

Criminal Case Update
District Court Judge Virtual Summer Conference
May 20, 2020

Cases covered include reported decisions from the North Carolina appellate courts and the U.S. Supreme Court decided between October 4, 2019 and May 5, 2020. The summaries were prepared by School of Government faculty and staff. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Arrest, Search, and Investigation

Investigatory Stops

Given the commonsense inference that vehicles likely are being driven by their owners, an officer’s knowledge that the registered owner of a vehicle has a revoked driver’s license provides reasonable suspicion for a traffic stop in the absence of information negating the inference that the owner is the driver.

Kansas v. Glover, 589 U.S. ___, ___ S. Ct. ___ (Apr. 6, 2020)

In this Kansas driving with a revoked license case, the Court held that when a police officer knows that the registered owner of a vehicle has a revoked driver’s license and lacks information negating an inference that the owner is the driver of the vehicle, a traffic stop is supported by reasonable suspicion and does not violate the Fourth Amendment. Recognizing that persons other than the registered owner sometimes may be lawfully driving, the Court said that knowledge of a registered owner’s revoked license “provided more than reasonable suspicion to initiate [a] stop” based on the “commonsense inference” that, in the absence of negating information, vehicles likely are being driven by their registered owners. The Court emphasized the narrow scope of its holding, saying that the presence of additional facts may dispel reasonable suspicion and offering the example of a situation where an officer observes that a driver does not appear to be the registered owner.

Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion expressing the view that the stop in this case was reasonable given the particular nature of Kansas motor vehicle law, where a license revocation usually is the consequence of serious or repeated offenses, and in light of the fact that the “barebones [evidentiary] stipulation” before the court demonstrated a total absence of “additional facts” that might “dispel reasonable suspicion.”

Justice Sotomayor dissented, criticizing the majority’s approach for “absolving officers from any responsibility to investigate the identity of a driver” when feasible and arguing that inferences

contributing to reasonable suspicion must be based on specialized law enforcement training and experience rather than layperson “common sense.”

Middle finger gesture from passing car did not create reasonable suspicion of disorderly conduct

State v. Ellis, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020)

In this Stanly County case, no reasonable suspicion existed when a trooper, already conducting a traffic stop, observed the defendant gesturing with his middle finger from the passenger side of a car driving past the stop. The Court of Appeals unanimously rejected the State’s argument that the stop of the defendant was justified by the community caretaking exception to the Fourth Amendment, but a majority of the panel found that the stop was supported by reasonable suspicion of disorderly conduct ([here](#)). Judge Arrowood dissented and would have ruled that the act was protected speech under the First Amendment and that the trooper lacked reasonable suspicion [Jeff Welty blogged about that decision [here](#)].

On appeal to the Supreme Court, the State waived oral argument and conceded that the trooper lacked reasonable suspicion. The court agreed. The State’s evidence at suppression showed that the trooper saw the defendant waving from the car, and then begin “flipping the bird,” perhaps vigorously. The trooper did not know for whom the gesture was intended, and otherwise observed no traffic violations or other suspect activities. This failed to establish reasonable suspicion of a crime. In the court’s words:

The fact that [the trooper] was unsure of whether defendant’s gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. . .Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Slip op. at 6-7.

The court did not consider the defendant’s First Amendment arguments in light of its ruling, and the matter was unanimously reversed and remanded.

A trooper unlawfully extended a traffic stop initiated for speeding by asking the defendant additional investigatory questions and for consent to search after the trooper had returned the defendant’s paperwork, issued him a warning ticket, and stated that the stop had ended

State v. Reed, ___ N.C. ___, 838 S.E.2d 414 (Feb. 28, 2020)

In this drug trafficking case arising out of a traffic stop, the court affirmed the conclusion of the Court of Appeals that the law enforcement officer who arrested the defendant violated the Fourth amendment by prolonging the stop without the defendant’s consent or a reasonable articulable suspicion of criminal activity. Highway Patrol Trooper Lamm, a member of the Patrol’s Criminal Interdiction Unit who was assigned to aggressively enforce traffic laws while being on the lookout for other criminal activity including drug interdiction and drug activity, clocked the black male defendant’s vehicle by radar being operated at a speed of 78 miles per hour in a 65 mile-per-hour zone. Lamm initiated a traffic stop and

observed at its outset that there was a black female passenger and a female pit bull dog inside the vehicle. The defendant provided Lamm with his New York driver's license and the rental agreement for the vehicle, which indicated that the female passenger, Usha Peart who also was the defendant's fiancée, was the renter and that the defendant was an additional authorized driver. Trooper Lamm ordered the defendant out of the vehicle, which Lamm characterized as displaying "signs of . . . hard [continuous] driving," and into the front seat of Lamm's patrol car, where he further ordered the defendant to close the door of the patrol car, which the defendant did after expressing some reluctance. Trooper Lamm did not consider the defendant to be free to leave at this point and began to question the defendant about his travel and other activities. Upon confirming that things were sufficiently in order regarding the rental car, Lamm completed the traffic stop and returned all paperwork to the defendant, telling him that the stop was concluded. About 20 minutes had elapsed at this point. After telling the defendant that the stop had ended, Lamm said "I'm going to ask you a few more questions if it is okay with you," and construed the defendant's continued presence in his patrol car as voluntary. Lamm testified that despite informing the defendant that the stop had ended, defendant would still have been detained, even if he denied consent to search the vehicle and wanted to leave. Lamm asked the defendant for consent to search the vehicle, to which he replied "you could break the car down," but further explained that Lamm should seek consent from Peart since she had rented the car. Lamm told the defendant to "sit tight" in the patrol vehicle as Lamm went to confer with Peart. At this time, Trooper Ellerbe, also a member of the Criminal Interdiction Unit, arrived at the scene in response to Lamm's request for backup where he was informed by Lamm that Lamm was going to attempt to obtain consent to search from Peart. Ellerbe then stationed himself next to Lamm's passenger seat where the defendant remained seated with the door closed. Lamm proceeded to talk with Peart and obtained her signature on the State Highway Patrol form "Written Consent to Search," which he had completed himself. Lamm then discovered cocaine in the backseat area of the vehicle and directed Ellerbe to place the defendant in handcuffs.

