RECENT CASES AFFECTING CRIMINAL LAW AND PROCEDURE
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North Carolina Supreme Court

Capital Case Issues

Trial Judge Erred in Limiting Defendant's Cross-Examination of State's Witness Who Testified in Support of Aggravating Circumstance (e)(3) (Prior Violent Felony Conviction)

State v. Valentine, 357 N.C. 512, 591 S.E.2d 846 (7 November 2003). The court ruled that the trial judge erred in limiting the defendant's cross-examination of a state's witness (concerning whether the witness signed an affidavit denying that the defendant was involved in the crime resulting in the defendant's prior conviction) who testified in support of aggravating circumstance (e)(3) (prior violent felony conviction).

Defendant's Prison Sentence for Other Crimes Was Not a Nonstatutory Mitigating Circumstance

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (7 November 2003). The court ruled, citing State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992), that trial judge did not err in not submitting as a nonstatutory mitigating circumstance that the defendant had been sentenced to 105 years' imprisonment in Georgia for convictions there. A defendant's prison sentence for other crimes is not a nonstatutory mitigating circumstance.

Criminal Law and Procedure

No Error in Jury Instruction on First-Degree Felony Murder When Felony of Attempted Sale of Cocaine With Deadly Weapon Was Underlying Felony

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (7 November 2003). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that there was no error in the conviction of first-degree felony murder when the jury instruction authorized the felony murder conviction for the commission or attempted commission of the sale of cocaine with a deadly weapon and the words "sale of cocaine" appeared on the jury verdict sheet. Even if some jurors found a completed sale of cocaine rather than an attempted sale (for which there was sufficient evidence), there was no error because an attempted sale of cocaine is a lesser-included offense of sale, and a finding of sale necessarily included the attempt to sell.

Arrest, Search, and Confession Issues

Trial Judge Had No Authority to Rule on State's Motion to Reconsider Another Trial Judge's Order Granting Defendant's Motion to Suppress When State Did Not Make Sufficient Showing of Substantial Change of Circumstances—Ruling of Court of Appeals Reversed

State v. Woolridge, 357 N.C. 544, 592 S.E.2d 191 (7 November 2003), *reversing*, 147 N.C. App. 685, 557 S.E.2d 158 (2001). The court ruled, citing State v. Hilliard, 120 N.C. 479, 27 S.E. 130 (1997) and other cases, that a trial judge had no authority to rule on the state's motion to reconsider another trial

judge's order granting the defendant's motion to suppress when the state did not make a sufficient showing of a substantial change of circumstances since the first judge's order. The court stated that superior court judges must remain mindful that the power of one judge of the superior court is equal and coordinate with that of another.

Evidence

State v. Valentine, 357 N.C. 512, 591 S.E.2d 846 (7 November 2003). (1) The court ruled that the murder victim's statements were properly admitted under Rule 803(3) and the residual hearsay exception, Rule 804(b)(5). The statements related directly to the victim's fear of the defendant. (2) The court ruled that the statements of defendant's brother were properly admitted under co-conspirator exception, Rule 801(d)(E). The evidence sufficiently showed that there was a conspiracy between the defendant and the defendant's brother, and the statements were made in furtherance of the conspiracy. The court also ruled that even the statements were not admissible under that exception, the statements were not hearsay because they not offered for their truth.

North Carolina Court of Appeals

Criminal Law and Procedure

(1) Court Sets Aside Defendant's Guilty Plea As Part of Plea Agreement Conditioned on Right to Appeal Several Issues, Only One of Which Defendant Had Right to Appeal
(2) Court Rules That Possession of Cocaine Under G.S. 90-95(d)(2) Is a Misdemeanor, Not a Felony

State v. Jones, ___ N.C. App. ___, 588 S.E.2d 5 (4 November 2003) **[Note: The North Carolina Supreme Court has granted the state's petition to review the ruling involving cocaine possession and the state's petition to stay the ruling. I believe that the current prevailing law until the supreme court decides this issue is as set out in State v. Chavis, discussed below: the possession of any amount of cocaine under G.S. 90-95(d)(2) is a felony.]** The defendant pleaded guilty to possession with intent to sell and deliver cocaine and habitual felon status. (1) The defendant's guilty plea was part of a plea agreement with the state that conditioned the plea on the defendant's right to appeal several issues. The court ruled that the defendant had the right to appeal only one of these issues. The court also ruled that because the defendant was entitled to the benefit of the plea agreement, the guilty plea must be vacated and remanded to the trial court, placing the defendant in the position he was in before he entered into the plea agreement—the court cited State v. Wall, 348 N.C. 671, 502 S.E.2d 585 (1998). The court stated that the defendant may attempt to negotiate another plea agreement or proceed to trial. (2) One of the felony convictions supporting the defendant's habitual felon status was a 1991 conviction for possession of cocaine committed on August 2, 1991, in which the defendant was punished as a Class I felon and sentenced to five years in prison. The court ruled that this conviction could not support habitual felon status because possession of cocaine under G.S. 90-95(d)(2) is a misdemeanor, not a felony. The court noted that the plain language of the statute states that possession of cocaine is a misdemeanor that is punishable as a felony. It does not state that possession of cocaine is a felony. Thus possession of cocaine is a misdemeanor. (The court also noted that the current statute involving this offense is the same as existed in 1991 when the defendant was convicted.) The court distinguished State v. Chavis, 134 N.C. App. 546, 518 S.E.2d 241 (1999), which had stated, "N.C. Gen. Stat. § 90-95(d)(2) (Cum. Supp. 1998) clearly states that the possession of any amount of cocaine is a felony." The court noted that the statute does not state what the court in *Chavis* said the statute stated.

