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CRIMINAL CASE UPDATE
District Court Judges' Fall Conference
October 21, 2021

Cases covered include reported decisions from the North Carolina Appellate Courts and the U.S. Supreme Court decided between May 19, 2021 and September 24, 2021. To view a complete set of summaries for this time period, go to the **Criminal Case Compendium**. To obtain summaries automatically by email, sign up for the **Criminal Law Listserv**.

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Counsel Issues

The defendant forfeited the right to counsel by firing various appointed attorneys and failing to hire an attorney after waiving appointed counsel

State v. Atwell, ___ N.C. App. ___, 2021-NCCOA-271 (June 15, 2021)
In this case where the defendant was convicted of violating a DVPO by attempting to purchase a firearm, the indictment was facially valid and the trial court did not err in concluding that the defendant forfeited her right to appointed counsel.

Reciting general principles regarding the facial validity of indictments, the court found the indictment in this case was valid because, among other things, it specifically referenced the defendant's attempt to purchase a firearm and the existence of the DVPO.

As to the defendant's forfeiture of her right to counsel, the court discussed *State v. Simpkins*, 373 N.C. 530 (2020) and *State v. Curlee*, 251 N.C. App. 249 (2016), noting that the *Simpkins* court contemplated that counsel may be forfeited in situations where a defendant obstructs proceedings by continually hiring and firing counsel or refusing to obtain counsel after multiple opportunities to do so. The court noted that the *Curlee* court contemplated that a defendant properly may be required to proceed to trial without counsel when the defendant waives appointed counsel and has a case continued several times to hire counsel while knowing that he or she likely will be unable to do so, provided that the defendant is informed of the consequences of proceeding pro se and is subjected to the inquiry required by G.S. 15A-1242. Here, the defendant appeared at a pretrial hearing without representation after her fifth attorney had withdrawn. Over a period of two years, her previous appointed attorneys had either withdrawn or been fired by the defendant, and during that time the defendant had waived counsel on several occasions, including at the setting preceding the pretrial hearing. At the pretrial hearing, the trial court denied the defendant's request for another appointed attorney, advised her of the consequences of proceeding pro se, and conducted the inquiry required by G.S. 15A-1242. The trial court then entered an order finding that the defendant had forfeited her right to counsel, though the trial court had reiterated that the defendant was free to hire counsel between the pretrial hearing and the trial date. The majority opinion found no error.

Judge Jackson concurred in the majority's opinion with respect to the validity of the indictment but dissented with respect to the counsel forfeiture issue, finding that the trial court's colloquy with the defendant at the pretrial hearing was insufficient for purposes of G.S. 15A-1242 and that the record did not reveal that the defendant engaged in the sort of egregious misconduct that would support a finding of forfeiture.

Arrest, Search, and Investigation

Motions

State failed to show that improperly admitted blood evidence was harmless beyond a reasonable doubt; new trial

State v. Scott, ___ N.C. App. ___, 2021-NCCOA-314 (July 6, 2021)
On remand from the North Carolina Supreme Court, this Alamance County case involved a medical blood draw from a defendant suspected of driving while impaired and second-degree murder. The Court of Appeals previously determined that the seizure of the defendant's medical records without a search warrant violated the defendant's Fourth Amendment rights but found that the defendant failed to prove prejudice and was not entitled to relief (here). A dissent at the Court of Appeals agreed that the warrantless seizure was a Fourth Amendment violation but disagreed that the defendant was required to show prejudice. The North Carolina Supreme Court unanimously reversed, agreeing with the dissent below. It remanded to that court for application of the correct standard, harmless error, whereby the State has the burden to demonstrate that the error did not affect the validity and fairness of the proceedings beyond a reasonable doubt.