With this recitation of the factual circumstances surrounding the stop and search, the court proceeded to analyze, under the two-pronged analysis of *Terry v. Ohio*, 392 U.S. 1 (1968), (1) whether the stop was reasonable at its inception, and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Focusing on the second prong of the analysis because the defendant conceded that the stop was lawful at its inception, the court cited its previous decision in *State v. Bullock*, 370 N.C. 256 (2017) while explaining that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop," and that a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so." The critical question on this second prong in the traffic stop context is whether Trooper Lamm "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant" or whether Lamm unlawfully extended an otherwise-completed stop. Reviewing its own precedent and that of the U.S. Supreme Court, the court explained that all of Trooper Lamm's investigative activities until the point where Lamm returned the defendant's paperwork, issued the warning ticket, and told the defendant that the stop had ended were lawful. At that point, however, the mission of the stop was accomplished and Lamm unlawfully prolonged it by detaining the defendant in his patrol car and asking the defendant further questions without reasonable suspicion. As to whether reasonable suspicion existed to prolong the stop, the court found that inconsistencies in Lamm's testimony demonstrated that he was unable to articulate an objective basis for his purported reasonable suspicion and was unable to articulate the time at which he formulated such suspicion. The court disagreed with dissenting justices who took the view that the defendant's nervousness, his explanation of travel plans, the condition of the rental car, and the fact that it had been paid for in cash provided reasonable

suspicion, saying that these circumstances were generally consistent with lawful travel and were unremarkable. The court concluded by agreeing with the Court of Appeals that the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of the defendant's unlawful detention.

Justice Newby dissented, explaining that in his view, and as the trial court had found, the defendant consented to the prolonging of the stop in order to allow Trooper Lamm to ask him a few more questions.

Justice Davis, joined by Justices Newby and Ervin, also dissented, expressing the view that even is the defendant's consent to search was not voluntary, Trooper Lamm possessed reasonable suspicion to extend the stop. In finding that reasonable suspicion existed, Justice Davis noted the defendant and his passenger's inconsistent statements regarding their travel plans, certain features of the rental car agreement, the fact that the car had been paid for in cash, and the condition of the interior of the car, including that dog food was strewn about and that air fresheners were present.

Reasonable suspicion to stop defendant's vehicle was based on an objectively reasonable mistake of fact; extension of the stop was permissible based on reasonable suspicion of other criminal activity.

State v. Wiles, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020)

While parked on the side of the road, a trooper saw a truck pass by and believed that the passenger was not wearing a seat belt. After the trooper stopped the truck and approached the passenger side, he realized that passenger was wearing his seat belt, but the gray belt had not been visible against the passenger's gray shirt. The passenger stated that he was wearing his seat belt the whole time, and the trooper did not cite him for a seat belt infraction.

However, upon approaching the window, the trooper had also immediately noticed an odor of alcohol coming from the vehicle. The trooper asked the passenger and the driver (the defendant) if they had been drinking, and both men said yes. The trooper asked the men to step out of the truck, and saw that the defendant's eyes were red, glassy, and bloodshot. After further investigation, the trooper determined the defendant was impaired and charged him with DWI. The defendant filed a motion to suppress, arguing there was no reasonable suspicion to support the initial or extended vehicle stop. The trial court denied the motion, finding that the trooper had a mistaken but lawful basis for the initial stop, and he developed reasonable suspicion of other criminal activity that warranted an extension of the stop. The defendant proceeded to trial, was convicted of DWI, and appealed.

The appellate court affirmed the findings and rulings denying the suppression motion. First, the trial court's findings of fact were adequately supported by the trooper's testimony. Second, even though the trooper's initial belief that the passenger was not wearing a seat belt turned out to be mistaken, it was nevertheless objectively reasonable ("failing to see a gray seat belt atop a gray shirt is one a reasonable officer could make") and the extension of the stop was permissible based on the trooper "instantaneously" smelling an odor of alcohol coming from the vehicle, raising a reasonable suspicion of DWI. Defendant's related constitutional arguments concerning the extension of the stop and probable cause to arrest were not properly raised at the trial level, so they were dismissed on appeal. As to defendant's remaining arguments regarding his trial (denial of motion to dismiss at close of evidence, allowing a "positive" PBT reading into evidence, and qualifying the trooper as an expert in HGN), the appellate court likewise found no error.

Searches

(1) The trial court erred by denying the defendant’s motion to suppress blood evidence obtained pursuant to an improper court order. (2) Evidence of the defendant’s speeding and reckless driving established the malice necessary to support a second-degree murder conviction. (3) Evidence of the defendant’s prior convictions was properly admitted under Rule 404(b).

State v. Scott, ___ N.C. App. ___, 838 S.E.2d 676 (Jan. 21, 2020)

The defendant was charged with second-degree murder after he crashed into another vehicle, killing a passenger in it. Five days after the crash the police obtained a court order for the release of the defendant’s medical records related to his hospitalization as a result of the crash. SBI testing of blood drawn by the hospital showed the defendant’s blood alcohol concentration was .22 grams of alcohol per 100 milliliters of blood. The trial court denied the defendant’s motion to suppress and motion *in limine* related to the blood evidence and a jury found him guilty of second-degree murder and felony death by vehicle. (1) On appeal, the defendant argued that the trial court erred by denying the defendant’s motion to suppress the blood evidence obtained pursuant to a court order. The Court of Appeals agreed that the defendant’s motion to suppress should have been granted. The trial court order to release the medical records was not authorized under G.S. 8-53, G.S. 90-21.20B, or otherwise supported by exigent circumstances, reasonable suspicion, or probable cause, as the first indication of the defendant’s intoxication was the result of the tests done on the blood samples obtained pursuant to the order. Without the blood evidence, the second-degree murder conviction could not be supported on a theory of intoxication. (2) However, the court concluded over a dissent that there was sufficient evidence of the defendant’s speeding and reckless driving to establish the malice necessary to support the conviction—a theory on which the jury was also instructed. Eyewitness testimony indicated the defendant passed the witness’s vehicle at a high rate of speed in a no-passing zone just before the crash, and crash reconstruction data showed the defendant was driving over 70 miles per hour on a road with a posted speed limit of 45 miles per hour at the time of the crash. (3) The Court of Appeals also concluded that evidence of the defendant’s three prior convictions for impaired driving and two prior instances of speeding, driving while license revoked, and no operator’s license were properly admitted under Rule 404(b) to show the defendant’s intent, knowledge, or absence of mistake to establish the malice element of second-degree murder. A judge dissenting in part would have concluded that the admission of the blood evidence violated the defendant’s Fourth Amendment rights, was prejudicial, and not harmless beyond a reasonable doubt, and that the defendant was therefore entitled to a new trial.

