work-related matter, committed armed robbery and financial transaction card theft against her, and eventually killed her. The defendant and victim worked together. While the evidence showed that they enjoyed an amiable working relationship, perhaps even a friendship, it did not show a relationship between them generally conducive to reliance on the other to support this aggravating factor; the court cited *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987).

North Carolina Court of Appeals

Criminal Law and Procedure

Assault Inflicting Serious Bodily Injury Is Not Lesser-Included Offense of Assault with Deadly Weapon With Intent to Kill Inflicting Serious Injury

State v. Hannah, ___ N.C. App. ___, ___ S.E.2d ___ (16 April 2002). The defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury [G.S. 14-32(a)]. The court ruled that the trial judge erred in submitting assault inflicting serious bodily injury (G.S. 14-32.4) as a lesser-included offense. Proof of “serious bodily injury” in G.S. 14-32.4 requires proof of a more severe injury than “serious injury” in G.S. 14-32.4. The court noted that although there may be assaults in which the injury satisfies both elements (serious injury and serious bodily injury), this does not satisfy the definitional approach required to determine whether one offense is a lesser-included offense of another; the court cited *State v. Hudson*, 345 N.C. 729, 483 S.E.2d 436 (1997).

Evidence Was Sufficient to Prove Serious Bodily Injury in Prosecution of Assault Inflicting Serious Bodily Injury

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (4 June 2002). The defendant was convicted of assault inflicting serious bodily injury under G.S. 14-32.4. The victim was punched and kicked in the face and body. The court ruled that the following evidence was sufficient to prove “serious bodily injury” (as confined by the judge’s jury instruction to “permanent or protracted condition that causes extreme pain”): The victim suffered a broken jaw that was wired shut for two months, during which he lost 30 pounds. The jaw injury resulted in \$6,000 in damages to his teeth. His ribs were broken and he twice suffered back spasms that required trips to the emergency room. The back spasms continued up to the date he testified. A doctor testified that the victim’s broken jaw would cause a person “quite a bit” of pain and discomfort. The court noted that “serious bodily injury” in G.S. 14-34.4 requires proof of a more severe injury than the “serious injury” element of other assault offenses.

- (1) Because State Is Not Required to Charge Underlying Felony in Prosecuting First-Degree Felony Murder, Any Variance in Indictment Charging Underlying Felony and Jury Instruction on Underlying Felony in First-Degree Felony Murder Was Not Error**
- (2) First-Degree Arson Indictment Was Insufficient Because It Failed to Allege That Dwelling Was Occupied When Arson Was Committed**

State v. Scott, ___ N.C. App. ___, ___ S.E.2d ___ (4 June 2002). The defendant was convicted of first-degree arson, first-degree felony murder based on the underlying felony of first-degree burglary, and other offenses. (1) The defendant was indicted for first-degree murder using the short-form indictment. He also was indicted for first-degree burglary, alleging he broke and entered with the intent to commit murder. The trial judge’s jury instruction for first-degree felony murder based on the underlying felony of first-degree burglary described the intent element as the intent to commit murder *or* rape. The defendant argued that the variance between the first-degree burglary indictment (intent to commit murder) and the jury instruction on

burglary (intent to commit murder or rape) as the underlying felony of first-degree felony murder tainted the first-degree felony murder conviction. The court ruled that because the state is not required to charge the underlying felony in prosecuting first-degree felony murder, citing *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982) and *State v. Carey*, 288 N.C. 254, 218 S.E.2d 387 (1975), any variance in the indictment charging the underlying felony (first-degree burglary) and the jury instruction on the underlying felony (first-degree burglary) in first-degree felony murder was not error. (2) The court ruled that the first-degree arson indictment was insufficient because it failed to allege that the dwelling was occupied when arson was committed.

(1) In Felonious Assault Trial, When Jury Was Split on Lesser Misdemeanor Assault or Not Guilty, Mistrial Declaration Did Not Bar State from Retrying Defendant for Felonious Assault

(2) Defendant’s Stipulation to Being Habitual Felon Does Not Constitute Guilty Plea

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (4 June 2002). (1) During a jury’s deliberations on felonious assault, misdemeanor assault, and not guilty, the jury sent a note that it was split seven jurors for misdemeanor assault and five jurors for not guilty. The judge declared a mistrial. Relying on *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982), the court ruled that the mistrial declaration did not bar the state from retrying the defendant for the felonious assault charge. (2) During a habitual felon hearing, the defendant admitted to the three prior felony convictions and stipulated to being a habitual felon. The judge then adjudged the defendant to be a habitual felon and imposed a sentence. Relying on *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001), the court ruled the defendant’s admission and stipulation did not constitute a guilty plea in the absence of a judge’s establishing that the plea was voluntary, knowing, and intelligent. The court remanded the case for a new habitual felon hearing.