Evidence at trial showed that the defendant was driving recklessly at a high speed and passed another car in a no passing zone, and the defendant admitted as much. The defendant also had prior convictions for impaired driving and speeding. The State argued that this was sufficient to show malice for purposes of second-degree murder even without the blood result. However, the blood result was the only evidence of impairment—there were no signs of impairment at the scene, and no witness could attest that the defendant was impaired. The jury was instructed that it could find malice based on impairment, reckless driving, or speeding. It returned a general verdict and did not specify a theory of malice supporting the murder conviction. While the evidence of speeding, recklessness, and prior convictions were sufficient to survive a motion to dismiss the murder charge, the State here did not establish that the erroneous admission of the blood evidence was harmless beyond a reasonable doubt. The conviction for second degree murder was therefore vacated and the matter remanded for a new trial. Judges Gore and Griffin concurred.

Sentencing

A Watauga County trial court lacked jurisdiction to revoke the defendant's probation imposed in Lincoln and Catawba counties

State v. Ward, ___ N.C. App. ___, 2021-NCCOA-274 (June 15, 2021)
A Watauga County trial court lacked jurisdiction to revoke the defendant's probation imposed in two separate cases in other counties, one probationary sentence imposed in Lincoln County and the other in Catawba County. As to the Lincoln County case, the State failed to meet its burden to show that the defendant was properly being supervised in Watauga County as there was no evidence that the probation was imposed in Watauga County, that the defendant

violated probation imposed in the Lincoln case while she was in Watauga, or that the defendant resided in Watauga County at any relevant time. The State failed to meet its burden to show the same with respect to the Catawba County case.

(1) Probation could not be revoked for use of controlled substances, but it could be revoked for commission of a new criminal offense; and (2) the case was remanded for determination of whether good cause existed for not upholding defendant's statutory confrontation rights at the revocation hearing

State v. Hemingway, ___ N.C. App. ___, 2021-NCCOA-352 (July 20, 2021)
The defendant was on supervised probation for a conviction of possession with intent to sell or deliver marijuana, and the state alleged that he violated his probation by testing positive for cocaine and committing a new criminal offense. At a hearing held on the violation, the defendant's probation officer testified about the positive drug screen, and a police officer testified about the alleged new criminal activity. Officers used a confidential informant to conduct two controlled buys of a white powdery substance from the defendant, and then obtained a search warrant for his home where they discovered cash and additional drugs, resulting in new criminal charges against the defendant. The informant did not testify at the probation hearing. At the conclusion of the hearing, the trial court revoked the defendant's probation and the defendant appealed.

The trial court's oral pronouncement only indicated that the revocation was based on the commission of a new criminal offense, but the written findings indicated that the revocation was based on both allegations, so per case precedent the written order was deemed controlling on appeal. The appellate court agreed that pursuant to the Justice Reinvestment Act, the defendant's probation could not be revoked for using cocaine; instead, the trial court was only authorized to modify his conditions of probation or impose a 90-day CRV, so the order of revocation based on this allegation was reversed. But the state presented sufficient evidence at the hearing that the defendant also committed a new criminal offense by possessing and selling crack cocaine, which would support revoking the defendant's probation.

However, rather than affirming the trial court's order, the appellate court remanded the matter to determine whether the trial court properly exercised its discretion under G.S. 15A-1345(e), which provides that "the probationer may […] confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." (Since this was a probation revocation hearing, only the statutory confrontation right was at issue, rather than the confrontation rights under the Sixth Amendment.) The confidential informant did not testify at the hearing, and the defense objected to the admission of her hearsay statements. The trial court overruled those objections based on "the nature of these proceedings," and the appellate court held that it was unclear whether that ruling reflected an exercise of discretion and finding of good cause. The court distinguished this case from *State v. Jones*, 269 N.C. App. 440 (2020), where it had previously held that a failure to find good cause was not reversible error, because in *Jones* the defendant did not challenge the testimony on this basis and did not request

findings of good cause as to why confrontation should not be allowed, so no findings were required.

Judge Tyson concurred in part, finding that the defendant waived his statutory confrontation objection and failed to meet his burden of showing prejudice, and the trial court did not err in revoking the defendant's probation.

