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Criminal Case Update

Fall 2007 District Court Judges Conference

This handout is based on criminal case summaries prepared by Robert L. Farb of the School of Government. It includes cases decided through September 18, 2007.

Fourth and Fifth Amendment Issues

Stops

Court Rules That Officers' Stop of Vehicle in Which Defendant Was a Passenger Was a Seizure of Passenger Under Fourth Amendment So Passenger Could Contest Stop's Validity

Brendlin v. California, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (18 June 2007). Officers stopped a car in which the defendant was a passenger. The defendant remained in the vehicle and was eventually arrested. The Court ruled, reviewing its prior cases defining the seizure of a person under the Fourth Amendment, that the passenger was seized and therefore could contest the validity of the stop of the vehicle. The Court stated that any reasonable passenger in the defendant's position would have understood the officers to be exercising control to the extent that no one in the car was free to depart without their permission.

Court Reverses Trial Judge's Ruling That Checkpoint Violated Fourth Amendment Because Judge Misapplied Ruling in State v. Rose, 170 N.C. App. 284 (2005), and Court Remands for Further Factual Findings

State v. Burroughs, ___ N.C. App. ___, ___ S.E.2d ___ (21 August 2007). The trial judge ruled that a checkpoint (at which the defendant was arrested for DWI) violated the Fourth Amendment based on the ruling in State v. Rose, 170 N.C. App. 284 (2005). The state appealed. The court noted that the trial judge's ruling was based on the absence of evidence to support the primary programmatic purpose of the checkpoint. The court stated that the ruling misconstrued the principles of *Rose* and City of Indianapolis v. Edmond, 531 U.S. 32 (2000), on which *Rose* heavily relied. The court stated that the *Rose* ruling provided that when contradictory evidence exists about a checkpoint's primary purpose, the trial judge must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask unconstitutional purposes. Neither *Rose* nor *Edmond* mandated that trial judges extensively inquire about the purpose of every checkpoint. The court in *Rose* required additional findings of the checkpoint's purpose because substantial evidence indicated that the checkpoint's purpose was to impermissibly check for illegal drugs. The court concluded that from the available evidence in the case before it, the actual purpose of the checkpoint clearly was the same as its stated purpose: to check for impaired drivers. Because such a purpose has been expressly ruled constitutional and the trial judge misconstrued the *Rose* ruling, the court reversed the trial judge's ruling. However, the court ruled there still remained on remand for the trial court to determine whether the individual circumstances surrounding the stop of the defendant at this checkpoint were constitutional; the court cited and quoted from State v. Mitchell, 358 N.C. 63 (2004).

When Officer Ran Vehicle's Registration Plate and Then Registered Owner's Driver's License, Which Was Reported to be Suspended, Officer Had Reasonable Suspicion to Stop Vehicle When There Was No Evidence That Owner Was Not Driving Vehicle

State v. Hess, ___ N.C. App. ___, ___ S.E.2d ___ (21 August 2007). An officer on patrol at night ran a vehicle's registration plate and then the registered owner's driver's license, which was reported to be suspended. The officer could not determine the sex or race of the driver. The officer stopped the vehicle. The court ruled, relying on cases from other jurisdictions, that the officer had reasonable suspicion to stop the vehicle. The court stated that it was reasonable for the officer under these circumstances to infer that the owner was driving the vehicle.

When Officer Stopped Vehicle Because He Mistakenly Believed That Speed Limit Was 20 M.P.H. (Vehicle Was Going 30 M.P.H.) When Speed Limit Was Actually 55 M.P.H., Officer Did Not Have Probable Cause to Stop Vehicle

State v. McLamb, ___ N.C. App. ___, ___ S.E.2d ___ (18 September 2007). An officer stopped a vehicle going 30 m.p.h. The officer believed the speed limit was 20 m.p.h., but the legal limit was actually 55 m.p.h. The court ruled, relying on State v. Ivey, 360 N.C. 562 (2006), and cases from other jurisdictions, that the officer did not have probable cause to stop the vehicle for speeding. An officer's mistake of law may not support probable cause to stop a vehicle.