Defendant Was “Other Person Providing Care to or Supervision of a Child” to Support Felonious Child Abuse as Felony in First-Degree Felony Murder Conviction

State v. Carrilo, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The defendant was convicted of first-degree felony murder based on the felony of felonious child abuse under G.S. 14-318.4. The court ruled that the evidence showed that the defendant was an “other person providing care to or supervision of a child” under G.S. 14-318.4 to support the submission of first-degree felony murder. The defendant had resided with the child’s mother and the child for two months before the murder, shared the same bedroom with them, and the child’s mother had left the child in the defendant’s care for short periods of time.

Jury Instruction on Intentional Infliction of Injury in N.C.P.I.—Crim. 206.35 in Second-Degree Child Murder Prosecution Was Not Error

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (7 May 2002). The defendant was convicted of second-degree murder for the killing of a two-year-old child. The court ruled that the trial judge did not err in using the jury instruction on intentional infliction of injury in N.C.P.I.—Crim. 206.35. (The charging language is provided in “Third” on page three of the pattern instruction.) The court noted that the jury may properly consider the credibility of any

explanations offered by the defendant for other injuries sustained by the victim beside the injury that resulted in the victim's death.

Trial Judge Erred in Not Submitting Common Law Robbery as Lesser-Included Offense of Armed Robbery

State v. Frazier, ___ N.C. App. ___, ___ S.E.2d ___ (21 May 2002). The court ruled that the trial judge erred in not submitting common law robbery as a lesser-included offense of armed robbery when the defendant testified at trial that he unloaded his gun before entering the store where the robbery was committed.

(1) Defendant Was Properly Convicted of Possession of Cocaine Based on Residue of Crack Cocaine Found in Crack Pipe

(2) Double Jeopardy Did Not Bar Convictions of Both Possession of Cocaine and Possession of Drug Paraphernalia, Even Though Cocaine Was Found in Drug Paraphernalia

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (16 April 2002). (1) The state's evidence showed that the residue of cocaine in a crack pipe resulted from crack cocaine vaporizing from a solid into a gas. The court ruled that this evidence was sufficient to support the defendant's conviction of possession of cocaine. (2) The court rule that double jeopardy did not bar the defendant's convictions of both possession of cocaine and possession of drug paraphernalia, even though the cocaine was found in the drug paraphernalia—the crack pipe. Each crime has an element that is not included in the other crime; the court cited *State v. Perry*, 305 N.C. 225, 287 S.E.2d 810 (1982).

False Pretenses Offense Was Properly Alleged in Indictment That Stated “Obtain *and* Attempt to Obtain” and “Calculated to Deceive *and* Did Deceive”

State v. Armstead, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The defendant attempted to cash a stolen check in a store by stating that the check had already been pre-approved by the store manager. The employee handling the check was not actually deceived because she knew that her manager never pre-approved checks. The defendant left the store without cashing the check. The false pretenses indictment stated, in part, “obtain *and* attempt to obtain” and that the false pretense was “calculated to deceive *and* did deceive (emphasis added).” The court ruled, relying on *State v. Swaney*, 277 N.C. 602, 178 S.E.2d 399 (1970), that the indictment correctly used the conjunctive “and” between “obtain” and “attempt to obtain.” In addition, an indictment charging a completed offense is sufficient under G.S. 15-170 to support a conviction of an attempt to commit the charged offense. The court also ruled that the language “and did deceive” was surplusage and did not make the indictment defective.

- (1) Indictment Charging Felonious Breaking or Entering Was Not Defective**
- (2) Indictment Charging Felonious Larceny Was Defective**
- (3) No Fatal Variance Between Indictment Charging Felonious Breaking or Entering and Evidence at Trial**

State v. Norman, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The defendant was convicted of felonious breaking or entering and felonious larceny. (1) The breaking and entering indictment alleged that the defendant broke and entered a building occupied by Quail Run Homes, Ross Dotson Agent at a specific address in Winston-Salem. The court ruled that this indictment was not defective. An indictment for this offense does not require an allegation of ownership of the building; it only requires identification of the building with reasonable particularity. (2) The felonious larceny indictment described the property as that of “Quail Run Homes Ross Dotson, Agent.” The court ruled that this indictment was fatally defective because it failed to properly indicate the legal ownership of the property. (3) The court ruled that there was not a fatal variance between the indictment charging felonious breaking or entering and the evidence at trial, which failed to show that any individual named “Ross Dotson” had any connection to Quail Run Homes. The language concerning “Ross Dotson” was surplusage and immaterial.