[Author's note: Below is the pertinent legislative history concerning possession of cocaine since 1971. Chapter 919 of the Session Laws of 1971 made possession of any amount of cocaine a felony punishable by up to five years' imprisonment. Chapter 654 of the Session Laws of 1973, effective January

1, 1974, made possession of cocaine a misdemeanor punishable by up to two years' imprisonment, but if the quantity possessed exceeded 100 dosage units or equivalent quantity, it was a felony punishable by up to five years' imprisonment. Chapter 1358 of the Session Laws of 1973, effective April 12, 1974, made possession of cocaine a misdemeanor punishable by up to two years' imprisonment, but if the quantity possessed was one gram or more, it was a felony punishable by up to five years' imprisonment. Chapter 760 of the Session Laws of 1979, which created the Fair Sentencing Act that codified felonies into Classes A through J, inserted the language "punishable as a Class I felony" in G.S. 90-95(d)(2). Chapter 641 of the Session Laws of 1989, effective October 1, 1989 and applicable to the conviction relevant to this case, deleted the words "one gram or more of" cocaine from the sentence stating that "the violation shall be punishable as a Class I felony." The title of Chapter 641 was "AN ACT TO MAKE THE POSSESSION OF ANY AMOUNT OF COCAINE OR PHENCYCLIDINE A FELONY (capitalization in original)." Chapter 539 of the Session Laws of 1993, enacted in conjunction with the creation of the Structured Sentencing Act in Chapter 538 of the Session Laws of 1993, amended G.S. 90-95(d)(2) to reinsert the words "one gram or more of" that had been deleted by Chapter 641 of the Session Laws of 1989. However, before this provision became effective, Chapter 11 of the Sessions Laws of 1993, Extra Session 1994, repealed it. The title of Chapter 11 was, in relevant part, "AN ACT TO REPEAL THE PROVISION IN THE STRUCTURED SENTENCING ACT THAT WOULD HAVE PROVIDED THAT POSSESSION OF LESS THAN ONE GRAM OF COCAINE WAS NOT A FELONY . . . (capitalization in original)."]

(1) Defendant Was Not Prejudiced By State's Failure to Produce Actual Money Seized During Defendant's Drug Arrest When Money Had Been Transferred Before Trial to Federal Agency for Federal Forfeiture
(2) Evidence Was Sufficient to Support Defendant's Conviction of Possession of Cocaine With Intent to Sell or Deliver

State v. Davis, ___ N.C. App. ___, 586 S.E.2d 804 (21 October 2003). An officer arrested the defendant and found on his person 9.2 grams of marijuana, 18.6 grams of cocaine, and cash in the amount of $2,641.68. Before trial, the money was transferred to the U.S. Drug Enforcement Agency for federal forfeiture, and thus the actual money was not available at the defendant's trial. The defendant was convicted of possession of cocaine with the intent to sell or deliver and misdemeanor possession of marijuana. (1) The court discussed the trial testimony offered by the state and defense concerning the money and ruled, citing the provision in G.S. 15-11.1(a) that substitute evidence may be introduced at trial as long as it does not prejudice the defendant, that the defendant was not prejudiced by the state's failure to produce the actual money. (2) The court ruled that the evidence was sufficient to support the defendant's conviction of possession of cocaine with the intent to sell or deliver. First, the court stated that the amount of cocaine, almost 20 grams, far exceeded the amount that a typical user would possess for personal use. Second, the cocaine was packaged separately, and an officer testified that drug dealers often keep cocaine in individual packages so it is readily available for sale. Third, the drugs were found in close proximity to the money. The cash was in the defendant's pocket, while the drugs were hidden in his boots.

Maiming of Victim's Ear Requires Proof That Victim's Ear Was Totally Severed from Victim's Head or Part of Victim's Ear Was Totally Severed from Rest of Ear

State v. Scott, ___ N.C. App. ___, 587 S.E.2d 485 (4 November 2003). The court ruled, relying on State v. Foy, 130 N.C. App. 466, 503 S.E.2d 399 (1998), that maiming of a victim's ear under G.S. 14-29 requires proof that the victim's ear was totally severed from the victim's head or part of the ear was totally severed from the rest of the ear. There was insufficient evidence to support a conviction of maiming when the evidence showed that the victim's ear was mostly, but not totally, severed from her head. [Author's note: The evidence may have supported a conviction of attempting maiming.]