Reasonable Suspicion Did Not Exist to Justify Officer's Stop and Frisk of Defendant Shortly After Commission of Armed Robbery at Nearby Convenience Store

State v. Cooper, ___ N.C. App. ___, ___ S.E.2d ___ (18 September 2007). A law enforcement officer during the late afternoon heard a radio report that an armed robbery had been committed at a convenience store. The robber was described as a black male. The officer also heard over the radio that another officer has seen a black male walking on Lake Ridge Drive shortly after the robbery. The officer turned onto Deanna Drive to begin a sweep of the area. The robber had reportedly left the rear of the store, heading in the general direction of the area that the officer was searching. The officer knew that there was a path running approximately from the store through woods to Lake Ridge Drive. The officer approached the intersection of Deanna Drive and Lake Ridge Drive approximately five minutes after the robbery. The officer saw a black male near where the path exited onto Lake Ridge Drive. From the time the officer turned off Capital Boulevard until this point, the officer had seen no one else. He drove closer to the black male and motioned him to approach his car. In response, the defendant walked over to the car. The officer conducted a stop and frisk of the black male. The court ruled that the officer did not have reasonable suspicion to stop and frisk the defendant for the armed robbery. (See the court's discussion of the case law on this issue.)

Officer's Ramming Plaintiff's Vehicle From Behind to Stop Plaintiff's Public-Endangering Flight Did Not Violate Fourth Amendment

Scott v. Harris, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (30 April 2007). The plaintiff sued an officer and others for allegedly violating his Fourth Amendment rights in a high-speed chase that resulted in injury to the plaintiff. The Court ruled, based on the facts in this case, that the officer did not violate the Fourth Amendment by attempting to stop the plaintiff's vehicle from continuing his public-endangering flight by ramming his vehicle from behind.

Other Searches

Although Officers' Forcible Entry into Residence During Execution of Search Warrant Violated Fourth Amendment and Was Substantial Violation of G.S. 15A-251, Evidence Seized in Residence Was Not Subject to Suppression Because There Was No Causal Relationship Between Violation and Seizure of Evidence

State v. White, ___ N.C. App. ___, 646 S.E.2d 609 (3 July 2007). Officers executed a search warrant for illegal drugs. The trial court ruled that the officers' forcible entry into the residence violated the Fourth Amendment and was a substantial violation of G.S. 15A-251, and the substantial violation required suppression of the evidence seized in the residence as a fruit of he poisonous tree. The state on its appeal of the trial court's ruling did not contest that the officers' entry into the residence violated the Fourth Amendment and was a substantial violation of G.S. 15A-251. The court ruled, relying on State v. Richardson, 295 N.C. 309 (1978), that the evidence seized in the residence was not subject to suppression because there was no causal relationship between the violation and the seizure of the evidence. The search was conducted sometime after the forced entry and only after the occupants were secured and the defendant was read a copy of the search warrant. The cocaine would have likely been located even in the absence of the forced entry. (Author's note: The Fourth Amendment's exclusionary rule was not applicable based on the ruling in Hudson v. Michigan, 126 S. Ct. 2159 (2006).

Interrogation

Juvenile's Request During Custodial Interrogation to Telephone Aunt Was Not Request for "Guardian" to be Present Under G.S. 7B-2101(a)(3) and Thus Did Not Require Officers to Stop Interrogation, Because Aunt Was Not His Guardian

State v. Oglesby, ___ N.C. App. ___, ___ S.E.2d ___ (24 August 2007), *affirming*, 174 N.C. App. 658, 622 S.E.2d 152 (2005). Officers during the interrogation of the sixteen-year-old defendant did not stop questioning him during custodial interrogation when he requested to telephone his aunt. Although the aunt testified that she was a "mother figure" to the defendant, the court ruled that this evidence did not constitute the legal authority inherent in a guardian or custodial relationship. Thus, the aunt was not a "guardian" under G.S. 7B-2101(a)(3) to require the officers to stop their questioning of the defendant. [Author's note: See also State v. Jones, 147 N.C. App. 527 (2001), summarized on page 468 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Evidence Issues