Sufficient Evidence to Support Defendant’s Convictions of Failing to Notify Sheriff of Change of Address as Required by Registered Sex Offender

State v. Holmes, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The court ruled that there was sufficient evidence to support the defendant’s convictions of failing to notify the sheriff of a change of address as required by a registered sex offender. (See the discussion of the evidence in the court’s opinion.) The court distinguished *State v. Young*, 141 N.C. App. 220, 540 S.E.2d 794 (2000), noting that the *Young* ruling involved a defendant who was an adjudicated incompetent.

Evidence of Confinement and Restraint Was Separate and Distinct from Attempted First-Degree Rape to Support Conviction of Second-Degree Kidnapping

State v. Robertson, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The defendant was convicted of attempted first-degree rape and second-degree kidnapping. Evidence at trial showed that the defendant fraudulently induced the victim to return to his apartment by assuring her that he would help her find the person she was looking for, and then fraudulently induced her to enter his bedroom. Once there, he restrained her, brandished a knife, disrobed, attempted to get on top of her, and threatened to have sex with her or to kill her. The court ruled, relying on *State v. Muhammed*, 146 N.C. App. 292, 552 S.E.2d 236 (2001), that the evidence of restraint and confinement exceeded that necessary to establish attempted first-degree rape and thus supported the second-degree kidnapping conviction.

Trial and Conviction of Assault With Deadly Weapon With Intent to Kill Inflicting Serious Injury After Appellate Court Had Vacated Defendant's Conviction of Attempted Second-Degree Murder Did Not Violate Defendant's Statutory or Constitutional Rights

State v. Tew, ___ N.C. App. ___, 561 S.E.2d 327 (19 March 2002). The court ruled that the defendant's trial and conviction of assault with a deadly weapon with intent to kill inflicting serious injury after an appellate court had vacated the defendant's conviction of attempted second-degree murder [because the crime does not exist; see *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000)] did not violate the defendant's statutory or constitutional rights—joinder under G.S. 15A-926(c)(2), collateral estoppel, or double jeopardy.

Insufficient Evidence to Support Juvenile Adjudication of Disorderly Conduct in School, G.S. 14-288.4(a)(6)

In re Brown, ___ N.C. App. ___, ___ S.E.2d ___ (7 May 2002). The court ruled, relying on *In re Grubb*, 103 N.C. App. 452, 405 S.E.2d 797 (1991) and *In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992), that there was insufficient evidence to support a juvenile adjudication of disorderly conduct in a school, G.S. 14-288.4(a)(6). The evidence showed that a student talked during a test, slammed a door, and begged a teacher in the hallway that he not be sent to the office. The court stated that this evidence did not prove that there was a substantial interference with the school's operation.

Court, Without Deciding Whether Necessity Defense Exists for Offense of Possession of Firearm by Convicted Felon, Rules That Defendant Offered Insufficient Evidence of Defense

State v. Napier, ___ N.C. App. ___, 560 S.E.2d 867 (19 March 2002). The court, without deciding whether the necessity defense exists for the offense of possession of firearm by a convicted felon, ruled that defendant offered insufficient evidence of defense in this case. He did not show that he was under a present or imminent threat of death or serious bodily injury to justify his going to another's property with his firearm.

Defendant May Not Object to Trial By Citation at Superior Court Trial De Novo

State v. Phillips, ___ N.C. App. ___, 560 S.E.2d 852 (19 March 2002). The court ruled, relying on *State v. Monroe*, 57 N.C. App. 597, 292 S.E.2d 21 (1982), that a defendant may not object to trial by citation under G.S. 15A-922(a) at a superior court trial de novo. A defendant may object to trial by citation in district court only.

Trial Judge Did Not Err in Denying Defendant's Motion to Withdraw Guilty Pleas Filed Seven Days After Entry of Plea and One Day Before Sentencing Hearing

State v. Davis, ___ N.C. App. ___, ___ S.E.2d ___ (7 May 2002). On December 5, 2000, the defendant pleaded guilty to second-degree murder and other charges concerning a vehicular homicide. A sentencing hearing was scheduled for December 13, 2000. On December 12, 2000, the defendant filed a motion to withdraw his guilty pleas. The court, utilizing the standard from

State v. Handy, 326 N.C. 532, 391 S.E.2d 159 (1990) (presentence motion to withdraw guilty plea should be allowed for any fair and just reason), affirmed the trial judge's denial of the defendant's motion. The court noted that the record did not support the defendant's contention that there was confusion, haste, coercion, and misunderstanding when the guilty plea had been entered. The defendant did not assert his innocence, and the state's evidence strongly support the guilty pleas.

