Criminal Law Update
for Magistrates

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Contents

Search and Seizure 1
Search Warrants 1
Crimes, Elements, and Pleadings 3
Criminal Procedure 6
Sex Offender Registration 7

Search and Seizure

Search Warrants

State v. Brody, ___ N.C. App. ___, 796 S.E.2d 384 (Feb. 7, 2017). In this drug case, a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause and a subsequent search of the defendant's home. The court rejected the defendant's argument that the affidavit failed to show that the confidential informant was reliable and that drugs were likely to be found in the home. The affidavit stated that investigators had known the confidential informant for two weeks, that the informant had previously provided them with information regarding other people involved in drug trafficking and that the detective considered the informant to be reliable. The confidential informant had demonstrated to the detective that he was familiar with drug pricing and how controlled substances are packaged and sold for distribution. Moreover, the informant had previously arranged, negotiated and purchased cocaine from the defendant under the detective's direct supervision. Additionally, the confidential informant told the detective that he had visited the defendant's home approximately 30 times, including within 48 hours before the affidavit was prepared, and saw the defendant possessing and selling cocaine each time. The court noted: "The fact that the affidavit did not describe the precise outcomes of the previous tips from the [informant] did not preclude a determination that the [informant] was reliable." It added: "although a general averment that an informant is 'reliable' -- taken alone -- might raise questions as to the basis for such an assertion," the fact that the detective also specifically stated that investigators had received information from the informant in the past "allows for a reasonable inference that such information

[1] This manuscript is based largely on case summaries prepared by my colleagues Jessie Smith and Bob Farb. To receive their case summaries by email, subscribe to the UNC School of Government criminal law listserv.

demonstrated the [confidential informant's] reliability." Moreover, the detective had further opportunity to gauge his reliability when the informant arranged, negotiated and purchased cocaine from the defendant under the detective's supervision. [Jeff Welty blogged about this case here.]

State v. Lowe, ___ N.C. ___, 794 S.E.2d 282 (Dec. 21, 2016). (1) Affirming the Court of Appeals, the court held that a search warrant authorizing a search of the premises where the defendant was arrested was supported by probable cause. The affidavit stated that officers received an anonymous tip that Michael Turner was selling, using and storing narcotics at his house; that Turner had a history of drug related arrests; and that a detective discovered marijuana residue in the trash from Turner's residence, along with correspondence addressed to Turner. Under the totality of the circumstances there was probable cause to search the home for controlled substances. (2) Reversing the Court of Appeals, the court held that a search of a vehicle located on the premises was within the scope of the warrant. The vehicle in question was parked in the curtilage of the residence and was a rental car of the defendant, an overnight guest at the house. If a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car. In departing from this general rule, the Court of Appeals held that the search of the car was invalid because the officers knew that the vehicle in question did not belong to the suspect in the drug investigation. Noting that the record was unclear as to what the officers knew about ownership and control of the vehicle, the court concluded; "Nonetheless, regardless of whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant." [Bob Farb blogged about this case here.]

State v. Allman, ___ N.C. ___, 794 S.E.2d 301 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that because the magistrate had a substantial basis to find that probable cause existed to issue the search warrant, the trial court erred by granting the defendant's motion to suppress. The affidavit stated that an officer stopped a car driven by Jeremy Black. Black's half-brother Sean Whitehead was a passenger. After K-9 alerted on the car, a search found 8.1 ounces of marijuana packaged in a Ziploc bag and $1600 in cash. The Ziploc bag containing marijuana was inside a vacuum sealed bag, which in turn was inside a manila envelope. Both individuals had previously been charged on several occasions with drug crimes. Whitehead maintained that the two lived at Twin Oaks Dr. The officer went to that address and found that although neither individual lived there, their mother did. The mother informed the officer that the men lived at 4844 Acres Drive and had not lived at Twin Oaks Drive for years. Another officer went to the Acres Drive premises and determined that its description matched that given by the mother and that a truck outside the house was registered to Black. The officer had experience with drug investigations and, based on his training and experience, knew that drug dealers typically keep evidence of drug dealing at their homes. Supported by the affidavit, the officer applied for and received a search warrant to search the Acres Drive home. Drugs and paraphernalia were found. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the brothers were drug dealers. Based on the mother's statement that the two lived at the Acres Drive premises, the fact that her description of that home matched its actual appearance, and that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that the two lived there. And based on the insight from the officer's training and experience that evidence of drug dealing was likely to be found at their home and that Whitehead lied about where the two lived, it was reasonable for the magistrate to infer that there could be evidence of drug dealing at the Acres Drive premises. Although nothing in the affidavit directly connected the defendant's home with