Crawford

Affidavit Containing Defendant's Blood Alcohol Level Was Not Testimonial Statement Under *Crawford v. Washington* and Its Admission Did Not Violate Defendant's Confrontation Rights

State v. Heinricy, ___ N.C. App. ___, 645 S.E.2d 147 (5 June 2007). The defendant was convicted of second-degree murder based on his driving recklessly while impaired and killing a tow truck operator. The state was permitted to introduce an affidavit containing the defendant's

blood alcohol level involving a prior DWI conviction that was introduced to prove malice. The chemist who tested the defendant's blood with a gas chromatograph and prepared the affidavit did not testify at the defendant's trial. The court ruled, based on State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), State v. Smith, 312 N.C. 361, 323 S.E.2d 316 (1984), and State v. Cao, 175 N.C. App. 626 S.E.2d 301 (2006), that the affidavit was not a testimonial statement under Crawford v. Washington, 541 U.S. 36 (2004), and its admission did not violate the defendant's confrontation rights.

Victim's Statements to Law Enforcement Officer Responding to Crime Scene and Victim's Later Identification of Defendant at Photo Lineup Were Testimonial Statements Under Davis v. Washington, 126 S. Ct. 2266 (2006)

State v. Lewis, ___ N.C.. ___, ___ S.E.2d ___ (24 August 2007). (Author's note: The North Carolina Supreme Court's initial decision in this case was reported at 360 N.C. 1 (2005). The defendant sought review with the United States Supreme Court, which remanded the case to the North Carolina Supreme Court for further consideration in light of Davis v. Washington, 126 S. Ct. 2266 (2006).] The defendant was convicted of felonious assault, armed robbery, and feloniously breaking and entering. The victim died before trial and thus did not testify and be subject to cross-examination (the cause of death was not related to these crimes). The state was allowed at trial to offer her statements made to a law enforcement officer who had responded to the crime scene shortly after it was reported by neighbors, although apparently several hours after the crimes had been committed. The victim told the officer what had occurred. Several hours later, a detective showed a photographic lineup to the victim in which she identified the defendant's photo as the person who committed the crimes against her. The court ruled that the victim's statements and the photo identification were testimonial statements under Davis v. Washington, 126 S. Ct. 2266 (2006), and their admission violated the defendant's confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court's analysis of the victim's statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine "what happened" rather than "what is happening"; (3) the investigation was formal and conducted outside the defendant's presence; (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred some time after the crimes had been committed. The court ruled that it was also clear that the victim's later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim's statements was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

(1) Statements Made by Victim to Friend Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006)
(2) Statements Made by Victim to Friend Were Admissible as Present Sense Impressions, Rule 803(1)
(3) Trial Judge Did Not Err in Prohibiting Defense-Proffered Evidence of State's Witness's Plea Bargain Concerning Unrelated Federal Criminal Charge When No Evidence That Plea Bargain Was for Testimony in Current Trial

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (21 August 2007). The defendant was convicted of first-degree murder. (1) The court ruled that statements made by the victim to a friend were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006). The statements were made before the commission of the

murder and in the course of a private conversation outside the presence of a law enforcement officer. There was no indication that the statements were made with the thought of a future trial in mind. (2) The court ruled that the statements made by the victim to a friend were admissible as present sense impressions, Rule 803(1). The victim spoke by telephone to the friend immediately before the defendant and accomplice arrived at the victim's house to commit the murder, which was only two hours after the accomplice had initially spoken to the victim. (3) A state's witness, a jail inmate, testified about incriminating statements made by the defendant to the witness while they were in jail together. The defendant sought to introduce evidence that the witness received a reduced sentence for his cooperation with a federal prosecutor concerning an unrelated federal criminal charge against the witness. The defendant did not establish that the witness had entered into the plea bargain in return for his cooperation in the prosecution of the defendant. The court ruled that under these circumstances the trial judge did not err in prohibiting the introduction of this evidence to show bias.