Trial Judge Did Not Err in Summarily Punishing Probationer for Direct Criminal Contempt for Lying During Her Testimony in Probation Revocation Hearing

State v. Terry, ___ N.C. App. ___, ___ S.E.2d ___ (19 March 2002). The court ruled that the trial judge did not err in summarily punishing the probationer for direct criminal contempt for lying during her testimony in a probation revocation hearing. She did not dispute that she had been untruthful in her testimony. The court noted that the probationer was provided ample opportunity to present reasons why she should not be found in contempt.

Judge Did Not Err in Denying, Without Evidentiary Hearing, Defendant's Motion for Appropriate Relief Alleging Ineffective Assistance of Counsel When Motion Failed to Supply Affidavits or Other Evidence Beyond Bare Assertions in Motion

State v. Rhue, ___ N.C. App. ___, ___ S.E.2d ___ (21 May 2002). The court ruled, relying on State v. Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985), that the judge did not err in denying, without an evidentiary hearing, the defendant's motion for appropriate relief alleging ineffective assistance of counsel when the motion failed to supply affidavits or other evidence beyond the bare assertions in the motion; see G.S. 15A-1420(c)(6). The court also noted, citing State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985), the motion failed to comply with the requirements of G.S. 15A-1420(b)(1).

Several Years Delay in Processing Defendant's Appeal of Conviction to Court of Appeals Did Not Violate Defendant's Due Process Rights

State v. China, ___ N.C. App. ___, ___ S.E.2d ___ (4 June 2002). The defendant was convicted in superior court in April 1994, but his appointed counsel did not perfect the appeal. New counsel was appointed in December 2000 to seek appellate review. The court ruled, analyzing several factors (length of delay, reason for delay; defendant's assertion of right to speedy appeal; prejudice to defendant) that the delay in processing the appeal did not violate the defendant's due process rights.

Arrest, Search, and Confession Issues

- (1) Defendant's Motion to Suppress Incriminating Statements Based on Alleged Violation of Vienna Convention Was Properly Denied**
- (2) SBI Agent Was Competent to Testify About His Conversations in Spanish with Defendant**

State v. Aquino, ___ N.C. App. ___, 560 S.E.2d 552 (5 March 2002). The defendant, a Mexican national, made incriminating statements when interviewed in Spanish by an SBI agent who was fluent in Spanish. (1) The court upheld the trial judge's denial of the defendant's motion to suppress the statements based on an alleged violation of the Vienna Convention on Consular Relations, which requires law enforcement authorities to inform a detained or arrested foreign national that they may have their consulates notified of their status. The court noted that courts reviewing this issue—see, e.g., *United States v. Jimenez-Nava*, 243 F.3d 192 (5th Cir. 2001)—have refused to rule that suppression of evidence is a remedy for a violation of this treaty. In any event, the defendant was not detained for purposes of the treaty. He was voluntarily with the SBI agent during the interviews. [Author's note: For information about this treaty, see http://www.state.gov/www/global/legal_affairs/ca_notification/introduction.html and M. Wesley Clark, "Providing Consular Rights Warnings to Foreign Nationals," in *FBI Law Enforcement Bulletin*, 22-32 (March 2002).] (2) The SBI agent testified that he understood the defendant and what he was saying, and believed that the defendant understood him. The court ruled that the agent was competent to testify at trial about his interviews in Spanish with the defendant.

***Miranda* Ruling Does Not Apply to Statement to Law Enforcement Officer Offered into Evidence in Civil Abuse and Neglect Proceeding**

In re Pittman, ___ N.C. App. ___, ___ S.E.2d ___ (16 April 2002). The court ruled, citing *State v. Adams*, 345 N.C. 745, 483 S.E.2d 156 (1997) and a legal treatise, that the *Miranda* ruling does not apply to a statement made to a law enforcement officer offered into evidence in a civil abuse and neglect proceeding. The *Miranda* ruling only applies to a statement offered into evidence in a criminal proceeding.