The superior court lacked jurisdiction to hear the defendant's appeal where the defendant waived his revocation hearing

State v. Flanagan, ___ N.C. App. ___, 2021-NCCOA-456 (Sept. 7, 2021)
On July 19, August 24, and October 23, 2018, the defendant plead guilty to several charges. On each of these dates, the trial court suspended the sentences for twelve months of supervised probation and other special conditions of probation.

Between December 7, 2018 and November 22, 2019, the defendant engaged in numerous acts which prompted his probation officer to file violation reports. On December 2, 2019, the defendant appeared in district court for a hearing on the January 18, 2019 and April 4, 2019 violation reports. While in district court, the defendant waived his violation hearing and admitted he violated the conditions of his probation. The district court revoked the defendant's probation and activated the sentences in his misdemeanor cases. The defendant gave notice of appeal to the superior court.

On December 23, 2019, the probation officer filed violation reports in superior court. At a February 5, 2020 hearing, the defendant admitted to willfully violating his probation. The superior court revoked the defendant's probation and activated his suspended sentences in his remaining misdemeanor and felony cases. The defendant appealed.

The Court of Appeals held that the superior court did not have jurisdiction to hear the defendant's appeal from district court. In reaching this conclusion, the Court cited G.S. 15A-1347(b), which states "If a defendant waives a revocation hearing, the finding of a violation of probation, activation of sentence, or imposition of special probation may not be appealed to the superior court." The Court vacated the judgment of the superior court and reinstated the judgment of the district court.

Over a dissent, Court of Appeals finds condition of probation mandating the defendant to have no contact with the custodian of his children proper despite child custody order authorizing visitation

State v. Medlin, ___ N.C. App. ___, 2021-NCCOA-313 (July 6, 2021), *temp. stay allowed*, ___ N.C. ___, 859 S.E.2d 630 (July 15, 2021)
The defendant was living in a home owned by his girlfriend's mother. He and his girlfriend had three children living with the girlfriend's mother. The defendant exercised limited visitation with the children at the mother's home pursuant to a child custody order. The mother entrusted a box of jewelry and valuable coins to the defendant, requesting that he store it in a

safe within the home. Much of the property from the box was later discovered to be missing or to have been replaced with fake items, with some items having been pawned by the defendant at a local store. The defendant was ultimately convicted at trial of obtaining property by false pretense.

At sentencing, the court ordered that the defendant have no contact with the girlfriend's mother as a special condition of probation. The defendant challenged that condition on appeal. He argued it conflicted with the child custody and visitation order and was an abuse of discretion. A majority of the Court of Appeals disagreed. Noting that the child custody order was not before the court and was unaffected by this decision, the majority found other avenues to exercise visitation were available to the defendant—a third party could be utilized, or the mother could contact her daughter or the defendant himself to arrange for visitation. The condition of probation only prohibited the defendant from contacting the mother. This condition was reasonably related to the "protection of the victim, the defendant's rehabilitation, and his compliance with probation." *Medlin* Slip op. at 8. The condition was therefore not an abuse of discretion. Any constitutional challenge to the probationary term was not raised at the trial level and was deemed waived on appeal.

Judge Wood dissented. She would have found that the no contact condition was not reasonably related to the defendant's crime or rehabilitation and would have vacated it as an abuse of discretion.

Crawford Issues & Confrontation Clause

(1) Probation could not be revoked for use of controlled substances, but it could be revoked for commission of a new criminal offense; and (2) the case was remanded for determination of whether good cause existed for not upholding defendant's statutory confrontation rights at the revocation hearing

State v. Hemingway , ___ N.C. App. ___, 2021-NCCOA-352 (July 20, 2021)
The defendant was on supervised probation for a conviction of possession with intent to sell or deliver marijuana, and the state alleged that he violated his probation by testing positive for cocaine and committing a new criminal offense. At a hearing held on the violation, the defendant's probation officer testified about the positive drug screen, and a police officer testified about the alleged new criminal activity. Officers used a confidential informant to conduct two controlled buys of a white powdery substance from the defendant, and then obtained a search warrant for his home where they discovered cash and additional drugs, resulting in new criminal charges against the defendant. The informant did not testify at the probation hearing. At the conclusion of the hearing, the trial court revoked the defendant's probation and the defendant appealed.