Other Evidence Issues

Trial Judge Erred in Drug Prosecution in Allowing State to Introduce Evidence of Defendant's Gang Membership

State v. Gayton, ___ N.C. App. ___, ___ S.E.2d ___ (7 August 2007). An undercover officer bought cocaine from the defendant and his accomplice. A gun was recovered from the passenger seat of a vehicle that the defendant had been occupying. The defendant was convicted of trafficking by possessing cocaine and carrying a concealed weapon. The court ruled that the trial judge erred by allowing the state to introduce evidence of the defendant's gang membership. The court stated that even if the officers felt forced to revamp the drug buy operation after learning of the defendant's gang membership to reduce the likelihood of violence, this information was irrelevant to the offenses being tried.

Trial Judge Did Not Err in Allowing Officer with Training and Experience with Gangs to Explain Meaning of Gang Terminology

State v. Brockett, ___ N.C. App. ___, ___ S.E.2d ___ (7 August 2007). The defendant was convicted of first-degree murder and felonious assault involving gang-related offenses. The court ruled that the trial judge did not err in allowing an officer with training and experience with gangs to explain the meaning of gang terminology in a taped telephone conversation between the defendant and his brother.

Trial Judge Erred in Not Allowing Defense Witnesses to Offer Under Rule 405(a) Their Personal Opinions of State's Witness's Character for Truthfulness or Untruthfulness

State v. Hernendez, ___ N.C. App. ___, 646 S.E.2d 579 (3 July 2007). The defendant was on trial for rape. The court ruled that the trial judge erred in not allowing three defense witnesses to offer under Rule 405(a) their personal opinions of the character of truthfulness or untruthfulness of the state's witness (the alleged rape victim) who had testified on the state's case in chief. The defendant needed to show only that each of the three witnesses had personal knowledge of the witness and they had formed an opinion about her character for truthfulness or untruthfulness. The defendant was not required to show that the witness had been untruthful to the defense witnesses as a foundation for their testimony.

Criminal Offenses

Impaired Driving

Trial Judge Did Not Err in DWI Trial in Allowing Testimony on Retrograde Extrapolation to Explain Why Non-Refrigerated Blood Sample Might Register Lower Blood Alcohol Concentration When Tested Than When Blood Was Drawn

State v. Corriher, ___ N.C. App. ___, 645 S.E.2d 413 (19 June 2007). The defendant was convicted of DWI. A blood sample taken from the defendant was left unrefrigerated in an officer's vehicle for twelve days before it was tested. The court, relying on the standard for the admissibility of expert testimony set out in Howerton v. Arai Helmut, Ltd., 358 N.C. 440 (2004), and State v. Goode, 341 N.C. 513 (1995), ruled that the trial judge did not err in allowing testimony on retrograde extrapolation to explain why a non-refrigerated blood sample might register a lower blood alcohol concentration when tested than when the blood was drawn.

Drug Offenses

Positive Urinalysis Result for Marijuana Metabolites Is Insufficient Alone to Support Conviction of Possessing Marijuana

State v. Harris, 361 N.C. 400, 646 S.E.2d 526 (28 June 2007), *affirming*, 178 N.C. App. ___, 632 S.E.2d 534 (2006). The court ruled that a positive urinalysis result for marijuana metabolites is insufficient alone to support a conviction of possessing marijuana. [Author's note: The other ruling by the North Carolina Court of Appeals in this case was not reviewed by the North Carolina Supreme Court and remains a valid precedent: defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.]

Trial Judge Did Not Err in Allowing Law Enforcement Officer to Offer Opinion That Seized Pills Were Crack Cocaine

State v. Freeman, ___ N.C. App. ___, 648 S.E.2d 876 (21 August 2007). The defendant was convicted of possession of cocaine. The court ruled that the trial judge did not err under Rule 701 in allowing a law enforcement officer to offer his opinion that two of the pills in a pill bottle seized from the defendant were crack cocaine—based on his extensive training and experience with narcotics. The officer testified that during his eight years as an officer he had had contact with crack cocaine between 500 and 1,000 times.