Confession Was Voluntary; It Was Not Improperly Induced by Promises to Defendant

State v. Thompson, ___ N.C. App. ___, 560 S.E.2d 568 (19 March 2002). The defendant voluntarily came to the police station and spoke with a detective about a robbery. The court ruled that the detective's repeated assertions that the defendant would not be arrested that day regardless of what he said was not an improper inducement that led the defendant to confess. The court noted that the defendant was familiar with the criminal justice system (he had seven prior convictions) and had doubtless been questioned often by law enforcement officers before the questioning that occurred in this case.

Anonymous Tip and Officer's Corroboration Provided Reasonable Suspicion to Make Investigative Stop and Frisk for Robbery Suspect's Weapon

State v. Allison, ___ N.C. App. ___, 559 S.E.2d 828 (19 February 2002). An unidentified woman approached officer A at a convenience store and told him that about five minutes earlier she had been in a nearby restaurant where she had observed four African-American males sitting in the bar area. She said that she had overheard them talking about robbing the restaurant, and she had seen the four men passing a black handgun among themselves. At the officer's request, the woman repeated her observations to officer B. Officer A then obtained the woman's telephone number, which he wrote on the back of his hand. Officer A and other officers entered the restaurant and saw four African-American males sitting in the bar area. Officer A identified the defendant as having been involved in prior gun-related incidents. He then approached the men and asked them to step into the restaurant's foyer. The defendant was "holding his pants up as though he had something dragging his pants down." The officer began conducting a pat-down frisk of the defendant and asked him whether he was carrying any weapons. After the defendant responded "no," the officer continued frisking him and seized a nine milliliter handgun from his waistband. The defendant was arrested for carrying a concealed weapon. Later, officer A called the telephone number that he had written on the back of his hand, but there was no answer. The court ruled, distinguishing *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000) and *State v. Hughes*, 353 N.C. 200, 539 S.E.2d 625 (2000), that reasonable suspicion supported officer A's investigatory stop of the defendant. Unlike *Florida v. J. L.* and *Hughes*, the tip was supplied by a face-to-face encounter rather than by an anonymous phone call. Officer A had an opportunity to observe the demeanor of the tipster to assess the tip's reliability. By engaging officer A directly, the tipster significantly increased the likelihood that she would be held accountable if her tip proved to be false. Also, unlike the informants in *Florida v. J. L.* and *Hughes*, the tipster offered a reasonable explanation how she was aware that criminal activity was possibly going to take place. In addition, the officer's knowledge that the defendant had been involved in gun-related incidents buttressed the tip. The court also ruled that the officer's frisk was proper. The court rejected the defendant's argument that once officer A had begun to frisk him and found nothing, the defendant should have been permitted to leave once he informed the officer that he was not carrying a handgun.

Probable Cause Did Not Exist to Support Search Warrant for Residence When It Was Based on Anonymous Citizen Complaints Asserting Suspicions of Drug Activity Based on Heavy Vehicular Traffic There and Officer's Conclusion That There Was Illegal Drug Activity

State v. Hunt, ___ N.C. App. ___, ___ S.E.2d ___ (7 May 2002). The court ruled, relying on *State v. Crisp*, 19 N.C. App. 456, 199 S.E.2d 155 (1973) and *State v. Ford*, 71 N.C. App. 748, 323 S.E.2d 358 (1985) and distinguishing *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461 (1988), that probable cause did not exist to support a search warrant for a residence when it was based on anonymous citizen complaints asserting suspicions of drug activity based on heavy vehicular traffic with short visits there, and an officer's conclusion that there was illegal drug activity based on his observation of heavy vehicular traffic. The court noted that one ever saw drugs on the premises.

Informant's Information and Officer's Corroboration Supported Probable Cause to Arrest and Search Defendant

State v. Chadwick, ___ N.C. App. ___, 560 S.E.2d 207 (5 March 2002). A reliable informant gave an officer information that the defendant would be delivering a large amount of cocaine to a specific location in about fifty minutes. The informant described the driver and make of the vehicle in which the defendant would be a passenger, the direction of the vehicle's travel to the location, where the vehicle would park, and that the defendant would act like he was there to use the telephone and then conduct a drug transaction there. The officer had previously set up a drug deal with the defendant. The officer conducted surveillance at the place and corroborated all the informant's information. The court ruled that the officer had probable cause to arrest and search the defendant, citing several cases, including *State v. Wooten*, 34 N.C. App. 85, 237 S.E.2d 301 (1977), and *State v. Mills*, 104 N.C. App. 724, 411 S.E.2d 193 (1991).

