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Criminal Case Update

(includes cases decided through November 6, 2009)

The following summaries are drawn primarily from Bob Farb's criminal case summaries. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above website and click on Criminal Law Listserv.

Stops and Searches

Was There a Seizure?

Officer's Encounter with Vehicle Passenger Constituted Seizure Under Fourth Amendment—Ruling of Court of Appeals Is Affirmed in Part and Reversed in Part

State v. Icard, 363 N.C 303 (18 June 2009), *affirming in part and reversing in part*, 190 N.C. App. 76 (2008). At approximately 12:30 a.m., an officer noticed a vehicle parked in the parking lot of a food store in a high crime area known for prostitution and drug-related activity. The officer saw a person behind the steering wheel. The officer parked directly behind the vehicle in which the defendant was a passenger, with his blue lights flashing. The officer, who was in uniform and armed, told the driver in the defendant's presence that the two were being checked out because the area was known for drugs and prostitution. The officer requested from the driver his driver's license and registration and asked for and received the driver's explanation why they were there. After the officer requested law enforcement assistance, another officer arrived in a marked police car and used his take-down lights to illuminate the defendant's side of the vehicle. Both officers then approached the defendant. When the defendant twice failed to respond to one of the officer's attempts to initiate a conversation, the officer opened the defendant's door and made contact with her. The officer requested that the defendant produce her identification, then asked the defendant to come with her purse to the rear of the vehicle where he and the

other officer continued to ask questions. When one officer left the defendant to deal with the driver, he did not return her purse but instead handed it to the other officer. The court ruled that the encounter with the defendant constituted a seizure under the Fourth Amendment. The court stated, citing Florida v. Bostick, 501 U.S. 429 (1991), that a reasonable person in the defendant's position would have believed she was not free to leave or otherwise terminate the encounter.

Defendant Fleeing From Officers Was Not Seized Under Fourth Amendment Until They Took Physical Control of Him

State v. Mewborn, ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009). Officers patrolling a high crime area in a marked car saw the defendant and another person walking in the middle of the street. They pulled alongside them and asked if they would wait a minute because they needed to speak with them for a few minutes. As the officers were getting out of their car, the defendant turned and started to run away. A chase ensued, and the officers eventually took physical control of the defendant. During the chase, the defendant appeared to throw a gun from his pocket. Based on this evidence, he was convicted of possession of a firearm by a felon. After he was stopped, he threw a bag of cocaine under the police car. Based on this evidence, he was convicted of possession of cocaine. The defendant moved to suppress all the evidence, arguing that the officers unconstitutionally stopped the defendant without reasonable suspicion. The court noted that the dispositive issue is a determination whether the defendant was seized under the Fourth Amendment before or after he ran from the officers. The court ruled, relying on California v. Hodari D., 499 U.S. 621 (1991), that the defendant did not submit to the officers' authority before fleeing from them and was not seized until the officers took physical control of him. Thus, the flight from the officers could properly be considered in determining whether the officers had reasonable suspicion to stop him, and the court ruled that the officers did have reasonable suspicion.

Grounds for Stops: Tips

Officers Had Reasonable Suspicion of Defendant's Selling Marijuana to Make Investigative Stop

State v. Garcia, ___ N.C. App. ___, 677 S.E.2d 555 (16 June 2009). A detective received information in May 2007 and on July 7, 2007, from an anonymous confidential informant that marijuana was being stored in a storage shed at a house at 338 Barnes Road and identified the defendant as the seller of the marijuana. After searching the defendant's name on a law enforcement database, the detective found his picture and information that he lived at that address and had a lengthy history of police contact, including suspicion of drug and firearms offenses. Surveillance on July 26, 2007, at the house revealed two men who left and returned several times to the residence in a black BMW. The detective thought one of the men was the defendant. She also saw both men coming from the area near the shed and enter the BMW. One of them had a black bag with large handles. Other officers who received this information from the detective followed the BMW to a place which was a known drug area. Two people (not the two who were in the BMW) fled when an officer told them he was an officer. Both men who arrived in the BMW, one of whom was the defendant, were placed in handcuffs. The court ruled, distinguishing State v. Hughes, 353 N.C. 200 (2000), that the officers had reasonable suspicion of the defendant's selling marijuana to make an investigative stop, based on the information from the anonymous confidential informant and the officers' corroboration of that information.

Officer Had Probable Cause to Arrest Defendant Based on Information Given by Anonymous Caller Who Later Revealed His Identity Before Defendant's Arrest, and Caller's Information Was Corroborated by Officer's Investigation

State v. Brown, ___ N.C. App. ___, 681 S.E.2d 460 (18 August 2009). The court ruled that an officer

had probable cause to arrest the defendant for murder based on information given by an anonymous caller who later revealed his identity to the officer before the arrest, and the caller's information was corroborated by the officer's investigation. (See the court's opinion for the facts establishing probable cause.)