Sufficient Evidence to Support Conviction of Armed Robbery When Defendant Threatened Use of His Gun When Confronted by Security Officers After Defendant Had Been Seen on Security Camera Concealing Store's Merchandise

State v. Gaither, ___ N.C. App. ___, 587 S.E.2d 505 (4 November 2003). The court ruled, relying on State v. Cunningham, 97 N.C. App. 631, 389 S.E.2d 286 (1990), that there was sufficient evidence to support a conviction of armed robbery when the defendant threatened the use of a gun in his pocket when confronted by security officers near the store exit after the defendant had been seen on a security camera concealing some of the store's merchandise. While the defendant's use of intimidation with the gun occurred after the taking of the store's merchandise, the defendant's effort to avoid apprehension by the security officers was an action continuous with the taking and thus constituted a part of the robbery.

Sufficient Evidence to Support Conviction of Armed Robbery Based on Victim's Testimony Concerning Object That Appeared to Be Box Cutter, Even Though Victim Stated That He Did Not Feel His Life Was Threatened

State v. Pratt, ___ N.C. App. ___, 587 S.E.2d 437 (4 November 2003). The defendant was convicted of armed robbery. The victim testified that when accosted around his neck by the defendant, he saw an object that appeared to be a box cutter, and his injuries were consistent with those caused by a box cutter. The court ruled, citing State v. Wiggins, 78 N.C. App. 405, 337 S.E.2d 198 (1985), that because the jury could find that a box cutter was used in the robbery and the box cutter was a dangerous weapon, it could have properly been presumed that the victim's life was endangered. Although the victim stated that he did not feel his life was threatened and thus the presumption was rebutted, the dangerous character of the weapon was a fact to be determined by the jury, which found contrary to the victim's testimony.

(1) Jury Selection Procedure in Which Prospective Jurors Were Divided into Panels and Called in Order in Which They Were Assigned Was Improper
(2) Trial Judge Did Not Err After Opening Statements in Re-Impaneling Jury and Replacing Person Incorrectly Seated as Alternate Juror

State v. Johnson, ___ N.C. App. ___, 587 S.E.2d 445 (4 November 2003). (1) The court ruled that the trial judge erred in dividing prospective jurors into panels and then calling prospective jurors from each panel in the order in which they were assigned (thus allowing both parties to know exactly which prospective juror was next to be called), rather than calling prospective jurors randomly from the jury venire as a whole as required by G.S. 15A-1214(a). This procedure clearly violated the statute. (2) After opening statements had been presented, it was discovered that the jury had been impaneled with the wrong person serving as an alternate juror. Rather than declaring a mistrial, the trial judge re-impaneled the jury with the correct alternate juror seated and allowed the parties to present opening statements to the re-impaneled jury. The court ruled that the judge did not err in doing so, citing State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977), and State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976).

Defendant Was Not Entitled to Jury Instruction in N.C.P.I. 105.40 on Impeachment by Prior Conviction When Convictions Were Elicited by Defense Counsel on Direct Examination of Defendant

State v. Jackson, ___ N.C. App. ___, 588 S.E.2d 11 (4 November 2003). The court ruled, relying on State v. Gardner, 68 N.C. App. 515, 316 S.E.2d 131 (1984), *affirmed*, 315 N.C. 444, 340 S.E.2d 701 (1986), that the court did not err in not giving the jury instruction in N.C.P.I. 105.40 ("Impeachment of the Defendant as a Witness by Proof of Unrelated Crime") when the convictions were elicited by defense counsel on direct examination of the defendant. The court stated that the defendant under these

circumstances was not entitled to a special instruction limiting consideration of such testimony to the defendant's "truthfulness."

Sentencing

Trial Judge Did Not Err in Ordering Defendant to Pay $30.00 in Restitution for Drug Purchase Made by Confidential Informant with Money Supplied by Officer, Even Though Purchase Did Not Result in Charge or Conviction, When Purchase Was Part of Ongoing Investigation Leading to Defendant's Conviction

State v. Reynolds, ___ N.C. App. ___, 587 S.E.2d 456 (4 November 2003). A confidential informant, working under an officer's supervision, was supplied thirty dollars by the officer and made a drug purchase from the defendant on September 16, 2001. The defendant was not charged with this offense, but was tried and convicted for a similar offense on November 19, 2001. The court ruled that the trial judge properly ordered defendant to pay restitution of thirty dollars for the September drug purchase under G.S. 90-95.3 and G.S. 15A-1343(d) because the September purchase was part of the ongoing investigation leading to his conviction.