

## **Criminal Procedure**

### **Motion to Dismiss**

[\*State v. Messer\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery asserting that the State failed to establish the corpus delicti of the crime. Specifically, the defendant argued that the State relied solely on his uncorroborated confession, which, under the corpus delicti rule, was insufficient to establish guilt. Rejecting the defendant's argument, the court also rejected the notion that the corpus delicti rule requires non-confessional evidence of every element of a crime. Citing prior case law, it concluded that the State need only show corroborative evidence tending to establish the reliability of the confession. Here, the State presented evidence that aligned with the defendant's confession, including, among other things, the medical examiner's determination as to cause of death; the recovery of a firearm at the scene; and DNA evidence. [Author's note: for a discussion of the corpus delicti rule, see my Judges' Benchbook Chapter here: <http://benchbook.sog.unc.edu/criminal/corpus-delicti>]

### **Bond Forfeiture**

[\*State v. Chestnut\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). The trial court erred by granting a motion to set aside a bond forfeiture. When the defendant failed to appear in district court, the trial court issued a bond forfeiture notice. The bail agent filed a motion to set aside the forfeiture. However, on the preprinted form used for such motions the bail agent did not check any of the seven exclusive reasons under the statute, G.S. 15A-544.5, for setting aside a bond forfeiture. In addition to the motion, the bail agent submitted a letter stating that it had "been putting forth efforts to locate [the defendant]" but had been unsuccessful in doing so despite spending "\$150 checking leads as to where and how" to locate the defendant. The Board of Education objected to the motion. The trial court allowed the surety's motion to set aside. On appeal, the court held that the trial court erred in allowing the motion to set aside because the surety failed to demonstrate a legally sufficient reason to set aside under the statute. No box was checked on the relevant form and the reasons asserted in the letter attached to the motion did not fall within any of the seven exclusive statutory reasons for setting aside a forfeiture.

[\*State v. Hinnant\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). Over a dissent, the court held that the trial court erred by allowing a motion to set aside a bond forfeiture filed by the bail agent on behalf of the surety. Because the record establishes that at the time the surety posted the bond, it had actual notice that the defendant previously had failed to appear in the same matter the trial court was prohibited by statute from setting aside the bond forfeiture. When the defendant failed to appear in district court an order for arrest was issued, indicating that this was the defendant's second or subsequent failure to appear on the charges. The defendant was served with the order for arrest and released on a secured bond posted by the bail agent in the amount of \$16,000. The release order also explicitly indicated that this was the defendant's second or subsequent failure to appear in the case. When the defendant again failed to appear, the trial court ordered the bond forfeited. A motion to set aside asserted that the defendant had been surrendered by a surety on the bail bond. At the hearing on the motion, the bail agent presented a letter from the sheriff's office stating that the defendant had been surrendered. The trial court allowed the motion to set aside. The Board of Education appealed, arguing that the trial court was statutorily barred from setting aside the bond forfeiture and that no competent evidence supported the trial court's decision to set aside. The Court of Appeals agreed, noting in part that while the statute allows a forfeiture to be set aside where the defendant has been surrendered by a surety, it explicitly prohibits setting aside a bond forfeiture "*for any reason in any case* in which the surety or the bail agent had actual notice before executing a bail bond that the defendant

had already failed to appear on two or more prior occasions in the case for which the bond was executed.” G.S. 15A-544.5(f). Here, both the order for arrest and the release order expressly indicated the defendant’s second or subsequent failure to appear on the charges. Thus, the bail agent had actual notice and the trial court lacked authority to set aside the forfeiture for any reason.

[\*State v. Knight\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). The trial court lacked statutory authority to reduce the bond forfeiture amount. After the defendant failed to appear, the clerk of court issued a bond forfeiture notice in the amount of \$2,000. A bail agent filed a motion to set aside the bond forfeiture. However, the motion did not indicate the reason for setting aside the forfeiture. A document attached to the motion indicated that the defendant was incarcerated. The Board of Education objected to the motion to set aside. Following a hearing, the trial court denied the surety’s motion to set aside, finding that it had not established one of the statutory reasons for setting aside the forfeiture. Despite denying the motion, the trial court verbally reduced the amount of the bond forfeiture from \$2,000 to \$300. The Board of Education appealed, arguing that the trial court lacked authority to reduce the amount of the bond forfeiture after denying the motion to set aside. On appeal, the surety did not argue that the motion to set aside should have been allowed; rather, it asserted that the trial court had discretion to reduce the bond forfeiture amount. The court concluded that the trial court did not have authority under G.S. 15A-544.5 to reduce the amount owed by the surety. The court reasoned that under G.S. 15A-544.5, the trial court may only grant relief from the forfeiture for the reasons listed in the statute, and the only relief it may grant is the setting aside of the forfeiture. Here, having denied the motion to set aside, the trial court had no authority to grant partial relief by reducing the amount owed on the bond.