Permissible Scope of Actions after Stop

(1) Court Rules That Officers During Routine Traffic Stop May Frisk Driver or Passengers for Whom They Have Reasonable Suspicion To Be Armed and Dangerous; They Need Not Additionally Have Cause to Believe That Any Vehicle Occupant Is Involved in Criminal Activity

(2) Officer's Questions Into Matters Unrelated to Justification for Traffic Stop Do Not Convert Encounter Into Unlawful Seizure As Long As Those Questions Do Not Measurably Extend Duration of Stop

Arizona v. Johnson, ___ U.S. ___, 129 S. Ct. 781 (26 January 2009). Three officers, members of a gang task force, were on patrol near a neighborhood associated with the Crips gang. They stopped a vehicle after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation, which under Arizona state law was a civil infraction warranting a citation. There were three occupants in the vehicle: the driver, a front-seat passenger, and the defendant, a backseat passenger. When making the stop, the officers had no reason to suspect anyone of criminal activity. Each officer dealt with one of the occupants. The officer involved with the defendant had noticed on the officers' approach to the vehicle that the defendant had looked back and kept his eyes on the officers. She observed that the defendant was wearing clothing that was consistent with Crips membership. She also noticed a scanner in the defendant's back pocket, which she believed that most people would not carry in that manner unless they were involved with criminal activity or trying to evade law enforcement. The defendant answered the officer's questions (he provided his name and date of birth but had no identification; he said that he had served time in prison for burglary) and also volunteered that he was from an Arizona town that the officer knew was home to a Crips gang. The defendant complied with the officer's request to get out of the car. Based on her observations and the defendant's answers to her questions, the officer suspected he might have a weapon and frisked him and discovered a gun. (1) The Court reviewed its case law on stop and frisk beginning with Terry v. Ohio, 392 U.S. 1 (1968), particularly noting Pennsylvania v. Mimms, 434 U.S. 106 (1977) (officer may automatically order driver out of lawfully stopped vehicle); Maryland v. Wilson, 519 U.S. 408 (1997) (applying *Mimms* to passengers); and Brendlin v. California, 551 U.S. 249 (2007) (when vehicle is stopped, passengers as well as driver are seized). The Court stated that the combined thrust of these three cases is that an officer who conducts a routine traffic stop may frisk the driver and any passenger for whom they have reasonable suspicion to be armed and dangerous. They need not additionally have cause to believe that any vehicle occupant is involved in criminal activity. (2) An Arizona state appellate court had ruled that while the defendant initially was lawfully seized, before the frisk occurred the detention had evolved into a consensual conversation about his gang affiliation because the officer's questioning was unrelated to the traffic stop. The Arizona court concluded that the officer did not have the right to frisk the defendant—even if she had reasonable suspicion that he was armed and dangerous—absent reasonable suspicion that the defendant had engaged, or was about to engage, in criminal activity. The United States Supreme Court rejected that view and concluded that the seizure of the defendant during this traffic stop was continuous and reasonable from the time the vehicle was stopped to when the frisk occurred. A traffic stop of a vehicle communicates to a reasonable passenger that he or she is not free to terminate the encounter with law enforcement and move about at will. Nothing occurred in this case that would have conveyed to the defendant that before the frisk, the traffic stop had ended or that he was otherwise free to depart without the officer's permission. The officer was not constitutionally required to give the defendant an

opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her. Citing Muehler v. Mena, 544 U.S. 93 (2005) (questioning of the plaintiff about her immigration status did not violate the Fourth Amendment because the plaintiff's detention during the execution of the search warrant was not prolonged by the questioning), the Court stated that an officer's questions about matters unrelated to the justification for a traffic stop do not convert the encounter into an unlawful seizure, as long as the questions do not measurably extend the duration of the stop.

(1) Passenger in Stopped Vehicle May Challenge Duration of Seizure
(2) Passenger Was Illegally Seized When Traffic Stop Had Ended, Driver's License and Registration Had Not Been Returned to Driver, and Officers Did Not Have Reasonable Suspicion to Further Detain Driver and Passengers

State v. Jackson, ___ N.C. App. ___, 681 S.E.2d 492 (18 August 2009). An officer stopped a vehicle and with other officers checked the driver's license and registration of the driver and determined that they were valid and there were no outstanding warrants for the driver and two passengers, one of whom was the defendant. After the traffic stop had ended but before the driver's license and registration had been returned, an officer asked questions about illegal drugs and weapons in the vehicle and then asked for consent to search the vehicle, which was granted. Cocaine was found in the vehicle, the three occupants were arrested, and cocaine was found in the defendant's sock at the jail. The court ruled, relying on Brendlin v. California, 551 U.S. 249 (2007), that the defendant was seized during the stop of the vehicle and could challenge the duration of the seizure as violating the Fourth Amendment. The court also ruled that once the traffic stop had ended and the driver's license and registration had not been returned, the officer's questioning about illegal drugs and weapons in the vehicle was an extension of the seizure beyond the scope of the original traffic stop, and reasonable suspicion did not exist to justify the extension of the seizure. The court rejected the argument that the encounter had become consensual after the traffic stop had ended, because a reasonable person under the circumstances would not believe he was free to leave without his driver's license and registration. The vehicle search was tainted by the illegality of the extended detention. Because the defendant was arrested based on the discovery of cocaine and a weapon in the vehicle, the cocaine found in the defendant's sock at the jail was the direct result of the officer's illegal search of the vehicle. Thus, the exclusionary rule prohibited the admission of the evidence found in the vehicle and the defendant's sock.