Criminal Procedure

Right to Counsel

While a defendant may forfeit his or her right to counsel by engaging in egregious misconduct, the defendant in this case did not do so and the trial court erred by not ensuring that the defendant’s waiver of counsel was knowing, intelligent, and voluntary.

State v. Simpkins, 373 N.C. 530 (Feb. 28, 2020)

In this case where the defendant was tried without counsel for driving with a revoked license, RDO, and other charges, the Court of Appeals was correct in holding that the defendant did not forfeit his right to counsel and that the trial court therefore was required to ensure that the defendant’s waiver of counsel

was knowing, intelligent, and voluntary. Noting that it had never previously held that a criminal defendant in North Carolina can forfeit the right to counsel, the court agreed with holdings of the Court of Appeals establishing that “in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel.” The court reviewed decisions of the Court of Appeals where a finding of forfeiture was proper, and summarized that case law as follows:

If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant’s obstructionist actions completely undermine the purposes of the right to counsel. If the defendant’s actions also prevent the trial court from fulfilling the mandate of N.C.G.S. § 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute’s directive to engage in a colloquy regarding a knowing waiver.

Characterizing the conduct described above as “[s]erious obstruction” and disavowing previous statements by the Court of Appeals suggesting that “[a]ny willful actions on the part of the defendant that result in the absence of defense counsel [constitute] a forfeiture of the right to counsel,” the court went on to explain that “[s]erious obstruction of the proceedings is not the only way in which a defendant may forfeit the right to counsel.” The court suggested that a defendant who “intentionally seriously assaults their attorney” may also forfeit the right to counsel.

With this explanation of the law of forfeiture of the right to counsel, the court agreed with the Court of Appeals majority that the defendant in this case did not “engage in such serious misconduct as to warrant forfeiture of the right to counsel.” Conceding that some of the defendant’s conduct probably was highly frustrating, the court rejected the state’s arguments that he forfeited his right to counsel by (1) putting forward frivolous legal arguments throughout the proceeding; (2) failing to employ counsel before appearing for trial where no evidence indicated that he consistently refused to retain counsel in an attempt to delay the proceedings; (3) being generally uncooperative during the proceeding. Because the defendant did not forfeit his right to counsel, the trial court was required, under G.S. 15A-1242 and the state and federal constitutions, to advise the defendant of the right to counsel, the consequences of proceeding without counsel, and “the nature of the charges and proceedings and the range of permissible punishments” before permitting the defendant to waive counsel and proceed pro se. The trial court’s failure to do so in this case entitled the defendant to a new trial.

Justice Newby, joined by Justice Morgan, expressed his view that “[b]y continually refusing to answer the trial court’s questions and posing his own questions to the court, defendant demonstrated his unwillingness to accept the judicial process, forfeiting his right to an attorney.”

Trial judge erred in finding that the defendant forfeited his right to counsel and requiring the defendant to represent himself at trial

State v. Harvin, ___ N.C. App. ___, 836 S.E.2d 899 (Dec. 3, 2019), writ of supersedeas allowed, ___ N.C. ___, ___ S.E.2d ___ (April 29, 2020)

The defendant was convicted of first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The Court of Appeals found that the trial judge erred in finding that the defendant forfeited his right to

counsel and in requiring the defendant to represent himself at trial. In a lengthy colloquy at trial, the defendant requested the judge to activate or replace his standby counsel, who previously had been appointed as standby counsel when the defendant expressed a desire to represent himself. When the trial judge did not grant that request, the defendant stated that he did not want to represent himself and wanted to be represented by counsel. The Court found that the request was clear and unequivocal. The Court further found that when the trial judge previously appointed standby counsel, the judge did not make any note of dilatory tactics by the defendant or inform him that requesting that standby counsel be activated or replaced could result in forfeiture of his right to counsel; rather, the judge advised him that standby counsel could be activated as counsel. Although the defendant had five previous attorneys, only two withdrew for reasons related to the defendant and then not because of a refusal by the defendant to participate in his defense but instead due to differences related to preparation of the defendant's defense. The Court concluded that the record failed to show that the defendant intentionally delayed or obstructed the process. A dissenting judge would have found that the trial judge's forfeiture ruling was not erroneous.

Failure to appoint counsel or secure a valid waiver of counsel for more than a year after the defendant was charged violated the defendant's Sixth Amendment right to counsel.

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 21, 2020)

In March 2018 the defendant was charged with multiple crimes after breaking into a gas station. In August 2018, the trial court first addressed the defendant's right to counsel. The defendant said that he did not want a lawyer, but then, when asked by the judge, "You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?," the defendant replied that he was "simply waiving court appointed counsel." The defendant signed a waiver of counsel form, checking only box one, waiving his right to assigned counsel. The trial judge appointed standby counsel. The defendant argued several preliminary motions without the assistance of counsel between August 2018 and when his case came on for trial in March 2019. At that point, a different judge presiding over the trial noticed that the defendant had waived court-appointed counsel but not all counsel. After a full colloquy with the judge, the defendant checked box 2 on a new form, waiving his right to all assistance of counsel. The defendant was convicted and sentenced.