Exigent Circumstances Did Not Support Officers' Seizure of Defendant's Horses on Her Property Without Search Warrant

State v. Nance, ___ N.C. App. ___, ___ S.E.2d ___ (16 April 2002). The defendant leased barns and paddocks for her horses. Animal control officers received a telephone call on December 18, 1998, that the horses were being treated cruelly. That same day they viewed the horses from a road. The horses were located in open, accessible areas on the defendant's leased property. They were emaciated and appeared to be starving. On December 21, 1998, the officers entered the property and seized the horses without a search warrant. The court noted that although the officers did not violate the Fourth Amendment when they initially viewed the horses on December 18, 1998, they deprived her of her Fourth Amendment possessory interest in the horses when they removed them three days later. The court then ruled that exigent circumstances did not support the officers' seizure of the horses on the defendant's property without a search warrant. The court stated the officers had ample time during the three days to secure a search warrant.

Officer's Warrantless Entry Into Apartment Did Not Violate Fourth Amendment Because He Reasonably Believed That Someone Inside Needed Immediate Assistance

State v. China, ___ N.C. App. ___, ___ S.E.2d ___ (4 June 2002). An officer and two victims of a burglary that had occurred within an hour approached an apartment where they believed that the burglary suspect was located. As they approached, they heard a violent argument emanating from inside the apartment. The officer knocked on the door, which opened, and they walked inside. One person was sitting in the living room with a knife in her hand, and the defendant walked out of the kitchen bleeding profusely from his forearm. The court ruled, citing *State v. Woods*, 136 N.C. App. 386, 524 S.E.2d 363 (2000) and *Mincey v. Arizona*, 437 U.S. 385 (1978), that the officer's warrantless entry into the apartment did not violate the Fourth Amendment because he reasonably believed that someone inside needed immediate assistance.

- (1) Stop of Vehicle and Frisk of Passenger Did Not Violate Fourth Amendment**
- (2) Vehicle Passenger Did Not Have Reasonable Expectation of Privacy in Vehicle to Challenge Search**
- (3) Search Incident to Arrest of Vehicle Occupant Included Search of Center Console**

State v. Van Camp, ___ N.C. App. ___, ___ S.E.2d ___ (21 May 2002). The defendant was a passenger in a vehicle that failed to stop at a driver's license checkpoint, but it eventually stopped sixty feet beyond the checkpoint in response to an officer's command to stop. The officer looked inside the vehicle with his flashlight and saw the corner of a plastic bag sticking out from the passenger seat occupied by the defendant. The officer knew that a plastic bag such as this one was often used to transport illegal drugs. When the defendant rolled down the window, the officer smelled the odor of alcohol coming from the vehicle. The officer asked the defendant to get out of the vehicle, frisked him for weapons, felt what he recognized to be a pair of brass knuckles in the defendant's front pants pocket, and arrested him for carrying a concealed weapon. The officer then searched the vehicle and found crack cocaine in the center console. (1) The court ruled that the stop of the vehicle and the officer's frisk of the defendant did not violate the Fourth Amendment. (2) The court ruled that the defendant did not assert an ownership or possessory interest in the vehicle and therefore did not have a reasonable expectation of privacy to challenge the search of the center console. (3) Even if the defendant had a reasonable expectation of privacy in the vehicle, the search of the center console was lawful under *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), as a search incident to the arrest of a vehicle occupant.

- (1) Nonverbal Conduct Intended as Assertion Is a "Statement" Giving Consent to Search Under G.S. 15A-221(b)**
- (2) Officer Had Probable Cause to Seize and Unfold Twenty Dollar Bill to Look for Illegal Drugs**

State v. Graham, ___ N.C. App. ___, ___ S.E.2d ___ (5 March 2002). Officers responded to a tip of reported drug activity at an apartment. They entered with consent and stated their intentions to search for drugs and pat down the occupants for weapons. They noticed that the defendant continuously reached into his pants pocket. The defendant responded "no" to an officer's question about whether he had anything in his pocket. When the officer asked the defendant if she could check his pants pocket, he stood up and raised his hands away from his body accompanied by a gesture that the officer understood to mean consent. Shortly thereafter, the defendant allowed the officer to search his pocket. The officer found a folded twenty dollar bill with a lump in it. Based on her training and experience, it was consistent with the way drugs are packaged or concealed. She unfolded the bill and found crack cocaine. (1) The court ruled that proper consent was obtained because nonverbal conduct intended as an assertion is a "statement" giving consent to search under G.S. 15A-221(b). (2) The court ruled, citing *State v. Briggs*, 140 N.C. App. 484, 536 S.E.2d 858 (2000), that the officer had probable cause to seize the bill and unfold it to look for illegal drugs.