Court Remands to Trial Court to Determine Whether Officer's Handcuffing of Defendant During Investigative Stop Was Permissible

State v. Carrouthers, ___ N.C. App. ___, 683 S.E.2d 781 (20 October 2009). The trial court granted the defendant's motion to suppress evidence obtained by an officer during an encounter with the defendant leading to his arrest. The trial court had concluded that the defendant was arrested when handcuffed by the officer because a reasonable person would not have felt free to leave, and there was no probable cause for the arrest. The court ruled that the trial court applied an incorrect standard to determine whether the defendant was under arrest. Instead, the trial court should have determined whether special circumstances existed that would have justified the officer's use of handcuffs as the least intrusive means reasonable necessary to carry out the purpose of the investigative stop. The court remanded the case to the trial court to make this determination.

Grounds to Arrest or Search

Officer's Smell of Marijuana Odor Emanating From Vehicle Authorized Warrantless Search of Vehicle

State v. Corpening, ___ N.C. App. ___, 683 S.E.2d 457 (6 October 2009). The defendant approached a checkpoint in his vehicle, pulled over, and parked on the side of the road about 100 to 200 feet before the checkpoint. He sat alone in the vehicle for about thirty to forty-five seconds. An officer walked to the vehicle and smelled a marijuana odor emanating from it. The court ruled that the officer's "plain smell" of the marijuana provided probable cause to conduct a warrantless search of the vehicle. The court also ruled that the defendant's argument that the checkpoint was unconstitutional was irrelevant because the defendant stopped solely on his own volition (that is, the defendant was not seized under the Fourth Amendment). Also, the officer did not conduct a seizure by simply approaching the vehicle to investigate.

Permissible Scope of Actions During Search or Arrest: Search Incident to Arrest

Court Rules That Officers May Search Vehicle Incident To Arrest Only If (1) Arrestee Is Unsecured and Within Reaching Distance of Passenger Compartment When Search Is Conducted; or (2) It Is Reasonable To Believe That Evidence Relevant To Crime of Arrest Might Be Found in Vehicle

Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710 (21 April 2009). The Court ruled that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For an analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/arizonagantbyfarb.pdf.

(1) Officer Did Not Have Authority Under *Arizona v. Gant* to Conduct Search of Vehicle Incident to Arrest of Defendant for Traffic Violations
(2) Officer Did Not Have Authority to Seize and Search Torn Papers on Vehicle's Passenger Seat Under Plain View Doctrine

State v. Carter, ___ N.C. App. ___, 682 S.E.2d 416 (15 September 2009). An officer noticed that a vehicle's temporary tag was old or worn and with an obscured expiration date. He stopped the vehicle, which was being driven by the defendant. The officer saw several whole pieces of paper lying on the passenger seat and noticed the defendant seemed unusually nervous. The officer investigated the vehicle's registration and then arrested the defendant for an expired registration tag and failing to notify the Division of Motor Vehicles of a change of address. The defendant was removed from the vehicle, handcuffed, and directed to sit on a curb while the vehicle was searched. The officer noticed that the whole pieces of paper had been ripped into smaller pieces. He placed the pieces together and discovered incriminating evidence that led to the defendant's guilty plea to several offenses, while reserving the right to appeal the trial court's order denying his motion to suppress the paper evidence. (1) The court ruled that the officer's search of the vehicle incident to the defendant's arrest violated the Fourth Amendment under the ruling in Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710 (2009). First, the defendant was not within the reaching distance or otherwise able to access the passenger compartment when the search began. He had been arrested, handcuffed, and was sitting on the curb. Second, there was no evidence that the papers were related to the offenses for which he had been arrested. (2) The court ruled that the officer's seizure and search of the papers were not justified under the plain view doctrine because it was not immediately apparent that the papers were evidence of a crime or contraband.

Seizure and Search of Defendant's Cell Phone Was Justified as Incident to His Arrest

State v. Wilkerson, 363 N.C. 382 (28 August 2009). The defendant was convicted of two first-degree murders and sentenced to death. The defendant was arrested for the two murders shortly after they were committed, and while in custody received a call on his cell phone. When a detective asked the defendant who the caller was, he answered that it was his friend, "Will." When the detective asked who else had called the defendant that morning, the defendant scrolled through his cell phone's log, showing her the numbers of the telephones that had called his phone and the times the calls were made. At trial, the cell phone was admitted into evidence, including the serial number located inside the phone, to prove that this phone was used to make calls to a person who was involved with the murder. The court ruled, relying on United States v. Edwards, 415 U.S. 800 (1974), and State v. Steen, 352 N.C. 227 (2000), the detective's seizure and subsequent search of the cell phone was justified as incident to the defendant's arrest.