On appeal, the defendant argued that the trial court erred by failing to appoint counsel or secure a valid waiver of counsel until more than a year after the defendant's initial arrest. Over a dissent, the Court of Appeals agreed with him and ordered a new trial. The majority first established that the issue was properly preserved for appellate review, noting that prejudicial violations of a statutory mandate (here G.S. 15A-1242) are preserved for appeal notwithstanding the defendant's failure to object at trial, and the Supreme Court of North Carolina has recently reviewed unobjected-to Sixth Amendment denial of counsel claims. The court then concluded that the trial court erred by allowing the defendant to proceed unrepresented without first obtaining a proper waiver of all counsel after a proper inquiry under G.S. 15A-1242. The August 2018 colloquy was flawed to the extent that the trial court did not ask whether the defendant understood and appreciated the consequences of his decision to proceed without representation, and in any event resulted only in a waiver of assigned counsel. The State failed to establish that the defendant's self-representation through the pretrial period from August 2018 until the proper waiver colloquy in March 2019 was harmless beyond a reasonable doubt—which the court noted would have been difficult even if the State had tried, given the many issues addressed during the uncounseled period (possible plea negotiations, discovery, and evidentiary issues).

A dissenting judge would have concluded that the defendant failed to preserve the issue for appellate review.

Discovery and Brady Issues

(1) Sufficient evidence supported each of the defendant’s convictions; (2) Trial court properly denied motion to suppress; (3) Any error in the admission of the vodka bottle found in the defendant’s lap was abandoned on appeal; (4) No *Brady* violation on the facts of the case

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (Jan. 7, 2020)

The defendant was found guilty by a Cleveland County jury of impaired driving and resisting a public officer and was found responsible for possession of open container. He appealed, challenging the denial of his motion to dismiss, the denial of his mid-trial motion to suppress, an evidentiary ruling, and alleging constitutional violations for lost evidence. The Court of Appeals unanimously affirmed.

(1) The defendant claimed there was insufficient evidence that he operated the vehicle while impaired. As to operation, the defendant was found asleep behind the wheel with the car running in the middle of the road and had a bottle of vodka between his legs. No passengers were present, and the defendant asked the officer if he could move the car, revving the engine several times. He also used the driver side door to exit the vehicle. This was sufficient to establish operation. “An individual who is asleep behind the wheel of a car with the engine running is in actual physical control of the car, thus driving the car within the meaning of the statute.” As to impairment, while the defendant’s blood alcohol content was only 0.07, the defendant’s blood revealed the presence of marijuana, amphetamine and methamphetamine. In addition to the blood test, the defendant “failed” horizontal and vertical gaze nystagmus tests, refused a breath test, had a strong odor of alcohol, was “confused and disoriented,” and exhibited other signs of impairment. This was sufficient evidence of impairment.

The defendant also claimed there was insufficient evidence to support his conviction for resisting a public officer. Specifically, he argued that he was merely confused and in pain at the time of his interactions with the officers, and that this was the cause of his “negative interactions” with the officers. The court rejected this argument, noting: “The conduct proscribed under [N.C. Gen. Stat. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in discharge of his duties.” Here, the defendant committed multiple acts that obstructed the officer’s duties. The defendant would not roll down his window when asked by the officer, he repeatedly tried to start his car after being commanded to stop, he refused a breath test at least 10 times, and repeatedly put his hands in his pockets during the nystagmus testing after being instructed not to do so. He also refused to get into the patrol car once arrested and refused to voluntarily allow his blood to be drawn after a search warrant for it was obtained. In the court’s words:

Through these actions and his inactions, Defendant directly opposed the officers in their efforts to discharge their investigative duties of identifying him, speaking with him, and performing field sobriety tests. Thus, Defendant resisted the officers within the meaning of the statute.

The motion to dismiss for insufficient evidence of resisting a public officer was therefore properly denied.

The defendant also claimed his motion to dismiss for insufficiency as to the possession of open container of alcohol should have been granted. He pointed out that the bottle found in his car was not missing much alcohol and the officer admitted to emptying the bottle on the side of the road. Rejecting this argument, the court observed:

[T]he amount of alcohol missing from the container is irrelevant for purposes of this offense, because a container is opened “[i]f the seal on [the] container of alcoholic beverages has been broken.’ Additionally, the fact that [the officer] poured out the contents of the container goes to the weight of the evidence, not its sufficiency.

The trial court therefore did not err in denying the motion for insufficient evidence for this offense.

(2) As to the suppression motion, the issue was preserved despite the motion being untimely because the court considered and ruled on the motion. The defendant argued that the forcible blood draw violated his rights to be free from unreasonable force. He did not challenge the validity of the search warrant authorizing the blood draw. Claims of excessive force are evaluated under the Fourth Amendment reasonableness standard. *Graham v. Connor*, 490 U.S. 386 (1989). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Id.* at 22 (citations omitted). Here, the officer had a valid warrant (obtained after the defendant’s repeated refusals to provide a breath sample), and the blood draw was performed by medical professionals at a hospital. Any acts of force by police to obtain the blood sample were the result of the defendant’s own resistance. The court observed:

Defendant had no right to resist the execution of a search warrant, and in fact, his actions rose to the level of criminal conduct under N.C. Gen. Stat. § 14-223, for resisting a public officer. . . Defendant ‘cannot resist a lawful warrant and be rewarded with the exclusion of the evidence.’

The force used to effectuate the blood draw was reasonable under the circumstances and did not violate the Fourth Amendment.

The defendant also argued that his motion to suppress should have been granted for failure of the State to show that his blood was drawn by a qualified professional. G.S. 20-139.1(c) provides that doctor, registered nurse, EMT, or other qualified person shall take the blood sample. “An officer’s trial testimony regarding the qualifications of the person who withdrew the blood is sufficient evidence of the person’s qualifications.” Here, the officer testified that a nurse drew the blood, although he could not identify her by name and no other proof of her qualifications was admitted. This was sufficient evidence that the blood was drawn by a qualified person, and this argument was rejected.

(3) The trial court admitted into evidence the bottle found between the defendant’s legs at the time of arrest. According to the defendant, this was an abuse of discretion because the officers admitted to destroying the contents of the bottle (by pouring it out) before trial. The defendant argued this was prejudicial and required a new trial. Because the defendant offered no authority that admission of the bottle into evidence was error, this argument was treated as abandoned and not considered.