The trial court's oral pronouncement only indicated that the revocation was based on the commission of a new criminal offense, but the written findings indicated that the revocation was based on both allegations, so per case precedent the written order was deemed controlling on appeal. The appellate court agreed that pursuant to the Justice Reinvestment Act, the

defendant's probation could not be revoked for using cocaine; instead, the trial court was only authorized to modify his conditions of probation or impose a 90-day CRV, so the order of revocation based on this allegation was reversed. But the state presented sufficient evidence at the hearing that the defendant also committed a new criminal offense by possessing and selling crack cocaine, which would support revoking the defendant's probation.

However, rather than affirming the trial court's order, the appellate court remanded the matter to determine whether the trial court properly exercised its discretion under G.S. 15A-1345(e), which provides that "the probationer may […] confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." (Since this was a probation revocation hearing, only the statutory confrontation right was at issue, rather than the confrontation rights under the Sixth Amendment.) The confidential informant did not testify at the hearing, and the defense objected to the admission of her hearsay statements. The trial court overruled those objections based on "the nature of these proceedings," and the appellate court held that it was unclear whether that ruling reflected an exercise of discretion and finding of good cause. The court distinguished this case from *State v. Jones*, 269 N.C. App. 440 (2020), where it had previously held that a failure to find good cause was not reversible error, because in *Jones* the defendant did not challenge the testimony on this basis and did not request findings of good cause as to why confrontation should not be allowed, so no findings were required.

Judge Tyson concurred in part, finding that the defendant waived his statutory confrontation objection and failed to meet his burden of showing prejudice, and the trial court did not err in revoking the defendant's probation.

Arrest, Search, and Investigation

Arrests & Investigatory Stops

The duration of a traffic stop was not impermissibly prolonged under *Rodriguez v. United States*

State v. France, ___ N.C. App. ___, 2021-NCCOA-498 (Sept. 21, 2021)
In this case involving drug offenses, the trial court did not err by denying the defendant's motion to suppress evidence arising from a traffic stop because the duration of the stop was not impermissibly prolonged under *Rodriguez v. United States*, 575 U.S. 348 (2015). Two officers with the Winston-Salem Police Department conducted a traffic stop of a vehicle based upon observing its broken taillight. One officer requested identification from the occupants of the car, informed them of the reason for the stop, and returned to the patrol car to conduct warrant checks. During this time the other officer requested that a canine unit respond to the stop. The officer conducting warrant checks learned that a passenger had outstanding arrest warrants and placed him under arrest, at which time the officer discovered that the passenger was carrying a pistol and disarmed him. The other officer immediately returned to the patrol car to begin the process of issuing a citation for the taillight and finish warrant checks on the remaining occupants. While drafting the citation, the canine unit arrived and indicated a

positive alert after walking around the vehicle. The officers then searched the vehicle and found drug evidence. The court determined that at all times prior to the canine alert the officers were diligently pursuing the purpose of the stop, conducting ordinary inquiries incident to the stop, or taking necessary safety precautions. The court further determined that the request for the canine unit did not measurable extend the stop. Assuming for argument that any of the officers' actions unrelated to the initial purpose of the stop did extend its duration, they were justified by reasonable suspicion because a stopping officer encountered the defendant's vehicle earlier in the evening and witnessed a hand-to-hand drug transaction, the stop occurred in a high crime area late at night, and a passenger with outstanding arrest warrants was armed with a loaded gun.

The court vacated a civil judgment for attorney's fees because the trial court erred by not providing the defendant notice and an opportunity to be heard before entering the judgment.