Other Criminal Offenses

(1) Defendant's Use of Hands and Water Together (By Holding Victim Under Water) Was Sufficient Evidence of a Deadly Weapon in Trial of Assault with Deadly Weapon on Government Officer

(2) Trial Judge Erred in Not Submitting Lesser Offense of Misdemeanor Assault on Government Officer in Trial of Felony Assault with Deadly Weapon on Government Officer When Evidence Did Not Support Finding as a Matter of Law That Hands and Water Together Were Deadly Weapon

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (18 September 2007). The defendant was convicted of assault with a deadly weapon on a government officer under G.S. 14-34.2 involving an assault on a law enforcement officer who was attempting to arrest the defendant at a river. (1) The defendant used his hands to submerge the officer's head, chest, and abdomen in the river and to hold him there. The court ruled that the defendant's use of his hands and the water together was sufficient evidence of a deadly weapon to submit the issue to the jury. The manner in which the defendant used his hands and the water was likely to cause death or serious bodily harm. The court emphasized that the defendant did not assault the officer with his hands alone; rather, he used his hands to bring the officer to an instrument of the assault, forcibly submerging the officer in the river and holding him there. Thus, the state was not required to show (to prove the hands and water together were a deadly weapon) that the officer was significantly smaller or weaker than the defendant or that the officer was injured or otherwise incapacitated when the defendant assaulted him. The court referred to the rulings in State v. Rogers, 153 N.C. App. 203 (2002), and State v. Shubert, 102 N.C. App. 419 (1991). (2) The court ruled that the trial judge erred in not submitting the lesser offense of misdemeanor assault on a government officer when the evidence did not support a finding as a matter of law that the defendant's hands and water together were a deadly weapon.

(1) Sufficient Evidence to Support Juvenile's Adjudication of False Bomb Report Under G.S. 14-69.1(a)
(2) No Error When State Obtained Adjudication of False Bomb Report Under G.S. 14-69.1(a) (Involving Any Building) When Evidence Also Would Have Supported Adjudication of False Bomb Report Involving Public Building Under G.S. 14-69.1(c) (Involving Public Building)

In re B.D.N., ___ N.C. App. ___, ___ S.E.2d ___ (18 September 2007). Evidence showed that the juvenile typed "Bomb at Lunch" on a school calculator in a middle school math class. (1) The court ruled that there was sufficient evidence to support the juvenile's adjudication of making a false bomb report under G.S. 14-69.1(a) (false bomb report involving a building). Although no one saw the juvenile type the words on the calculator, testimony by students and teachers and admissions by the juvenile were sufficient to support the adjudication. (2) The court rejected the juvenile's argument that judgment should have been arrested for the adjudication under G.S. 14-69.1(a) because the state should have charged a violation under G.S. 14-69.1(c) (false bomb report involving public building). The court ruled that the state could have charged the juvenile under either statutory provision, and the state proved all the elements of the offense under G.S. 14-69.1(a).

Criminal Procedure

(1) G.S. 15A-1024 (Judge Imposing Sentence Other Than Provided in Plea Agreement Must Allow Defendant to Withdraw Plea) Did Not Apply When Judge Found Defendant Failed to Comply with Plea Agreement and Thus No Plea Agreement Existed at Time of Sentencing
(2) Trial Judge Did Not Err in Not Allowing Defendant to Withdraw Guilty Plea

State v. Hatley, ___ N.C. App. ___, 648 S.E.2d 222 (7 August 2007). The defendant pled guilty pursuant to a plea agreement in which he would provide truthful statements to a SBI agent and the state would recommend a specific sentence. If the defendant failed to provide truthful statements, the agreement specifically provided that the state was not bound to recommend the

specific sentence. The prosecutor later determined that the defendant did not provide truthful statements and thus the defendant was not entitled to the sentencing recommendation in the plea agreement. The trial judge denied the defendant's motion to withdraw his guilty plea and sentenced him to a more severe sentence than provided in the plea agreement. (1) The court ruled that G.S. 15A-1024 (judge imposing sentence other than provided in plea agreement must allow defendant to withdraw plea) did not apply when the judge found that the defendant failed to comply with the plea agreement and thus no plea agreement existed at the time of sentencing. (2) The court ruled that the trial judge did not err in not allowing the defendant to withdraw his guilty plea. The defendant did not meet his burden of proving a "fair and just" reason to support his motion to withdraw.