(4) During the arrest, the stopping officer forgot to turn on his body camera and only began recording the investigation mid-way through. The officer also failed to record interactions with the defendant during processing after arrest in violation of department policy. The trial court found no constitutional violation. The defendant complained on appeal that the “intentional suppression” of this camera footage violated his Sixth and Fourteenth Amendment rights and sought dismissal or a new trial. However, the defendant only argued the Fourteenth Amendment *Brady* violation on appeal. His Sixth Amendment argument was therefore abandoned and waived.

As to the alleged *Brady* violation, the defendant did not seek dismissal in the trial court. “We are therefore precluded from reviewing the denial of any such motion, and Defendant’s request that this Court ‘dismiss the prosecution against him’ is itself dismissed.” However, the defendant’s argument at suppression that the failure to record the blood draw violated due process and warranted suppression was preserved. Under *Brady v. Maryland*, 373 U.S. 83 (1963), suppression of material evidence relevant to guilt or punishment violates due process, regardless of the government’s good or bad faith. Here though, there was no evidence that the State suppressed anything—the video footage was simply not created. *Brady* rights apply to materials within the possession of the State. “Defendant essentially asks this Court to extend *Brady*’s holding to include evidence not collected by an officer, which we decline to do.” There was also no indication that the video footage would have been helpful to the defendant. The court therefore rejected this claim. “Although the officers’ failure to record the interaction violated departmental policy, such violation did not amount to a denial of Defendant’s due process rights under *Brady* in this case.”

Trial court erred by dismissing DWI charges for the destruction of dash cam video that was only potentially useful to the defendant without assessing whether the footage was destroyed in bad faith.

State v. Taylor, ___ N.C. App. ___, 836 S.E.2d 658 (Nov. 19, 2019)

The defendant was cited for misdemeanor driving while impaired on November 27, 2016. His attorney requested discovery in July 2017, specifically asking for dash cam and body camera footage. The defendant was subsequently indicted for habitual impaired driving and other traffic offenses based on the November 27, 2016 incident. In January 2018, the defendant’s attorney again requested dash cam footage. The defendant’s attorney was informed in February 2018 that the dash cam video had been deleted from the local server, and the Highway Patrol was attempting to locate it from other sources. In March 2018, defense counsel was informed that the video had been purged and was not available for release.

The defendant moved to dismiss the charges based on the destruction of the dash cam video. The trial court granted the motion, concluding that the destruction of the dash cam video footage violated the defendant’s right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and required dismissal of the charges. The State appealed.

The court of appeals noted that suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. But when the evidence is only potentially useful, the State’s failure to preserve the evidence does not violate the defendant’s constitutional rights unless the defendant shows bad faith on the part of the State.

Though the trial court concluded that the destruction of the dash cam video footage was a *Brady* violation, it made no findings on what the dash cam video footage would have shown. Indeed, it

could not have made such findings because there was no record of what the footage may have shown. The dash cam footage was not material exculpatory evidence; instead, it was only potentially useful. To establish a constitutional violation based on the destruction of potentially useful evidence, the defendant must show bad faith. The trial court erred by concluding that destruction of the footage warranted dismissal, regardless of bad faith on the part of the State. The court of appeals remanded the case to the trial court for a determination of whether the footage was destroyed in bad faith. A dissenting judge would have reversed the trial court on the basis that the evidence presented could not support a finding of bad faith.

Reinstatement of Charges

(1) The trial court did not err by denying the defendant’s petition for writ of certiorari; (2) The defendant’s writ of mandamus was an improper substitute for appeal and was filed in the wrong court.

State v. Diaz-Tomas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 21, 2020), temp. stay granted, ___ N.C. ___, 840 S.E.2d 221 (April 21, 2020)

In 2015, the defendant was charged with impaired driving and driving without an operator’s license. He failed to appear on the charges in 2016, which prompted the district court to issue an order for arrest and the State to dismiss the case with leave. In 2018 the defendant was arrested on the OFA, ordered to appear, and then arrested again for once more failing to appear. In January 2019 he filed a motion in district court seeking to reinstate the charges that had been dismissed with leave, which the district court denied. In July 2019, the defendant filed a petition for writ of certiorari in superior court, seeking review of the district court’s denial of his motion to reinstate the charges. The superior court denied the petition, leading the defendant to file a petition for writ of certiorari in the Court of Appeals. The Court of Appeals concluded that the superior court did not err by denying the petition. Certiorari is a discretionary writ, and the defendant did not show that the superior court’s decision was unsupported by reason or otherwise entirely arbitrary.

(2) The defendant also filed two other petitions in the Court of Appeals: a writ of mandamus seeking to compel the district court to grant his motion to reinstate the charges, and a motion asking the court to take judicial notice of the Wake County Local Judicial Rules. As to the writ of mandamus, the Court of Appeals concluded over a dissent that it was improper for two reasons—first, that it was being used as a substitute for an appeal or certiorari, and second that it should have been filed in superior court, not the appellate division. As to the motion to take judicial notice, the court did not need to resolve it to decide the case. Finally, the Court of Appeals declined to consider the defendant’s argument that the district court erred by denying his motion to reinstate charges, unanimously concluding that the issue was not properly before the court.

A judge dissenting in part included additional facts about the procedural history of the case. After the defendant’s initial failures to appear, he did appear when his case was calendared as an “add-on” case in December 2018, but the State declined to reinstate the charges. The dissenting judge agreed with the majority that mandamus was not the proper remedy, but she would have concluded that the superior abused its discretion by denying the petition for writ of certiorari. In the absence of an order from superior court revealing the basis for its rationale in denying the petition, and in light of the defendant’s allegations, which she described as “cogent” and “well-supported,” she would have remanded the case for a hearing and decision on the merits.

Crimes

Larceny

In a larceny case, the State established no more than the defendant’s mere opportunity to commit the crime and failed to present sufficient evidence that the defendant was the perpetrator.