The trial court erred by denying the defendant's motion to suppress drug evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez v. United States*

State v. Johnson, ___ N.C. App. ___, 2021-NCCOA-501 (Sept. 21, 2021)
In this felony possession of cocaine case, the trial court erred by denying the defendant's motion to suppress evidence that was discovered pursuant to a consent search where the request for consent and the search measurably extended a traffic stop without reasonable suspicion in violation of *Rodriguez*. An officer made a traffic stop of the defendant after observing him driving without wearing a seatbelt. "Almost immediately," the officer asked the defendant to exit the vehicle and accompany him to his patrol car. As they walked, the officer asked if the defendant possessed anything illegal and whether he could search the defendant. The defendant raised his hands above his waist and the officer reached into the defendant's sweatshirt pocket, discovering a plastic wrapper containing soft material he believed to be powder cocaine.

The court first determined that the defendant had preserved his undue delay argument for appellate review by generally arguing to the trial court that the stop was unsupported by reasonable suspicion and the search was unreasonable under the Fourth Amendment, regardless of the fact that the defendant's precise Fourth Amendment argument on appeal differed slightly from his argument to the trial court. The court went on to say that it would exercise Rule 2 discretion to address the merits in any event.

Addressing the merits, the court determined that while it may have been permissible on the grounds of officer safety to conduct an external frisk if the officer had reasonable suspicion that the defendant was armed and dangerous, the search in this case went beyond such a frisk, lasting almost thirty seconds and appearing to miss areas that would be searched in a safety frisk. The State also made no argument that reasonable suspicion of being armed and dangerousness justified the search. The court proceeded to distinguish case law the State argued supported the position that officers need no additional reasonable suspicion to request

consent to search during a traffic stop as a universal matter, explaining that in the case at hand the request for consent and the full search were not related to the mission of the stop and were not supported by additional reasonable suspicion beyond the observed seatbelt violation. The court concluded that any consent the defendant gave for the search was involuntary as a matter of law, reversed the trial court's denial of the defendant's motion to suppress, and vacated the judgement entered against the defendant based on his guilty pleas.

Judges Carpenter and Griffin concurred with separate opinions, each agreeing with the Fourth Amendment analysis. Judge Griffin wrote to address an argument in the defendant's brief "raising a question of impartiality in traffic stops, and our justice system generally, based on the color of a person's skin and their gender." Judge Griffin rejected that argument, characterizing it as "inflammatory and unnecessary." Judge Carpenter wrote that "[c]hoosing to inject arguments of disparate treatment due to race into matters before the Court where such treatment is not at issue . . . does not further the goal of the equal application of the law to everyone."

The trial court did not commit error in denying the defendant's request to suppress the controlled substances which were discovered as a result of the *Terry* search of the defendant's vehicle

State v. Johnson, ___ N.C. ___, 2021-NCSC-85 (Aug. 13, 2021)
An officer on patrol ran the license plate of the car the defendant was driving and discovered that the license plate was registered to another car. The officer initiated a traffic stop. As the officer approached the driver's side of the car, he noticed that the defendant had raised his hands in the air. On inquiry, the defendant denied the presence of any weapons in the car. When the officer explained that the mismatched license plate served as the reason for the traffic stop, the defendant responded that he had just purchased the car in a private sale that day. The defendant produced his driver's license, the car's registration, and bill of sale. The officer sensed that the defendant seemed nervous and was "blading his body" as he searched for the requested documentation. Slip op. at ¶ 3.

When the officer ran the defendant's information through the police database, he found that the defendant had been charged with multiple violent crimes and offenses related to weapons over the span of several years. When the officer returned, he asked the defendant to step out of the car with the intent of conducting a frisk of defendant's person and a search of the vehicle. The defendant consented to be frisked for weapons, and a pat down of the defendant's clothing revealed no weapons or other indicia of contraband. The defendant refused to grant consent to search the car, but the officer explained that he was going to conduct a limited search of car nonetheless based on the defendant's "criminal history . . . and some other things." Slip op. at ¶ 5. The officer found a baggie of powder cocaine and arrested the defendant.

The defendant was indicted for possession of cocaine. At trial, the defendant file a motion to suppress, which the trial court ultimately denied. The defendant agreed to plead guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia. The

defendant appealed, and the Court of Appeals, in a divided opinion, affirmed the trial court's denial of the defendant's motion to suppress. The defendant appealed to the Supreme Court based on the dissenting opinion from the Court of Appeals.