Officer's Violation of Knock-and-Announce Requirement (G.S. 15A-249) in Executing Search Warrant Was Not Substantial Violation to Require Suppression of Evidence Under G.S. 15A-974(2)

State v. Sumpter, ___ N.C. App. ___, ___ S.E.2d ___ (21 May 2002). An officer executed a search warrant for illegal drugs at a residence. As the officer pushed open an unlocked exterior door, he announced his identity and purpose ("police officer, search warrant"). The court noted that the officer violated G.S. 15A-249 by not announcing his identity and purpose before opening the door and entering the residence. However, the court ruled that this violation was not substantial to require the exclusion of evidence [G.S. 15A-974(2)] found in the search. An immediate entry could prevent the destruction of illegal drugs, the door was unlocked, no one objected to the officer's entry into the residence, several people had been seen entering the residence without knocking or receiving an invitation to enter, and people who use crack cocaine usually carry weapons.

Evidence

Evidence of Prior Sexually-Related Acts with Young Girls That Occurred Ten and Fifteen Years Before Similar Acts Being Tried Was Properly Admitted Under Rule 404(b)

State v. Patterson, ___ N.C. App. ___, ___ S.E.2d ___ (19 March 2002). The defendant was convicted of taking indecent liberties and other related offenses with four girls whose ages were thirteen and fourteen. Some of the acts included the girls removing their clothing and posing for pictures in their underwear. The court ruled that evidence of prior sexually-related acts with young girls that occurred ten and fifteen years ago in Delaware was properly admitted under Rule 404(b) to show the defendant's common scheme and plan. The evidence was not too remote in time.

(1) Statement of Unavailable Witness Was Properly Admitted under Residual Hearsay Exception, Rule 804(b)(5)

(2) Evidence of Defendant's 1971 Murder Conviction Was Properly Admitted under Rule 404(b) to Show Defendant's Intent to Kill and His Identity as Perpetrator

State v. Castor, ___ N.C. App. ___, ___ S.E.2d ___ (7 May 2002). The defendant was convicted of first-degree murder in which he used a shotgun to kill the victim. The murder was committed in 1998. (1) The court ruled that a statement of an unavailable witness was properly admitted under the residual hearsay exception, Rule 804(b)(5). The state's unsuccessful efforts to serve a subpoena sufficiently showed that the witness was unavailable. Other evidence showed why the statement was trustworthy. (See the court's discussion of these issues in its opinion.) (2) The court ruled that evidence of the defendant's 1971 murder conviction was properly admitted under Rule 404(b) to show the defendant's intent to kill and his identity as the perpetrator. The court noted that the trial judge had found ten similarities between the murder on trial and the 1971 murder. Also, during the twenty-seven year period between the killings, the defendant had been imprisoned for about eighteen years, which are excluded in determining the "remoteness" issue—see *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145 (2001).

State Was Properly Permitted to Impeach Its Witness With Investigator's Testimony

State v. Martinez, ___ N.C. App. ___, 561 S.E.2d 528 (2 April 2002). The defendant was convicted of conspiracy to traffic in marijuana. The state's witness, who was a co-conspirator, testified that he did not know what was in the package (marijuana) that was delivered to him. The court ruled, distinguishing *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989), that the trial judge did not err in permitting the state's investigator to testify in effect that the state's witness had said that marijuana was in the package. The court noted that before the investigator testified the trial judge had instructed the jury that his testimony was admitted only to show a prior inconsistent statement by the state's witness. The court also noted that there was no evidence that the state's *primary* purpose in eliciting testimony from the investigator was to evade the hearsay rule and admit the prior inconsistent statement as substantive evidence.

State Was Properly Permitted Under Rule 405(a) to Impeach Defendant's Character Witnesses with Defendant's Prior Conviction

State v. Rhue, ___ N.C. App. ___, ___ S.E.2d ___ (21 May 2002). The defendant was convicted of second-degree murder. The court ruled, citing *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1 (2000), that the state was properly permitted under Rule 405(a) and Rule 403 to impeach the defendant's character witnesses, who testified about the defendant's peacefulness, with the defendant's 1980 conviction of assault with a deadly weapon. The court noted that the character witnesses testified that they knew the defendant in 1980, and thus their testimony made that conviction relevant.