State v. Campbell, 373 N.C. 216 (Dec. 6, 2019)

In a larceny case, the State failed to present sufficient evidence that the defendant was the perpetrator. The State’s evidence at trial showed that audio equipment had been taken from Manna Baptist Church after the church doors were inadvertently left unlocked following a Wednesday evening service. The doors were locked by a church secretary the next morning and remained locked until Sunday morning. The church’s pastor discovered that the equipment was missing following the Sunday service. The defendant’s wallet was found near where some of the equipment had been stored. In an interview with an investigator, the defendant admitted to being at the church on the night the doors were left unlocked but claimed to not remember anything that he had done while he was there. At trial he testified that while at the church he did “a lot of soul searching” and drank a bottle of water but that he “did not take anything away from the church.” An EMT who interacted with the defendant soon after he left the church testified that the EMT did not see him carrying anything at that time.

The court reviewed “well-settled caselaw” establishing that “evidence of a defendant’s mere opportunity to commit a crime is not sufficient to send the charge to the jury.” Reviewing the evidence, the court said that while it “may be fairly characterized as raising a suspicion of defendant’s guilt of larceny,” crucial gaps existed in that “[t]he State failed to actually link defendant to the stolen property or to prove that he was in the church at the time when the equipment—which was never recovered—was stolen.” The court noted that the evidence showed a four-day time span over which the theft could have occurred and that a number of other persons had access to the interior of the church during that period. It further noted that the State was unable to show how the defendant would have been physically able to carry away the cumbersome audio equipment at issue. The evidence presented was, in the court’s words, “simply not enough to sustain a conviction for larceny.”

Impaired Driving

The trial court erred by denying the defendant’s motion to dismiss DWI and felony death by motor vehicle charges due to insufficient evidence of impairment; There was sufficient evidence of malice to submit a second-degree murder charge to the jury

State v. Nazzal, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

In this case arising from a fatal automobile collision involving convictions for second-degree murder, DWI, felony death by motor vehicle, and failure to maintain lane control, the trial court erred by denying the defendant’s motion to dismiss the DWI and felony death by motor vehicle charges due to insufficient evidence of impairment. There was, however, substantial evidence of malice with respect to second-degree murder and the trial court did not err in submitting that charge to the jury, nor did it err in submitting to the jury the failure to maintain lane control charge.

Likening the case to its previous decision in *State v. Eldred*, 259 N.C. App. 345 (2018), the court found that there was insufficient evidence the defendant was impaired at the time of the collision where the officer who formed the opinion on impairment, an opinion based on observations occurring five hours after the collision, did so “entirely through passive observation” of the defendant, without requesting him to perform any field tests. Moreover, the court noted, the officer did not ask the defendant if or when he had ingested any impairing substances. The trial court erred by denying the defendant’s motion to dismiss the DWI charge, and, because DWI was a necessary element of the felony death by motor vehicle charge, also erred in denying the defendant’s motion to dismiss that charge.

Substantial evidence supported the failure to maintain lane control charge under G.S. 20-146(d)(1), a statute providing the disjunctive mandates that a motorist must (1) drive his or her vehicle “as nearly as practicable entirely within a single lane” and (2) refrain from changing lanes unless he or she “has first ascertained that such movement can be made with safety.” The defendant had argued that the fact that a tow truck partially obstructed his lane of travel meant that it was not “practicable” for him to drive entirely within that lane. The court rejected that argument, finding that a reasonable juror could infer that the defendant could have avoided departing from his lane had he been traveling at a reasonable speed for conditions. The court also explained that there was substantial evidence that the defendant failed to ascertain that his lane change movement could be made with safety as the tow truck also obstructed the defendant’s view of the perils which lay in his chosen lane change path.

The jury was instructed that the defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second degree murder, and having upheld his conviction on the lane control offense the court’s only remaining task was to determine whether there was substantial evidence that the defendant acted with malice. Recounting the evidence in the light most favorable to the state, the court noted that the defendant was driving while knowing that his license was revoked for DWI and non-DWI offenses, was driving at an irresponsible speed for the icy conditions, made an unconventional maneuver to attempt to pass the tow truck partially obstructing his lane, became involved in a severe collision, left the scene without ascertaining whether anyone was harmed, and washed his car in an apparent attempt to destroy evidence and avoid apprehension. The court also noted that the defendant’s extensive record of motor vehicle offenses and car accidents was published to the jury, allowing the jury to infer that he was aware of the risk to human life caused by his behavior on the road but nevertheless once again engaged in dangerous driving with indifference to its consequences. This substantial evidence supported the element of malice by reckless disregard for human life.

Finally, the court determined that any error related to the admission of certain evidence was harmless because that evidence was relevant only to the issue of impairment, and further determined that the trial court’s denial of the defendant’s request for a jury instruction on the defense of accident, assuming the denial was error, was harmless because the jury’s verdicts suggested that it had rejected the notion that the defendant’s fatal unconventional traffic maneuver was unintentional.

Threats

(1) Alleged threats prohibited by statute must be “true threats” to survive constitutional challenge; (2) proving that the statement was a true threat, and was intended as one by the defendant, are essential elements of the offense; (3) defendant must subjectively intend the statement as a true threat, and it must be one that would be perceived in context as a threat by an objectively reasonable recipient; (4) as a mixed question of law and fact, convictions for making a threat are subject to whole case review on appeal.

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020), temp. stay allowed, ___ N.C. ___, 839 S.E.2d 856 (Apr. 7, 2020)

The victim in this case was the elected district attorney for the county, and the defendant was an acquaintance who worked in an office building next to the courthouse. After learning that the district attorney would not be pursuing criminal charges in a matter involving the death of a child, the defendant made a series of posts on Facebook. Some of the posts broadly addressed the defendant’s general anger and frustration with politics and the judicial system as a whole, while other posts more specifically referenced the district attorney in particular, using phrases such as “death to her as well” or calling for “old time mtn [mountain] justice,” and implied his willingness to use firearms against law enforcement if they came to his house in response to the posts. The defendant deleted the posts later the same evening, but a detective who was a Facebook friend of the defendant took screenshots of the posts before they were removed. After bringing in the SBI to investigate and interviewing the defendant about the posts, the defendant was charged with threatening a court officer under G.S. 14-16.7(a). Following a jury trial, the defendant was convicted and appealed.