The defendant's first argument was that the officer did not have a reasonable suspicion that defendant was armed. In rejecting this argument, the Court noted that the officer rendered uncontroverted testimony that he conducted a late-night traffic stop of the defendant's vehicle in a high-crime area and encountered the defendant who acted very nervous, appeared to purposely hamper the officer's open view of the defendant's entry into the vehicle's center console, and possessed a criminal history which depicted a "trend in violent crime." Slip op. at ¶ 18. The Court thus concluded that the officer's suspicion of the defendant's potentially armed and dangerous status was reasonable.

The defendant next argued that the *Terry* search of defendant's vehicle represented an unconstitutional extension of the traffic stop. The Court rejected this argument, noting that the testimony rendered by the officer as to the actual chain of events and the observations by the officer which culminated in the *Terry* search did not equate to a conclusion that the officer unreasonably prolonged the traffic stop.

The defendant finally argued that the Court's correction of the trial court's supposed error should result in an outcome which vacates the trial court's order and overturns defendant's conviction. The Court concluded that the unconflicted evidence introduced by the State at the suppression hearing was sufficient for the trial court to make findings of fact and conclusions of law that the investigating officer had reasonable suspicion to conduct a *Terry* search of the defendant's person and car. The Court thus left the lower court's ruling undisturbed.

Justice Earls, joined by Justice Hudson, dissented. She wrote that the result reached by the majority is a decision inconsistent with the Fourth Amendment and fails to consider the racial dynamics underlying reasonable suspicion determinations.

Exigent Circumstances

Flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home

Lange v. California, 594 U.S. ___, 141 S. Ct. 2011 (June 23, 2021)
In this case, the Court held, in an opinion by Justice Kagan, that the flight of a person suspected of a misdemeanor offense does not categorically justify an officer's warrantless entry into a home. Instead, an officer must consider all the circumstances in a case involving the pursuit of a suspected misdemeanant to determine whether there is an exigency that would excuse the warrant requirement.

A California highway patrol officer attempted to stop the petitioner Lange's car after observing him driving while playing loud music through his open windows and repeatedly honking his horn. Lange, who was within 100 feet of his home, did not stop. Instead, he drove into his attached garage. The officer followed Lange into the garage, where he questioned Lange and

saw that Lange was impaired. Lange was subsequently charged with the misdemeanor of driving under the influence of alcohol and a noise infraction.

Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The trial court denied Lange's motion, and the appellate division affirmed. The California Court of Appeal also affirmed, concluding that an officer's hot pursuit of a fleeing misdemeanor suspect is always permissible under the exigent circumstances to the warrant requirement. The United States Supreme Court rejected the categorial rule applied by the California Court of Appeal and vacated the lower court's judgment.

In rejecting a categorial exception for hot pursuit in misdemeanor cases, the Court noted that the exceptions allowing warrantless entry into a home are "'jealously and carefully drawn,' in keeping with the 'centuries-old principle' that the 'home is entitled to special protection.'" Slip op. at 6. Assuming without deciding that *United States v. Santana*, 427 U.S. 38 (1976), created a categorical exception that allows officers to pursue fleeing suspected felons into a home, the Court reasoned that applying such a rule to misdemeanors, which "run the gamut of seriousness" from littering to assault would be overbroad and would result in treating a "dangerous offender" and "scared teenager" the same. Slip op. at 11. Instead, the Court explained that the Fourth Amendment required that the exigencies arising from a misdemeanant's flight be assessed on a case-by-case basis – an approach that "will in many, if not most, cases allow a warrantless home entry." *Id.* The Court explained that "[w]hen the totality of the circumstances shows an emergency — such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home" law enforcement officers may lawfully enter the home without a warrant. *Id.* The Court also cited as support the lack of a categorical rule in common law that would have permitted a warrantless home entry in every misdemeanor pursuit.