evidence of drug dealing, federal circuit courts have held that a suspect drug dealer's lie about his address in combination with other evidence of drug dealing can give rise to probable cause to search his home. Thus, under the totality of the circumstances there was probable cause to support search warrant. [Bob Farb blogged about this case here.]

State v. Jackson, ___ N.C. App. ___, 791 S.E.2d 505 (Oct. 4, 2016). Over a dissent, the court held that the search warrant was supported by sufficient probable cause in this drug use. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior)

State v. Parson, ___ N.C. App. ___, 791 S.E.2d 528 (Oct. 18, 2016). (1) In this methamphetamine trafficking case, the trial court erred by denying the defendant's motion to suppress evidence seized during execution of a search warrant. Noting that a factual showing sufficient to support probable cause "requires a truthful showing of facts," the court rejected the defendant's argument that a statement in the affidavit supporting the search warrant was made in reckless disregard for the truth. However, the court went on to find that the application for the search warrant and attached affidavit insufficiently connected the address in question to the objects sought. It noted that none of the allegations in the affidavit specifically refer to the address in question and none establish the required nexus between the objects sought (evidence of a methamphetamine lab) and the place to be searched. The court noted that the defendant's refusal of an officer's request to search the property cannot establish probable cause to search. (2) Although federal law recognizes a good-faith exception to the exclusionary rule where evidence is suppressed pursuant to the federal Constitution, no good faith exception exists for violations of the North Carolina Constitution. [Jeff Welty blogged about this case here; Bob Farb blogged about it here.]

Crimes, Elements, and Pleadings

State v. Phillips, ___ N.C. App. ___, ___ S.E.2d ___, 2017 WL 899991 (Mar. 7, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of attempting to obtain property by false pretenses. After an officer learned about larcenies of Michael Kors items from a local store, he found an online posting for similar items in an online flea market. Using a fake name and address, the officer created a social media account and started a conversation with the seller, later determined to be the defendant, to discuss purchase of the items. The two agreed to meet. Unbeknownst to the defendant, the officer decided to set up an undercover purchase for one of the items to determine if it in fact was stolen from the local store or whether it was counterfeit merchandise. The undercover purchase occurred and the item in question was determined to be counterfeit. Noting that actual deceit is not an element of attempting to obtain property by false pretenses, the court held that the evidence was sufficient to sustain the conviction. The court rejected the defendant's argument that because he did not actually represent the item as an authentic Michael Kors item, there was no evidence of a false

pretense or intent to deceive. The court noted that the defendant advertised the items as Michael Kors bags and described them as such to the undercover officer. Additionally, the defendant purchased the bags from a warehouse in Atlanta that sold them for only a fraction of their worth, suggesting that the defendant knew the merchandise was counterfeit. The court also rejected the defendant's argument that because the offense was completed, a conviction for attempt was improper. The offense only occurs if the property actually is obtained in consequence of the victim's reliance on the false pretense. Here, because of the undercover operation, the officer was never deceived by the defendant's misrepresentation.