Criminal Offenses

Impaired Driving

G.S. 20-38.6(f) and G.S. 20-38.7(a) Do Not Violate Separation of Powers Provision in North Carolina Constitution

State v. Mangino, ___ N.C. App. ___, 683 S.E.2d 779 (20 October 2009). The court ruled that G.S. 20-38.6(f) (district court judge in implied consent case shall preliminarily indicate whether pretrial suppression motion should be granted, but shall not enter final judgment on motion until state has appealed to superior court or decided not to appeal) and G.S. 20-38.7(a) (state may appeal to superior court a district court's preliminary determination granting motion to suppress or to dismiss) are within the General Assembly's constitutional power to make rules of practice and procedure in the district and superior courts. Thus, the statutes do not violate the separation of powers provision in the North Carolina Constitution. The court overruled a contrary ruling by the trial court.

State Has No Right to Appeal Superior Court's Affirmance of District Court's Preliminary Determination under G.S. 20-38.6(f) to Grant Defendant's Pretrial Motion to Dismiss DWI Offense.

State v. Rackley, ___ N.C. App. ___, ___ S.E. 2d ___ (20 October 2009). The court ruled, relying on State v. Fowler, ___ N.C. App. ___, 676 S.E.2d 523 (19 May 2009), that the state had no right to appeal to the North Carolina Court of Appeals a superior court's affirmance of a district court's preliminary determination under G.S. 20-38.6(f) to grant the defendant's pretrial motion to dismiss a DWI offense.

(1) Defendant May Not Be Sentenced for Both Involuntary Manslaughter and Felony Death by Vehicle Based on Same Death
(2) Defendant May Not Be Sentenced for Both Felony Death by Vehicle and DWI Based on Same Incident
(3) Trial Court Did Not Commit Error Concerning Defendant's Right to Unanimous Verdict When Involuntary Manslaughter Jury Instruction on Culpable Negligence Allowed Jury to Consider One or More Traffic Violations to Establish Element
(4) Court Orders Remand for Resentencing

State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009). The defendant was convicted of DWI, involuntary manslaughter, and felony death by vehicle arising from a crash in which the defendant was impaired and one person died as a result of the crash. The trial court imposed sentences for all three

convictions. (1) Although the court, based on North Carolina Supreme Court cases, rejected the ruling in State v. Williams, 90 N.C. App. 614 (1988), that the offenses of felony death by vehicle and involuntary manslaughter have the same elements, it ruled that the legislature did not intend that a defendant could be sentenced for convictions of both offenses. (2) The court ruled, relying on State v. Richardson, 96 N.C. App. 270 (1989), that the defendant could not be sentenced for both DWI and felony death by vehicle. (3) The court ruled, relying on State v. Funchess, 141 N.C. App. 302 (2000), that the trial court did not commit error concerning the defendant's right to a unanimous verdict when the involuntary manslaughter jury instruction on culpable negligence allowed the jury to consider one or more traffic violations to establish the element. (4) The court ordered that on remand for resentencing, if the trial court vacates the conviction of involuntary manslaughter and sentences the defendant for felony death by vehicle, then the court must arrest the DWI judgment. If the trial court vacates the felony death by vehicle conviction, the defendant may be sentenced for both involuntary manslaughter and DWI.

Sufficient Evidence of Malice to Support Defendant's Convictions of Second-Degree Murder Based on Vehicle Crash

State v. Davis, ___ N.C. App. ___, 678 S.E.2d 385 (7 July 2009). The court ruled that, relying on State v. Rich, 351 N.C. 386 (2000), there was sufficient evidence of malice to support the defendant's second-degree murder convictions based on a vehicle crash. The state's evidence showed that the defendant had consumed nine to twelve beers in a two-hour period and had a 0.13 blood alcohol concentration. He drove his truck on a well-traveled highway and ran over a sign and continued driving. The court noted that the defendant should have known then that he was a danger to the safety of others. He continued weaving side to side. He eventually ran off the road and, without braking or otherwise attempting to avoid a collision, crashed into a pickup truck, knocking it into the air. Two people in the pickup truck died.