Trial Judge Erred in Not Allowing Handwriting Expert to Offer Opinion on Genuineness of Person's Signature

Taylor v. Abernethy, ___ N.C. App. ___, ___ S.E.2d ___ (19 March 2002). The court ruled that the trial judge erred in not allowing a handwriting expert to offer an opinion on the genuineness of a person's signature. The court noted that there is no requirement that a party offering expert testimony must produce evidence that the testimony is based in science or has been proven through scientific study. Expert testimony may be based not only on scientific knowledge, but also on technical or other specialized knowledge not necessarily based in science. The court also noted that appellate cases have consistently upheld expert testimony concerning handwriting analysis.

Compact Disk Presentation on Mechanism of Baby-Shaking Syndrome Was Properly Admitted During Testimony of Forensic Pathology Expert

State v. Carrilo, ___ N.C. App. ___, ___ S.E.2d ___ (2 April 2002). The court ruled that a compact disk presentation on the mechanism of baby-shaking syndrome was properly admitted during the testimony of a forensic pathology expert in a child abuse homicide trial. The disk included (1) a stop-action video demonstration of the shaking of a doll, representing an infant, and (2) animated diagrams of an infant's brain. The presentation was used to illustrate the expert's testimony concerning the manner in which an infant is shaken to cause the severity of injuries sustained in the typical shaken baby syndrome case.

- (1) Trial Judge Erred in Permitting State to Cross-Examine Defendant About Over Ten-Year-Old Aggravated Battery Conviction Under Rule 609(b)**
- (2) Evidence of Defendant's Beating of Victim Three Months Before Murder Was Properly Admitted Under Rule 404(b)**

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (19 March 2002). The defendant was convicted of first-degree murder in the 1998 beating death of the victim with a hammer. (1) The court ruled that the trial judge erred in permitting the state to cross-examine the defendant about a 1984 Florida aggravated battery conviction under Rule 609(b)—the conviction involved an assault with a bullwhip against his then wife. The court noted that the conviction did not shed any light on the defendant's veracity and the substantial likelihood of prejudice outweighed its minimal impeachment value. (2) The court ruled that the trial judge did not err in admitting under Rule 404(b) evidence of the defendant's beating of the victim with a baseball bat three months before the murder to show malice, premeditation and deliberation, intent, and ill will.

Sentencing

PJC in District Court Is Prior Conviction for Felony Sentencing Under Structured Sentencing Act

State v. Graham, ___ N.C. App. ___, ___ S.E.2d ___ (5 March 2002). Relying on *State v. Hatcher*, 136 N.C. App. 524, 524 S.E.2d 815 (2000), the court ruled that a PJC entered in district court was properly counted as a prior conviction for felony sentencing under the Structured Sentencing Act [author's note: although not stated in the court's opinion, presumably the PJC was for a Class A or A1 misdemeanor—see G.S. 15A-1340.14(5)].

When Revoking Defendant's Probation, Judge Erred in Recommending That as Condition of Work Release That Defendant Pay Fine Owed in Probationary Judgment

State v. Wingate, ___ N.C. App. ___, ___ S.E.2d ___ (16 April 2002). In January 2000, the defendant was placed on probation. Among the probation conditions was an order to pay \$231 in costs, a \$1,500 fine, a \$100 community service fee, and \$400 in attorney fees. In October 2000, a judge revoked the defendant's probationary sentence and activated his sentence. The judge recommended that as a condition of work release that the defendant pay monies owed in the probationary sentence. The court noted that a judge may recommend restitution or reparation be imposed as a condition of attaining work release. The court ruled that the money owed for costs and attorney's fees was properly included in the recommendation. The court also ruled that if the community service fee had been incurred by the state and constituted damages as a result of the defendant's commission of the crime for which he was placed on probation, then it was properly included in the recommendation. The court rejected the defendant's argument that the community service fee is a normal operating expense of government and cannot be considered restitution. The court ruled that the judge erred in recommending payment of the fine as a condition of work release because a fine is not restitution or reparation; the court cited *State v. Alexander*, 47 N.C. App. 502, 267 S.E.2d 396 (1980).

Fourth Circuit Court of Appeals

North Carolina Supreme Court Ruling That Short-Form First-Degree Murder Indictment Did Not Violate Defendant's Sixth or Fourteenth Amendment Rights Was Neither Contrary To, Nor an Unreasonable Application of, Clearly Established United States Supreme Court Precedent

Hartman v. Lee, 283 F.3d 190 (4th Cir. Mar. 5, 2002). The court ruled that a North Carolina Supreme Court ruling [State v. Hartman, 344 N.C. 445, 476 S.E.2d 328 (1996)] that a short-form first-degree murder indictment did not violate a defendant's Sixth or Fourteenth Amendment rights was neither contrary to, nor an unreasonable application of, clearly established United States Supreme Court precedent.