State v. Stith, ___ N.C. ___, ___ S.E. 2d ___, 2017 WL 1033763 (Mar. 17, 2017). The court per curiam affirmed the decision below, State v. Stith, ___ N.C. App. ___, 787 S.E.2d 40 (April 5, 2016). In that decision, the court of appeals held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone bitartrate," a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase "Schedule II." At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: "the original indictment identified the controlled substance … as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone." It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed "such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony." Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. The court of appeals applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___, 2017 WL 490471 (Feb. 7, 2017). Over a dissent, the court held that "[b]ecause the evidence did not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance." The State failed to demonstrate continuous maintenance or possession of the vehicle by the defendant beyond the brief period of time when he was observed by the police on the afternoon of his arrest or that the defendant had used the vehicle on a prior occasion to keep or sell drugs. The evidence showed only that the defendant possessed drugs in the vehicle on one occasion.

State v. China, ___ N.C. App. ___, ___ S.E.2d. ___, 2017 WL 672177 (Feb. 21, 2017). Over a dissent, the court held that because there was no evidence that the defendant restrained the victim beyond the

degree of restraint that is inherent in the commission of a sexual or physical assault, the evidence was insufficient on the restraint element of kidnapping. The case involved a sudden attack, in which the defendant broke down the door of an apartment, ran into the bedroom where the victim was dressing, and assaulted him. After the defendant entered the bedroom, he immediately punched the victim hard enough to throw the victim onto the bed. The defendant continued punching the victim while he committed a brief, brutal sexual attack. After the sexual offense, the defendant dragged the victim off the bed and the defendant and his companion kicked the victim in the head and body. The entire incident took no more than a few minutes. The court agreed with the defendant that there was no evidence that the victim was subjected to any restraint beyond that inherent in the defendant's commission of the sex offense and assault.

State v. Frazier, ___ N.C. App. ___, 795 S.E.2d 654 (Feb. 7, 2017). In this child abuse case the trial court erred by allowing the State to amend the indictment. The defendant was indicted for negligent child abuse under G.S. 14-318.4(a5) after police discovered her unconscious in her apartment with track marks on her arms and her 19-month-old child exhibiting signs of physical injury. Under that statute, a parent is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" and the parent's act or omission "results in serious bodily injury to the child." The indictment charged that the defendant committed this offense by negligently failing to treat her child's wounds. At trial, the trial court allowed the State to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well." This amendment was improper because it constituted a substantial alteration of the indictment. The amendment alleged conduct that was not alleged in the original indictment and which constituted the "willful act or grossly negligent omission," an essential element of the charge. The amendment thus allowed the jury to convict the defendant of conduct not alleged in the original indictment. Additionally, the amendment violated the North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury.

State v. Greene, ___ N.C. App. ___, ___ S.E.2d. ___, 2017 WL 163735 (Jan. 17, 2017). (1) The evidence was insufficient to support convictions of felony larceny from the person. Items were stolen from the victim's purses while they were sleeping in a hospital waiting room. At the time the items were stolen, the purses were not attached to or touching the victims. The court rejected the State's argument that the purses were under their owners' protection because hospital surveillance cameras operated in the waiting room. The court noted: "Video surveillance systems may make a photographic record of the taking, but they are no substitute for 'the awareness of the victim of the theft at the time of the taking.'" The court noted that the State's theory would convert any larceny committed in areas monitored by video to larceny from the person. (2) The court rejected the defendant's argument that one of the larceny convictions had to be arrested because both occurred as part of a single continuous transaction. The court reasoned that where the takings were from two separate victims, the evidence supported to convictions.

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The Court of Appeals improperly found that attempted assault is not a recognized criminal offense in North Carolina. The court rejected the notion that attempted assault is an "attempt of an attempt." Thus, a prior conviction for attempted assault with a deadly weapon inflicting serious injury can support a later charge of possession of a firearm by a felon and serve as a prior conviction for purposes of habitual felon status. [Jessie Smith blogged about this case here.]