At trial, the defendant raised a First Amendment challenge, arguing that anti-threat statutes such as G.S. 14-16.7 must be construed as constitutionally requiring proof of a “true threat,” meaning that the communication shows a serious intent to cause harm to the victim, and further arguing that the trial court should not admit the five posts offered by the state while excluding other posts and comments that would have provided relevant context and explanation. On appeal, the defense argued that the trial court erred by: (i) denying the defendant’s motion to dismiss at the close of evidence based on the state’s failure to prove the alleged threats were true threats; and (ii) failing to properly instruct the jury on the law and requirements of a true threat.

Ruling as a matter of first impression, the Court of Appeals found in favor of the defendant and reversed the conviction. The appellate court’s decision contains an exhaustive review of case law from North Carolina and other jurisdictions on the First Amendment’s application to anti-threat statutes and other forms of protected speech, but it relies most extensively on *Watts v. United States*, 394 U.S. 705 (1969), *Virginia v. Black*, 538 U.S. 343 (2003), and their progeny. Based on those cases, the appellate court agreed that laws which criminalize speech must be construed in accordance with the First Amendment; here, that means a threat cognizable under the statute must be a “true threat” as defined by *Black*: “under the First Amendment the State can punish threatening expression, but only if the ‘speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.’” To clarify its holding and provide guidance in future cases, the court made six supplemental holdings that were not yet fully addressed by the North Carolina case law.

First, when reviewing a conviction under an anti-threat statute, the appellate court will engage in a “whole record” review. Whenever a defendant’s conviction is based in part on a determination that the state met its burden of proving a true threat, the appellate court will conduct an independent review of

the entire record to determine the sufficiency of the evidence and whether the defendant's First Amendment rights were preserved.

Second, establishing that an alleged threat was a "true threat" must be treated as an essential element of the offense to be proved by the state. At trial in this case, the state relied heavily on the fact that the underlying statute and pattern jury instructions only used the single word "threat," without further qualification. The appellate court's holding on this point acknowledged that fact, but explained that in order to comport with the First Amendment, "'true threat' must be incorporated into the *definition* of N.C.G.S. § 14-16.7(a) if the statute is to be held constitutional" (emphasis in original).

Third, the "intent" to communicate a true threat is also deemed an essential element of the offense. A statement is only a true threat if it was made intentionally, meaning that it was made with both the general intent to make the threatening statement (considered "from the viewpoint of an objective, reasonable person considering the alleged threat in full context") and specific intent (i.e., a subjective intent to truly threaten). This does not require proof that the defendant actually intended to carry out the threatened act, but he must have intended that it would be received as a true threat by him to do so.

Fourth, deciding on appeal whether a statement was a true threat is a mixed question of fact and law. Therefore, proving a true threat will usually be a matter for the jury (or judge acting as trier of fact) to decide initially, but as noted above the appellate courts will conduct a "de novo whole record review" on appeal, even if the jury was properly instructed on the law and there is some evidence in the record to support its finding.

Fifth, noting that many types of protected speech may be unpopular, crude, or even aggressive, a "true threat" is defined in accordance with *Black* as only those statements where "the speaker intends to communicate, to a particular individual or group of individuals, a threat, being 'a serious expression of an intent to commit an act of unlawful violence[.]'" This definition incorporates the intent requirements adopted above, meaning that the defendant had the "subjective intent to threaten a person or group of persons by communicating the alleged threat." But deciding whether a statement was a true threat must also be evaluated objectively, based on the "context in which the communication was made; i.e., all the facts surrounding the communication of the challenged speech." In other words, finding a statement to be a true threat requires both a subjective and an objective determination: (i) the defendant subjectively intended the statement to be understood as a true threat; and (ii) the people hearing or reading it would objectively understand it, in context, as a serious expression of intent to kill or injure the person or group identified.

Sixth, applying the preceding analyses to the particular statute at issue, the court identified and summarized the seven essential elements of the offense as follows:

In order to obtain a constitutional conviction for threatening a court officer pursuant to N.C.G.S. § 14-16.7(a), the State must prove, beyond a reasonable doubt, that: (1) the defendant; (2) knowingly and willfully; (3) made a threat; (4) constituting a "true threat," meaning a statement "that an ordinary, reasonable [person] who is familiar with the context in which the statement [wa]s made would interpret as a serious expression of an intent to do harm"; (5) to a court official; (6) knowing the court official was a court official; and (7) when the defendant communicated the statement, the defendant specifically intended the

statement to be understood by the court officer as a real threat expressing the defendant's intention to carry out the actions threatened.

Additionally, since proving a true threat is an essential element of the offense, failure to properly instruct the jury on these issues violates the defendant's First, Sixth, and Fourteenth Amendment rights. That error is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.

Finally, turning back to the case at hand, the court conducted an independent whole case review to decide whether the statements made by this defendant were true threats, whether the defendant had the subjective intent that they reach the recipient and cause her to believe that he intended to kill her, and whether they would be understood as threats by an objectively reasonable person.

Looking first at the plain language of the posts, although some of them did contain aggressive statements such as "death to her as well" and "she will be first to go," the court concluded that they were also vague or contingent on the occurrence of unlikely events (such as a revolution), and "there were no specifics such as time, manner, place, ability, preparation, or other facts that might allow a reasonable person to read Defendant's words as a 'true threat' to kill D.A. Welch." As a result, none of the posts offered by the state rose to the level of constituting a true threat.

The court then evaluated the statements in context, considering other factors such as the defendant's reference (and apparent access) to firearms, his close proximity and ability to reach the purported victim, and the initial concern of the detective who saw the posts indicating that she viewed the threat as real. However, other evidence indicated that neither the victim nor law enforcement perceived the statements as true threats, such as the detective's somewhat delayed response to the posts, the purported victim's belief that additional security was unnecessary, the fact that officers did not further investigate the defendant's ability to carry out the alleged threats, a history of "polite and non-threatening" interactions between the parties, and the broad nature of other comments directed at the judicial system as a whole.