Justice Kavanaugh concurred, observing that "there is almost no daylight in practice" between the majority opinion and the concurrence of Chief Justice Roberts, in which the Chief Justice concluded that pursuit of a fleeing misdemeanant constitutes an exigent circumstance. The difference between the two approaches will, Justice Kavanaugh wrote, be academic in most cases as those cases will involve a recognized exigent circumstance such as risk of escape, destruction of evidence, or harm to others in addition to flight.

Justice Thomas concurred on the understanding that the majority's articulation of the general case-by-case rule for evaluating exceptions to the warrant requirement did not foreclose historical categorical exceptions. He also wrote to opine that even if the state courts on remand concluded the officer's entry was unlawful, the federal exclusionary rule did not require suppression. Justice Kavanaugh joined this portion of Justice Thomas's concurrence.

The Chief Justice, joined by Justice Alito, concurred in the judgment. The Chief Justice criticized the majority for departing from the well-established rule that law enforcement officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect – regardless of what offense the suspect was suspecting of doing before he fled. He characterized the rule adopted by the Court as "famously difficult to apply." Roberts, C.J., concurrence, slip op. at 14.

The Chief Justice concurred rather than dissenting because the California Court of Appeals assumed that hot pursuit categorically permits warrantless entry. The Chief Justice would have vacated the lower court's decision to allow consideration of whether the circumstances in this case fell within an exception to the general rule, such as a case in which a reasonable officer would not believe that the suspect fled into the home to thwart an otherwise proper arrest.

Search Warrants

Search warrant affidavit that failed to identify dates or time frame of events did not establish probable cause; trial court erred by considering information outside of the four corners of the warrant

State v. Logan, ___ N.C. App. ___, 2021-NCCOA-311 (July 6, 2021)
In this Cleveland County case, police were dispatched to a commercial business around 3 a.m. in response to a noise complaint. Upon arrival, they noticed a strong odor of burning marijuana and loud noises from a party within the building. The property owner-defendant approached police on scene and refused to consent to a search of the property. Officers applied for a search warrant. The defendant was ultimately charged with possession of firearm by felon based on the discovery of firearms inside, along with having obtained the status of habitual felon. He moved to suppress all evidence derived from the search, arguing that the warrant did not establish probable cause, was based on stale information, and was overbroad. Following the denial of his motion, the defendant was convicted of both offenses at trial. The Court of Appeals unanimously reversed.

The affidavit in support of the warrant alleged an investigation at the location and the odor of marijuana but failed to recount any specific time or date of the officer's observation. This was fatal to a finding of probable cause. In the words of the court:

> [W]e agree with Defendant that the affidavit in support of the search warrant application did not provide sufficient facts from which the magistrate could conclude there was probable cause because it did not specify when the purported events occurred nor did it indicate sufficient facts from which the magistrate could reasonably infer the timing of such events . . . Logan Slip op. at 12.

The trial court erred in considering information (the timing of the officer's observations) not found within the four corners of the warrant. The denial of the motion to suppress was therefore reversed, the convictions vacated, and the matter remanded for a new trial. Because the court determined that the warrant application failed to establish probable cause, it did not consider the defendant's other arguments regarding the validity of the warrant. Judge Gore and Judge Dillon concurred.

Criminal Offenses

Motor Vehicle Offenses

(1) There was sufficient evidence of the defendant's impairment. (2) Any error in the admission of a toxicology expert's testimony was not prejudicial in light of the defendant's admission to taking Hydrocodone.