In re S.A.A., ___ N.C. App. ___, 795 S.E.2d 602 (Dec. 20, 2016). The State failed to introduce sufficient evidence of sexual battery. The 13-year-old juvenile was adjudicated delinquent in part based on two counts of sexual battery against two 11-year-old female schoolmates. It was alleged that he draped his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. The State failed to introduce sufficient evidence that the juvenile touch the tops of the girls' breasts for a sexual purpose. One girl testified that the juvenile rubbed "this green glow stick stuff" on her leaving glowing liquid on her shirt above her collarbone. The other girl testified that the juvenile reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt. In criminal cases involving adult defendants the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself. However, an intent to arouse or gratify sexual desires may not be inferred in children under the same standard. Rather, a sexual purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Here, the juvenile denied touching either girl's breasts, saying that he only put his hand around their shoulders; this account was supported by witnesses. Neither the location nor the alleged manner of the touching was secretive in nature; rather, the incident occurred on a busy public street on Halloween. The evidence was undisputed that the juvenile have been wiping green glowing liquid on trees, signs, and other young people during the evening. Nothing about his attitude suggested a sexual motivation; neither girl said that he made any sexual remarks. And when the girls ran away, he did not try to pursue them. [Jessie Smith blogged about this case here.]

State v. Howell, ___ N.C. App. ___, 792 S.E.2d 898 (Dec. 6, 2016). G.S. 90-95(e)(3) operates as a sentence enhancement not a separate offense. The defendant was charged with possession of marijuana of over ½ ounce but less than 1½ ounces, a Class I misdemeanor, of having previously been convicted of any offense in violation of the Controlled Substances Act, and with attaining the status of habitual felon. The defendant pled guilty to the possession charge, acknowledged his prior conviction subjecting him to enhanced punishment and acknowledged attaining habitual felon status. The trial court treated the marijuana misdemeanor as a Class I felony because of the prior conviction and then elevated that conviction to a Class E felony because of the habitual felon status. On appeal the defendant argued that under G.S. 90-95(e)(3), the prior conviction was merely a sentence enhancement, and could not serve to elevate the misdemeanor offense to a felony offense. The court agreed, concluding: "it appears that our General Assembly intended that section (e)(3) to act as a sentence enhancement rather than a separate offense." It continued: "Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor." The court went on to conclude that as a result, the defendant's habitual felon status had no impact on his sentence as a misdemeanant. [John Rubin blogged about this case here.]

Criminal Procedure

State v. Turner, ___ N.C. App. ___, 793 S.E.2d 287 (Dec. 6, 2016). Because the State failed to prosecute the defendant's impaired driving misdemeanor charge within two years, the trial court did not err by dismissing that charge. According to the court, the defendant "received a citation for driving while impaired" and "was arrested and brought before a magistrate, who issued a magistrate's order." The court stated:

> The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge.

[Shea Denning blogged about this case several times, including here.]

Sex Offender Registration

Doe v. Cooper, 842 F.3d 833 (4th Cir. November 30, 2016). Plaintiffs, convicted sex offenders, filed a lawsuit in a North Carolina federal district court that challenged the constitutionality of North Carolina General Statutes 14-208.18(a)(2) and (a)(3). The district court ruled that (a)(2) was unconstitutionally overbroad, and (a)(3) was unconstitutionally vague. The fourth circuit affirmed the district court rulings. (G.S. 14-208.18(a)(1) was also challenged as unconstitutional, but the district court upheld that subdivision, and the plaintiffs did not appeal that ruling.).

Subdivision (a)(2) provides that two categories of sex offenders are prohibited within 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors, including, but not limited to, places described in subdivision (a)(1) that are located in malls, shopping centers, or other property open to the general public. The court concluded that (a)(2) was unconstitutionally overbroad because it applies to all of these sex offenders, not just those who pose a danger to minors or are likely to pose such a danger.

The court noted that (a)(3) states that these sex offenders may not "knowingly be . . . [a]t any place where minors gather for regularly scheduled educational, recreational, or social programs." It said that two principal problems compel the conclusion that (a)(3) is unconstitutionally vague. In particular, a reasonable person, whether a sex offender or a law enforcement officer, cannot reasonably determine (1) whether a program for minors is "regularly scheduled," or (2) what places qualify as those "where minors gather." [Jamie Markham blogged about this case here.]