As part of its whole case review, the appellate court also considered the hyperbolic nature of many posts on "public forums" like Facebook, the political context of the defendant's related comments about the judicial system, the lack of specificity to any alleged threats, the reactions of others who saw the posts, and the defendant's explanation for the posts. In sum, the court found that as a matter of law the defendant's posts did not rise to the level of being a "true threat" in this case, and the evidence did not support a finding that the defendant's intent in posting the comments was to make the purported victim believe he actually intended to kill her. Consistent with the holdings above, the appellate court found that the trial court erred by failing to instruct the jury on the constitutionally required elements of a "true threat" and state's burden to prove the defendant's intent, and further found that the error was not harmless beyond a reasonable doubt in this case, given the erroneous law and arguments presented to the jury.

Based on its whole record review (or, in the alternative, based on the regular standard of appellate review as well as the trial court's failure to properly instruct the jury), the defendant's conviction was reversed and the case was remanded for entry of judgment of acquittal. The court then reiterated and summarized the essential elements of the offense, the state's burden of proof, and the jury instructions required for a constitutionally valid conviction under the statute.

Sentencing

Prayer for Judgment Continued

PJC counts as conviction under statute defining conviction as including adjudication of guilt

Mace v. North Carolina Department of Insurance, ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 18, 2020)

The petitioner was found guilty of simple assault in a bench trial before a district court judge, who entered a prayer for judgment continued (PJC). In reliance on the advice of his attorney, the petitioner, an insurance agent, did not believe that he was required to report the PJC to the North Carolina Department of Insurance (DOI). The DOI found that the petitioner's failure to report the PJC violated G.S. 58-2-69(c), which requires licensees to notify the DOI of criminal convictions and defines conviction as including "an adjudication of guilt, a plea of guilty, or a plea of nolo contendere." Because of his reliance on the advice of counsel, the DOI imposed a \$100 civil penalty instead of suspending or revoking the petitioner's license. The petitioner appealed. Reviewing several previous decisions about the treatment of PJCs, the Court of Appeals recognized that a PJC constitutes an adjudication of guilt and upheld the DOI's determination.

Appeal of district court's denial of defendant's motion to enter judgment on PJC was not properly before Court of Appeals

State v. Doss, ___ N.C. App. ___, 836 S.E.2d 856 (Dec. 3, 2019)

In 1999, the defendant was found guilty of assault on a female, and the trial judge entered a prayer for judgment continued (PJC) with a condition that the defendant pay costs of court. In 2017, the defendant was denied a concealed carry permit in West Virginia on the ground that his 1999 case resulted in a conviction for domestic violence and that he misstated in his permit application that he had never been convicted of an act of violence or act of domestic violence. In 2018, the defendant filed a motion in North Carolina to enter judgment in the 1999 case, which he then would be able to appeal to superior court for a trial de novo. The district court denied the motion, and the defendant appealed to the Court of Appeals. The Court found that the defendant did not have a right to appeal and refused to treat the defendant's brief as a petition for a writ of certiorari. The Court therefore dismissed the defendant's appeal. In addition to its holding, the Court made several other observations. (1) The District Attorney's office that handled the defendant's 1999 assault on a female case advised West Virginia that the case involved domestic violence even though the remaining records in ACIS indicated that the case did not involve domestic violence. (2) The Court recognized that it could be argued that the defendant's representation on his permit application was not a misrepresentation about whether he had a conviction because the question is ambiguous and he could have believed in good faith that a PJC was not a conviction. (3) The Court observed that although a PJC with a condition that the defendant pay costs is not a condition that converts a PJC into a final judgment, a trial judge may not impose that condition without the defendant's consent. When a defendant consents to a PJC, the defendant waives any right to appeal. (4) In support of its refusal to treat the defendant's brief as a petition for a writ of certiorari, the Court stated that it would be unfair to the State to allow the defendant to renege on a twenty-year-old deal for a PJC with costs, ask the trial court to enter judgment, and appeal the judgment to superior court, which would most certainly result in dismissal of the charges because the State no longer has the evidence to proceed. (5) The court observed that G.S. 15A-1416(b)(1) gives the State the right to move for appropriate relief to enter a final judgment on a PJC, presumably when a defendant

has not satisfied the conditions of a PJC, but the defendant does not have the same statutory right. (6) The court noted that the defendant can petition the superior court for a writ of certiorari under Rule 19 of the North Carolina Rules of Superior and District Court.

Attorney's fees

The trial court erred by failing to give the defendant an opportunity to be heard on the issue of attorney's fees prior to entering a civil judgment against him in a case involving a guilty plea and the Court of Appeals reached the issue despite the limitations on appeals from guilty pleas provided in G.S. 15A-1444

State v. Mangum, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

Over a dissent and with one judge concurring in result only, the court determined that the trial court erred by failing to give the defendant an opportunity to be heard on the issue attorney's fees prior to entering a civil judgment against him. Among several procedural issues in this case was whether the defendant had a right to appeal the judgment given that he had pleaded guilty and G.S. 15A-1444 limits appeals from guilty pleas. Citing *State v. Pell*, 211 N.C. App. 376 (2011), the court held that the appeal of the civil judgment did "not arise from the underlying convictions" and, therefore, G.S. 15A-1444(a2) did not deprive the court of jurisdiction. Because of issues caused by the defendant's filing of the record on appeal prior to the time at which the civil judgment was filed, the court engaged in a lengthy discussion of the Rules of Appellate Procedure, as well as principles of law regarding petitions for writs of certiorari, on its way to determining that it had jurisdiction to address the merits of the appeal, either upon direct appeal or by certiorari.

Judge Berger concurred in result only, stating that "anyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of [G.S.] 15A-1444(a2)."

Judge Tyson dissented, expressing the view that because of the defendant's various "jurisdictional failures and criminal, civil, and appellate rules violations" he had failed to invoke the jurisdiction of the court, as well as the view that the defendant's petition for certiorari should have been denied for lacking merit. Judge Tyson agreed with Judge Berger's hope that the state supreme court would "return us to the plain language of [G.S.] 15A-1444(a2)."