State v. Teesateskie, ___ N.C. App. ___, 2021-NCCOA-409 (Aug. 3, 2021)
In this Graham County case, the defendant was convicted of felony death by vehicle and driving while impaired after she drove off the road and killed her passenger. Though first responders did not initially think the defendant had ingested any impairing substance, the Highway Patrol suspected impairment. A blood sample revealed the presence of Xanax, Citalopram, and Lamotrigine, but was inconclusive as to Hydrocodone, which the blood analyst testified could have been masked by the Lamotrigine, metabolized, or present in too small a quantity to be measured. (1) On appeal, the defendant argued that the trial court erred by denying her motion to dismiss based on insufficient evidence of impairment to support her charge of DWI, and, in turn, her charge of felony death by motor vehicle. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the State, and allowing the State every reasonable inference arising from the evidence, the court concluded that there was sufficient evidence of impairment, including the results from standardized field sobriety tests, the defendant's statement that she had consumed alcohol and Hydrocodone, and the opinion of the Highway Patrol's drug recognition expert. The defendant's conflicting evidence—including that the accident occurred at night on a curvy mountain road and that her weight and diabetes affected the results of her sobriety tests—did not allow the trial court to grant a motion to dismiss, because conflicting evidence is for the jury to resolve.

(2) The defendant also argued on appeal that the trial court should not have allowed the State's expert to testify as to possible reasons why Hydrocodone did not show up in the defendant's blood test, because that testimony violated Rule 702 in that it was not based on scientific or technical knowledge, was impermissibly based on unreliable principles and methods, and was prejudicial due to the stigma associated with Hydrocodone on account of the opioid crisis. The Court of Appeals concluded that even if the issue was properly preserved for appeal, and even if the admission of the expert's statement was an abuse of discretion in violation of Rule 702, it was not prejudicial given the defendant's admission that she took 20 mg of Hydrocodone approximately one hour and fifteen minutes before the accident.

Judicial Administration

Contempt

(1) Defendant was properly served subpoenas to appear by telephone; (2) Show cause order based on defendant's disregard of the subpoena was sufficient to confer jurisdiction for contempt hearing; (3) Trial court's oral pronouncement of the correct standard of proof was sufficient despite failure to check box on form finding the defendant in criminal contempt

State v. Gonzalez, ___ N.C. App. ___, 2021-NCCOA-309 (July 6, 2021), *temp. stay allowed*, ___ N.C. ___, 859 S.E.2d 634 (July 21, 2021)

The defendant was served with subpoenas for her and her children to testify in a murder trial. She was first served by telephone by the Watauga County Sheriff's deputy and later served personally. The defendant and her children did not appear as commanded. (This led to an improperly declared mistrial and ultimately resulted in a double jeopardy violation. *See State v. Resendiz-Merlos,* 268 N.C. App. 109 (Oct. 15, 2019)). The day before failing to appear as required by the subpoena, the defendant met with the prosecutor and acknowledged her obligation to appear and testify. After the trial, the defendant acknowledged to law enforcement that she had purposefully failed to comply with the subpoena. A show cause order was issued, and the defendant was found in criminal contempt. She was sentenced to an active term of 30 days and appealed.

(1) The subpoena personally served on the defendant only had one page of the AOC subpoena form (AOC-G-100). Page two of that document lists the rights and protections for a person under subpoena, and the defendant argued this rendered the process invalid. The Court of Appeals agreed that the subpoena personally served on the defendant did not comply with the requirements for service of a subpoena, but found the subpoena served by telephone was proper.

(2) The defendant also argued that the trial court lacked jurisdiction to find her in contempt based on the invalid subpoena. Because the telephone subpoena was properly served, the trial court had jurisdiction to enforce it. Contempt under these circumstances was permissible as a matter of Rule 45 of the North Carolina Rules of Civil Procedure or under G.S. 5A-11 (Criminal contempt). A show cause order alleging failure to comply with a court order and referencing the prior order gives a trial court jurisdiction for the trial court to act, and the show cause order here did so. In the court's words:

> [B]ecause the trial court entered a show cause order requiring defendant to appear in court and explain why she failed to appear in accordance with the subpoena served upon her, it was fully authorized to find her in criminal contempt of court. Gonzalez Slip op. at 9.

(3) An additional argument that the trial court failed to apply the beyond-a-reasonable-doubt standard to her contempt conviction was likewise rejected. The trial court announced in open court its use of that standard but failed to check the appropriate box on the form order. The oral pronouncement was sufficient to indicate the trial court's application of the correct

standard of proof, and the district court's judgment was therefore affirmed in all respects. Judges Carpenter and Arrowood concurred.