Domestic Violence

Temporary Restraining Order Entered Under Rule 65(b) of Rules of Civil Procedure Was Not Valid Domestic Violence Protective Order to Authorize Enhanced Sentence Under G.S. 50B-4.1(d)—Ruling of Court of Appeals Is Reversed

State v. Byrd, 363 N.C. 214 (1 May 2009), *reversing*, 185 N.C. App. 597 (2007). The defendant's wife filed a civil complaint seeking divorce from bed and board. She filed with the complaint a motion for a preliminary injunction under Rule of Civil Procedure 65(a) and also sought a temporary restraining order (TRO) under Rule 65(b). Her complaint and affidavit alleged that the defendant had assaulted her on many occasions. A district court judge on March 11, 2004, issued an ex parte order granting her request for a TRO (ordering the defendant not to assault his wife) and set a hearing date for March 15, 2004. The TRO was properly served on the defendant on March 12, 2004. The defendant moved for a continuance on March 15, 2004, and the hearing and TRO were both continued until March 24, 2004. On March 23, 2004, the defendant shot his wife in the head with a rifle, resulting in serious injury. The defendant was convicted of a Class C felony assault for this act. During the sentencing phase for this conviction, the jury found that the defendant knowingly violated a valid protective order in the same course of conduct involving the felony assault. Based on the jury's finding, the conviction was elevated under G.S. 50B-4.1(d) from a Class C felony to a Class B2 felony for sentencing purposes. The court ruled: (1) the TRO was not a valid protective order under the definition in G.S. 50B-1(c) and rejected the state's argument that the TRO was the functional legal equivalent of a valid protective order under G.S. 50B-2; and (2) even if the TRO had been entered under Chapter 50B, it failed to meet the definition in G.S. 50B-1(c) because it was not entered "upon hearing by the court or consent of the parties." Merely putting the defendant on notice that a TRO had been entered against him did not satisfy the hearing requirement to permit the sentence enhancement. The court stated that in addition to the statutory hearing requirement,

due process required a hearing at which the defendant had an opportunity to be heard about the allegations of domestic violence against him.

Other Offenses

Drug Loitering Ordinance Was Unconstitutionally Overbroad and Unconstitutionally Vague

State v. Mello, ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009). The court ruled, distinguishing State v. Evans, 73 N.C. App. 214 (1985) (upholding loitering for prostitution statute, G.S. 14-204.1), that a city drug loitering ordinance was unconstitutionally overbroad and unconstitutionally vague. Unlike G.S. 14-204.1, the city ordinance does not require proof of an intent to violate a drug law, but imposes liability solely for conduct that "manifests" such purpose. Because the ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct. (See the court's opinion for its analysis why a provision in the ordinance was unconstitutionally vague.)

Court Rules Unconstitutional Under Art. I, Sec. 30 of North Carolina Constitution (Right of People to Keep and Bear Arms) Application of 2004 Amendment to G.S. 14-415.1 (Convicted Felon Cannot Possess Firearm, With No Exceptions) to Person With Specified History Since 1979 Felony Conviction—Ruling of Court of Appeals Is Reversed

Britt v. State of North Carolina, 363 N.C. 546 (28 August 2009), *reversing*, 185 N.C. App. 610 (2007). Plaintiff in 1979 was convicted of a felony drug offense that did not involve violence or the use of a firearm. He completed probation in 1982 and in 1987 his civil rights were restored, including his right to possess a firearm. Then-existing G.S. 14-415.1 prohibited possession of a handgun and certain short-barreled firearms within five years of the later date of a conviction, discharge from prison, or termination of a suspended sentence, probation, or parole. In 1995, G.S. 14-415.1 was amended to prohibit the possession of such firearms by a convicted felon regardless of the date of conviction; it still allowed possession of a firearm in the convicted felon's own house or lawful place of business. In 2004, G.S. 14-415.1 was amended to prohibit possession of all firearms, even within one's own home or place of business. As a result of the 2004 amendment, the plaintiff divested himself of all his firearms, including rifles and shotguns he had used for game hunting on his own land. In the thirty years since the plaintiff's conviction, he had not been charged with any other crime nor was there any evidence that he had misused a firearm. No court or agency had determined that the plaintiff was violent, potentially dangerous, or more likely than the general public to commit a crime involving a firearm. The plaintiff in 2004 brought a civil action against the State of North Carolina, alleging G.S. 14-415.1 as amended violated various constitutional rights. The court ruled that the 2004 amendment to G.S. 14-415.1 (prohibiting a convicted felon from possessing any kind of firearm, with no exceptions), as applied to the plaintiff, violated Art. I, Sec. 30 of North Carolina Constitution (right of people to keep and bear arms). The court stated that it was unreasonable to assert that a nonviolent citizen who had responsibly, safely, and legally owned and used firearms for seventeen years (from 1987 to 2004) was in reality so dangerous that any possession of a firearm would pose a significant threat to public safety.

Double Jeopardy Does Not Prohibit Convictions of Both Possession With Intent to Sell or Deliver Marijuana and Felony Possession of Same Marijuana

State v. Springs, ___ N.C. App. ___, 683 S.E.2d 432 (6 October 2009). The court ruled that double jeopardy does not prohibit convictions of both possession with intent to sell or deliver marijuana and felony possession of the same marijuana. The court relied on the ruling in State v. Pipkins, 337 N.C. 431 (1994) (defendant properly convicted of both felony possession of cocaine and trafficking by possessing cocaine), and its explicit overruling of State v. Williams, 98 N.C. App. 405 (1990) (defendant may not be

convicted of both felonious possession of cocaine and possessing with intent to sell or deliver the same cocaine), and State v. Oliver, 73 N.C. App. 118 (1985) (same ruling).