Circumstantial Evidence Established That Crime Was Committed in State of North Carolina

State v. Freeman, ___ N.C. App. ___, 648 S.E.2d 876 (21 August 2007). The defendant was convicted of possession of cocaine. There was no testimony during the trial that explicitly stated that the crime was committed in North Carolina. However, the court ruled that circumstantial evidence established that the crime was committed in the State of North Carolina. The defendant was indicted by a Mecklenburg County, North Carolina grand jury, and the crime was investigated and the defendant was arrested on a named street by an officer of the Charlotte-Mecklenburg Police Department. A North Carolina identification card was seized during the defendant's arrest. A forensic chemist employed by the Charlotte-Mecklenburg Police Crime Lab analyzed the pills, and a Charlotte-Mecklenburg Police Department property sheet accompanied the sealed package containing the pills.

Probation

Trial Court Had Jurisdiction to Hold Probation Revocation Hearing After Probation Term Had Ended Because Trial Court Found That Probationer Had Absconded

State v. High, ___ N.C. App. ___, 645 S.E.2d 394 (5 June 2007). A probation revocation hearing was held after the defendant's probation term had ended and the trial judge revoked the suspended sentence and activated the sentence. The only issue on appeal under G.S. 15A-1344(f) was whether the state had made "reasonable efforts" to notify the probationer and to conduct the hearing earlier. The probation officer had filed a probation report before the term ended that stated the defendant had violated probation by absconding. The court ruled that the state satisfied the "reasonable efforts" standard because the trial court found that the defendant had absconded, and the probation officer had turned the case over to a surveillance officer who from time to time checked to see if there was any record of the defendant's arrest or whether the defendant was in jail.

When Defendant Violated Many Probation Conditions Warranting Revocation, Imposition of Improper Probation Condition That Defendant Admit Responsibility for Offenses Was Harmless Error

State v. Howell, ___ N.C. App. ___, 646 S.E.2d 622 (3 July 2007). The defendant was convicted of several sexual offenses and placed on probation. One of the probation conditions (admit responsibility for offenses) was invalid under In re T.R.B., 157 N.C. App. 609 (2003). The court

ruled, however, that when the defendant violated many other conditions warranting revocation, imposition of the improper condition was harmless error.

Defendant's Admission Through Counsel That He Had Violated Probation Conditions Was Sufficient; Trial Judge Did Not Need to Personally Examine Defendant Concerning His Admission

State v. Sellers, ___ N.C. App. ___, ___ S.E.2d ___ (4 September 2007). A probation violation report was filed against the defendant. The defendant through counsel admitted to two of the violations alleged in the report. The trial judge heard from the probation officer concerning the violations. The trial judge found that the defendant willfully violated the terms of his probation, revoked the probation, and activated his suspended sentence. The court ruled that unlike when a defendant pleads guilty, a trial judge is not required to personally examine a defendant concerning his admission that he violated probation. The defendant's admission through counsel was sufficient.

Sentencing

Stipulation to Existence of One Point for Prior Record Level Based on All Elements in Current Offense Are Included in Prior Offense Was Ineffective Because Stipulation to Legal Issue Is Not Permitted

State v. Prush, ___ N.C. App. ___, ___ S.E.2d ___ (21 August 2007). The court ruled, relying on State v. Hanton, 175 N.C. App. 250 (2006), that a stipulation to the existence of one point for a prior record level based on all the elements in the current offense are included in a prior offense was ineffective because a stipulation to a legal issue is not permitted.