### **Sex Offenders Satellite-Based Monitoring (SBM)**

[\*State v. Bishop\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). (1) The defendant failed to preserve the claim that the trial court erred by ordering him to enroll in SBM without conducting a *Grady* hearing to determine whether the monitoring was reasonable under the Fourth Amendment. After a jury convicted the defendant of taking indecent liberties with his daughter, the trial court ordered him to enroll in SBM for 30 years. The defendant did not challenge the trial court’s imposition of SBM on constitutional grounds at the hearing. Immediately after the sentence and SBM was imposed, the defendant entered a plea to two additional counts of indecent liberties with a child, evidence of which was uncovered during investigation with respect to his daughter. The trial court sentenced the defendant, found he qualified as recidivist, and ordered him to enroll in SBM for life. The defendant did not challenge this new SBM order on constitutional grounds. Nor did he timely appeal either of the SBM orders. He later filed a petition for writ of certiorari, asking the Court of Appeals to review the SBM orders. The court concluded that the defendant’s claim suffered from two separate preservation issues. First the defendant did not make the *Grady* constitutional argument before the trial court. Second, he did not timely appeal the SBM orders. The court went on to decline to consider the merits of his claim. (2) The court declined to issue a writ of certiorari to consider the defendant’s argument that the trial court erred in finding that he was a recidivist and thus qualified for lifetime SBM. The defendant failed to timely appeal on this ground. The court declined to issue the writ because the defendant had not shown that his argument has merit or that error was probably committed below. Here, the defendant argued that his convictions for indecent liberties against his daughter could not count as a “prior conviction” because they occurred on the same day as his guilty plea to the additional counts of indecent liberties against different victims. The court noted that the defendant was not simultaneously convicted of the offenses that rendered him a recidivist. After he was convicted and sentenced for offenses against his daughter, he plead guilty to

separate offenses that occurred more than a decade earlier. At the time he pled guilty to those offenses, he had already been convicted and sentenced for the offenses against his daughter. Thus, he had a prior conviction for a reportable offense at the time the trial court sentenced him on the new convictions. The court concluded: “That his prior conviction occurred earlier the same day rather than the day before, or many years before, is irrelevant . . . .”

[\*State v. Greene\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). The court reversed the trial court’s order denying the defendant’s motion to dismiss the State’s application for lifetime SBM. In the trial court, the defendant filed a motion to dismiss the State’s application for SBM. At the SBM hearing, the State presented evidence establishing that the defendant had a prior conviction of misdemeanor sexual battery in addition to his new conviction of two counts of taking indecent liberties with a child. The State offered no evidence other than the defendant’s criminal record. The defendant countered, challenging the constitutionality of imposition of lifetime SBM under *Grady*, arguing that the State had not met its burden of establishing the reasonableness of the SBM. The trial court rejected the defendant’s argument. On appeal, the defendant argued that the trial court erred by ordering lifetime SBM where the State’s evidence was insufficient to establish that imposition of SBM constituted a reasonable Fourth Amendment search. The State conceded this point but argued that it should have a chance to supplement its evidence upon the remand from the Court of Appeals. The court disagreed and reversed without a remand.

### **Removal from Registry**

[\*In Re Bethea\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). The court affirmed the trial court’s denial of the petitioner’s petition to be removed from the sex offender registry. The trial court found that the requested relief did not comply with federal law. On appeal, the court rejected the petitioner’s argument that the trial court violated his substantive due process rights by denying his petition for termination of sex offender registration after finding that he “is not a current or potential threat to public safety.” Specifically, the petitioner argued after the trial court found that he was not a current or potential threat to public safety, it was arbitrary for the trial court to deny his petition and to require him to continue to register because of federal standards incorporated into state law. The court also rejected the petitioner’s argument that the retroactive application of federal sex offender registration standards violates ex post facto protections. Citing its prior cases on point, the court rejected this argument.

### **Arrest, Search & Investigation**

#### **Arrest**

[\*State v. Messer\*](#), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). In this armed robbery and murder case, the trial court did not err by concluding that law enforcement officers had probable cause to arrest the defendant. Among other things, the defendant placed a telephone call using the victim’s cell phone about 20 minutes before the victim’s death was reported to law enforcement; the defendant spent the previous night at the victim’s residence; the victim’s son had last seen his father with the defendant; the victim’s Smith and Wesson revolver was missing and a Smith and Wesson revolver was found near the victim’s body; and the defendant was seen on the day of the victim’s death driving an automobile matching the description of one missing from the victim’s used car lot.

#### **Vehicle Stop Based on a Tip**

*State v. Walker*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (Oct. 3, 2017). No reasonable suspicion supported a stop. At approximately 5 pm dispatch notified a trooper on routine patrol that an informant-driver reported that another driver was driving while intoxicated. The informant reported that the driver was driving from the Hubert area towards Jacksonville, traveling about 80 to 100 mph while drinking a beer. He also claimed that the driver was driving “very erratically” and almost ran him off the road “a few times.” While responding to the dispatch, the informant flagged down the trooper and said that the vehicle in question had just passed through the intersection on US 258, heading towards Richlands. The trooper headed in that direction and stopped the defendant’s vehicle within 1/10 of a mile from the intersection. The defendant was arrested and charged with DWI and careless and reckless driving. The defendant unsuccessfully moved to suppress in District Court and appealed to Superior Court. After a hearing, the Superior Court granted the motion to suppress. The Court of Appeals found that the tip did not have sufficient indicia of reliability to provide reasonable suspicion for the stop. Although the informant was not anonymous, because the defendant’s vehicle was out of sight, the informant was unable to specifically point out the defendant’s vehicle to the trooper. The trooper did not observe the vehicle being driven in a suspicious or erratic fashion. Additionally, it is unknown whether the trooper had the vehicle’s license plate number before or after the stop and whether the trooper had any vehicle description besides a “gray Ford passenger vehicle.” The court distinguished prior case law involving tips that provided enough information so that there was no doubt as to which particular vehicle was being reported. Here, the informant’s ambiguous description did not specify a particular vehicle. Additionally, no other circumstances enabled the trooper to further corroborate the tip; the trooper did not witness the vehicle behaving as described by the informant.