Defendant's Entry Into Manager's Video Store Office Not Open to Public to Steal Money in Bank Deposit Bag Was Sufficient Evidence to Support Conviction of Felonious Breaking or Entering

State v. Rawlinson, ___ N.C. App. ___, 679 S.E.2d 878 (4 August 2009). The court ruled, relying on In re S.D.R., 191 N.C. App. 552 (5 August 2008), that the defendant's entry into the manager's video store office that was not open to the public to steal money in a bank deposit bag was sufficient evidence to support a conviction of felonious breaking or entering.

Assault Is Not Lesser-Included Offense of Sexual Battery

State v. Corbett, ___ N.C. App. ___, 675 S.E.2d 150 (21 April 2009). The court ruled that assault is not a lesser-included offense of sexual battery. The crime of assault has elements that are not elements of sexual battery.

Evidence Issues

Confrontation Clause

Defendant's Sixth Amendment Right to Confrontation Was Violated When State Laboratory Drug Analysis Report Was Introduced into Evidence to Prove Substance Was Cocaine and Analyst Did Not Testify

Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527 (25 June 2009). The defendant was on trial for trafficking in and distributing cocaine. The state placed into evidence bags containing a substance seized from the defendant and the police cruiser which he had occupied. It also introduced three certificates of analysis, sworn to before a notary public, reporting that the bags have been examined and the substance in the bags was cocaine. The drug analyst did not testify. The Court ruled, relying on Crawford v. Washington, 541 U.S. 36 (2004), that the certificates of analysis, functionally identical to affidavits, were testimonial evidence under *Crawford* and their introduction to prove the substance was cocaine violated the defendant's Sixth Amendment right to confrontation when the analyst did not testify (nor had the analyst previously testified, been subject to cross-examination, and was now unavailable). The Court rejected various arguments offered by the state for the admissibility of the certificates of analysis, including that they qualified as official or business records or the defendant had the authority to subpoena the analyst if he had wanted to cross-examine the analyst. The Court did, however, approve in general statutory procedures by which the state provides notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he or she may object to the admission of evidence absent the analyst's live appearance at trial. The Court stated that these notice-and-demand statutes simply govern the time within which a defendant must raise a confrontation objection, and states are free to adopt procedural rules governing objections. For an analysis of this ruling, see the online paper available at http://www.sog.unc.edu/programs/crimlaw/melendez_diaz.pdf.

(1) Trial Court Erred in Admitting Testimony of State's Forensic Expert Who Offered Evidence from Autopsy Report of Forensic Analyses Performed by Non-Testifying Forensic Pathologist and Forensic Dentist

(2) Trial Court Did Not Err Under Rule 404(b) or Rule 403 in Admitting Evidence of Another Murder Committed by Defendant That Occurred Thirty-Two Months Before Murder Being Tried

State v. Locklear, 363 N.C. 438 (28 August 2009). The defendant was convicted of first-degree murder and sentenced to death. (1) Dr. John Butts, a forensic pathologist, testified for the state concerning a state's exhibit, a copy of an autopsy report of the murder victim prepared by another forensic pathologist (Dr. Karen Chancellor) who did not testify at trial. Dr. Butts testified that according to the autopsy report, the cause of death was blunt force injuries to the chest and head. Dr. Butts also testified to the results of a forensic dental analysis performed by Dr. Jeffrey Burkes that was included in the autopsy report in which Dr. Burkes, who did not testify at trial, positively identified the autopsied body through dental records as that of the murder victim. The court ruled that the trial court erred in admitting the testimony of Dr. Butts in violation of Crawford v. Washington, 541 U.S. 36 (2004), and Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527 (2009). The state did not show that the non-testifying experts were unavailable to testify and the defendant had been given a prior opportunity to cross-examine them. (2) The court ruled that the trial court did not err under Rule 404(b) or Rule 403 in admitting evidence of another murder committed by the defendant that occurred thirty-two months before the murder being tried. The evidence was admitted to show the defendant's knowledge, plan, opportunity, intent, modus operandi, and motive to kill the victim in the case being tried. The court detailed the similarities between both murders. The court rejected the argument that the evidence could not be admitted under Rule 404(b) because the trial court had previously determined that the two murders would be tried separately. The decision to join two or more offenses for trial is discretionary and does not necessarily indicate a lack of a transactional connection between the two offenses.

Lab Supervisor's Testimony, Based Solely on Lab Report Prepared By Non-Testifying Lab Analyst, That Tested Cocaine Weighed 1,031.83 Grams Violated Confrontation Clause in Cocaine Trafficking Trial

State v. Galindo, ___ N.C. App. ___, 683 S.E.2d 785 (20 October 2009). The defendant was convicted of trafficking in cocaine and another drug offense. The court ruled, relying on Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527 (2009), and State v. Locklear, 363 N.C. 438 (2009), that a laboratory supervisor's testimony, based solely on a laboratory report prepared by a non-testifying laboratory analyst, that the tested cocaine weighed 1,031.83 grams violated the Confrontation Clause. The court also ruled that the constitutional error was harmless beyond a reasonable doubt based on the other evidence admitted at the defendant's trial.

Lab Analyst's Testimony Concerning DNA Tests Performed by Other Non-Testifying Analysts Did Not Violate Confrontation Clause

State v. Mobley, ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009). The court ruled, distinguishing State v. Locklear, 363 N.C. 438 (2009), that a lab analyst's testimony concerning DNA tests performed by other non-testifying analysts did not violate Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), and the Confrontation Clause. The analyst testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data. The court stated that Crawford v. Washington, 541 U.S. 36 (2004), noted that evidence offered for purposes other than proof of the matter asserted did not violate the Confrontation Clause. In this case, the underlying report by the

non-testifying analysts was used as a basis for the opinion of the testifying expert who independently reviewed and confirmed the results and was therefore not offered for the proof of the matter asserted.

Opinion Testimony

Court, Per Curiam and Without Opinion, Reverses Ruling of North Carolina Court of Appeals for Reasons Stated in Dissenting Opinion That Trial Judge Erred in Allowing Detective to Offer Lay Opinion That White Powder Was Cocaine

State v. Llamas-Hernandez, 363 N.C. 8 (6 February 2009), *reversing for reasons stated in dissenting opinion*, 189 N.C. App. 640 (15 April 2008). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for the reasons stated in the dissenting opinion that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder seized by officers was cocaine. The substance was not subject to preliminary testing. The identification of the powder was based solely on the detective's visual observations. There was no testimony why he believed that the white powder was cocaine other than his extensive experience in handling drug cases. There also was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

Trial Court Erred in Allowing State's Expert to Identify Prescription Pills as Controlled Substances Solely By Visual Examination Without Chemical Analysis of Any of the Pills

State v. Ward, ___ N.C. App. ___, 681 S.E.2d 354 (18 August 2009). (Author's note: The North Carolina Supreme Court has granted the state's petition to review the above ruling) The defendant was convicted of multiple drug offenses. (1) The court ruled, relying on State v. Llamas-Hernandez, 363 N.C. 8 (2009), *reversing for reasons stated in dissenting opinion*, 189 N.C. App. 640 (2008), and distinguishing State v. Fletcher, 92 N.C. App. 50 (1988) (officers properly allowed to identify substance as marijuana), that the trial court erred in allowing the state's expert, an SBI lab analyst, to identify prescription pills as controlled substances solely by visual examination without chemical analysis of any of the pills. The agent identified the pills by a visual examination of the appearance of and pharmaceutical markings on the pills and a comparison of the information derived from that process to information contained in Micromedics Literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines. The court concluded, based on the record in this case, the visual identification procedure did not provide "indices of reliability" sufficient to support the admission of the agent's testimony.

Sex Offender Registration and Monitoring

G.S. 14-208.40B (Satellite-Based Monitoring—SBM) Requires Department of Correction to Notify Offender, in Advance of Hearing, of Basis For Its Determination That Offender Falls Within One of Categories Set Out in G.S. 14-208.40(a), Making Offender Subject to SBM

State v. Stines, ___ N.C. App. ___, 683 S.E.2d 411 (6 October 2009). The court ruled that G.S. 14-208.40B (satellite-based monitoring—SBM) requires the Department of Correction to notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories set out in G.S. 14-208.40(a), making the offender subject to SBM. In this case the Department of Correction letter notifying the defendant of the hearing was insufficient because it did not identify which of the criteria in G.S. 14-208.40(a) the department had concluded the defendant met.

(1) Application of Satellite-Based Monitoring Program (SBM) to Defendant Did Not Violate Ex Post Facto Clause Although Legislature Enacted SBM After Defendant Had Been Convicted of Offenses That Subjected Him to SBM
(2) Defendant's Guilty Plea Was Not Involuntary

State v. Bare, ___ N.C. App. ___, 677 S.E.2d 518 (16 June 2009). The defendant in 1998 was convicted based on a plea of guilty to indecent liberties and sentenced to prison. In 2002, he was convicted based on a no contest plea to failure to register as a sex offender and sexual activity by a custodian of a minor; he was sentenced to prison. In 2006, the legislature enacted the satellite-based monitoring program (SBM). The defendant was released in 2007 and enrolled in SBM. In 2008, the trial court held a determination hearing under G.S. 14-208.40B and found that the defendant was convicted of a reportable conviction as defined under G.S. 14-208.6(4) and was a recidivist. The defendant was ordered to enroll in SBM for the remainder of his natural life. The court ruled that application of SBM to the defendant did not violate the Ex Post Facto Clause although the legislature enacted SBM after the defendant had been convicted of offenses that subjected him to SBM. The court concluded that the legislature intended SBM to be a civil and regulatory scheme, not a criminal punishment. Nor was SBM so punitive in purpose or effect to negate the legislature's intention to deem it civil. (2) The court rejected the defendant's two arguments concerning the trial court's acceptance of his 2002 no contest plea. First, the defendant argued that the trial court violated G.S. 15A-1002(a)(6) (informing defendant of possible sentence and related matters) when it failed to inform him that imposition of SBM would be a direct consequence of his plea. The court stated that the defendant's argument was predicated on the assumption that SBM is punishment, which the court had rejected under its Ex Post Facto Clause analysis. Second, the defendant argued that his plea was involuntary because imposition of SBM was a direct consequence of his no contest plea, and thus he had to be informed of SBM when entering his plea. The court noted that imposition of SBM was not an automatic result of his no contest plea.

Juvenile Cases

(1) Court Counselor Did Not Under G.S. 7B-1703 Timely File Petition Alleging Delinquent Act, and Thus Juvenile Court Lacked Jurisdiction to Adjudicate Delinquent Act
(2) Variance Between Allegation in Juvenile Petition and Evidence at Adjudicatory Hearing Was Not Fatal

In re D.S., ___ N.C. App. ___, 682 S.E.2d 709 (16 June 2009). [Author's note: The North Carolina Supreme Court has granted the state's petition to review the ruling summarized in (1) below.] The juvenile was adjudicated delinquent of simple assault and sexual battery. Both acts occurred during a single incident at a school on September 21, 2007. The court counselor received a complaint on September 25, 2007, and filed a petition on October 10, 2007, alleging simple assault. The court ruled that this petition was timely filed under G.S. 7B-1703. The court counselor received a complaint on November 15, 2007, and filed a petition on November 16, 2007, alleging sexual battery based on the incident that occurred on September 21, 2007. Although the second petition was filed within 15 days of receiving the second complaint, the court ruled that the second petition was filed beyond the 30 days allowed under G.S. 7B-1703 (15 days plus an extension of 15 days if allowed by the chief court counselor) because the court counselor received all the information about both delinquent acts in the complaint filed on September 25, 2007. Thus, the juvenile court lacked jurisdiction to adjudicate sexual battery; see In re J.B., 186 N.C. App. 301 (2007). (2) The petition alleged that the juvenile committed simple assault with his hands but the evidence at the adjudicatory hearing showed that he touched the victim with an object (Pixy Stix) that was in his hands. The court ruled that his variance was not fatal. It did not affect the juvenile's ability to present his defense.

Juvenile Petitions Alleging First-Degree Sexual Offense Were Fatally Defective and Deprived Court of Jurisdiction to Accept Juvenile's Admission of Delinquency Because They Failed to Name Victim

In re M.S., ___ N.C. App. ___, 681 S.E.2d 441 (18 August 2009). Juvenile petitions alleging first-degree sexual offense did not name the victim or give the victim's initials. The petitions simply stated "a child under the age of 13 years." The court ruled, noting that State v. McKoy, ___ N.C. App. ___, 675 S.E.2d 406 (2009) (victim's initials were sufficient based on the facts in the case), implicitly acknowledged that an indictment must name the victim in some way, ruled that the petitions were fatally defective and deprived the court of jurisdiction to accept the juvenile's admission of delinquency. Challenges to a court's subject matter jurisdiction may be raised at any time, including for the first time on appeal.

G.S. 15-196.1 Applies in Juvenile Court to Provide Credit Against Disposition for Time Juvenile Spent in Juvenile Detention Center Pending Dispositional Hearing

In re D.L.H., ___ N.C. App. ___, 679 S.E.2d 449 (21 July 2009). [Author's note: The North Carolina Supreme Court has granted the state's petition to review] The court ruled, relying on In re Allison, 143 N.C. App. 586 (2001), that G.S. 15-196.1 applies in juvenile court to provide credit against the disposition for the time a juvenile spent in a juvenile detention center pending the dispositional hearing.

Officer Improperly Advised Juvenile of Custodial Interrogation Rights When Form Advised Juvenile That He Had Right to Have Parent, Guardian, Custodian, or "Any Other Person" Present During Questioning

In re M.L.T.H., ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009). The court ruled that an officer improperly advised a juvenile of custodial interrogation rights when the form the officer used advised the juvenile that he had right to have a parent, guardian, custodian, or "any other person" present during questioning. G.S. 7B-2101 does not allow the advisement to include "any other person." The officer's advisement gave the juvenile an improper choice.

Sentencing

Trial Court Did Not Err in Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted)

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009). The defendant was convicted of delivery of a controlled substance, cocaine, and a sentencing hearing was held. The defendant had a prior conviction for delivery of a controlled substance, marijuana. The court ruled, relying on State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (2009), that the trial court did not err in assigning one point to the defendant's prior record level under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted).