John Rubin
UNC School of Government
919-962-2498, rubin@sog.unc.edu

Criminal Case Update

2008 Summer District Court Judges Conference
(includes cases decided through June 3, 2008)

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

Warrantless Stops and Searches

Grounds for Stop

Reasonable Suspicion Supported Stop of Vehicle Based on Vehicle's Remaining Stopped for Thirty Seconds After Light Had Turned Green and Officer's Testimony, Based on His Training and Experience, That Driver Might Be Impaired—Ruling of Court of Appeals Is Affirmed

State v. Barnard, ___ N.C. ___, 658 S.E.2d 643 (11 April 2008), *affirming*, ___ N.C. App. ___, 645 S.E.2d 780 (19 June 2007). An officer stopped his marked patrol vehicle behind the defendant's vehicle, which was stopped at a red light. When the light turned green, the vehicle remained stopped for approximately thirty seconds before making a legal left turn; the vehicle had remained at the light without any reasonable explanation for doing so. The officer initiated a stop of the vehicle. The court ruled that reasonable suspicion supported the stop of the vehicle based on these facts and the officer's testimony, based on his training and experience, that the driver might be impaired. The officer said that impairment slows reaction time, and that a red light turning green and the driver hesitating for thirty seconds would definitely be an indication of impairment. The court noted that it was irrelevant that part of the officer's motivation to stop the vehicle may have been for a perceived, though apparently nonexistent, statutory violation of impeding traffic. The court stated that the constitutionality of a traffic stop depends on objective facts, not an officer's subjective motivation; the court cited Whren v. United States, 517 U.S. 806 (1996), and State v. McClendon, 350 N.C. 630 (1999).

[Author's note: The court's opinion also stated that despite some initial confusion following the United States Supreme Court's ruling in *Whren*, courts have continued to hold that a traffic stop is constitutional if the officer has reasonable suspicion of criminal activity. The court cited Illinois v. Wardlow, 528 U.S. 119 (2000), and United States v. Delfin-Colina, 464 F.3d 392 (3d Cir. 2006). For a discussion of a probable cause standard to stop a vehicle for a perceived traffic violation [State v. Ivey, 360 N.C. 562 (2006)], or for a readily observed traffic violation [State v. Wilson, 155 N.C. App. 89 (2002)], see the summary of the *Ivey* ruling on pages 12-13 of "2006 Supplement to Arrest, Search, and Investigation in North Carolina (Third Edition 2003)," available online at http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0701.pdf and note 103 on page 52 of Arrest, Search, and Investigation in North Carolina (3d ed. 2003).]

Officer Had Reasonable Suspicion for DWI Stop of Defendant Operating Two-Wheeled Motorized Vehicle

State v. Jones, ___ N.C. App. ___, 651 S.E.2d 589 (16 October 2007). The court ruled that an officer had reasonable suspicion for a DWI stop of a defendant operating a two-wheeled motorized vehicle, based on

the following facts (quoted language is officer's testimony as recounted by the court): The officer saw the defendant operating a motorized vehicle in a "wobbly" manner, and the defendant had to "put her foot down" on the road to negotiate a right hand turn and "almost dropped the moped." The officer equated her operation of the vehicle as she was turning to that of "a child learning to ride a bicycle" for the first time. After the defendant made the turn, the officer saw the defendant for "two to three" minutes and followed her for "two to three blocks." During this time, he watched the defendant wobble on the moped and described her operation of it as "jerky."

Officer Did Not Have Reasonable Suspicion to Make Investigative Stop of Defendant

State v. Hayes, ___ N.C. App. ___, 655 S.E.2d 726 (15 January 2008). The court ruled, relying on State v. Fleming, 106 N.C. App. 165 (1992), that an officer did not have reasonable suspicion to make an investigative stop of the defendant. The officer saw the defendant and his companion driving on a Sunday afternoon in an area where several prior drug-related arrests had been made. They got out of the car and walked back and forth along a nearby sidewalk. The officer looked in the car and saw a gun under the seat where the companion had been sitting. The officer did not know anything about the defendant and his companion and did not believe that either man lived in the neighborhood.

Actions after Stop

Dog Sniff of Vehicle Whose Driver Had Been Lawfully Detained for Traffic Stop Did Not Violate Fourth Amendment When Driver's Detention Was Prolonged for Brief Time After Officer Issued Warning Ticket and Returned License and Registration to Driver

State v. Brimmer, ___ N.C. App. ___, 653 S.E.2d 196 (4 December 2007). An officer stopped a vehicle being driven by the defendant based on information that the vehicle may have fictitious tags. When the officer realized that the defendant was suspected of being involved in narcotics, he called for a canine officer. The stopping officer decided to issue a warning ticket. About seven minutes after the stop began, the canine officer arrived as the stopping officer was walking back to the defendant's vehicle to give him the warning ticket. The officer gave the defendant his license and registration and asked if he defendant had anything illegal in the vehicle. When the defendant responded "no," the officer explained to him that he was going to have a dog walk around the car. The dog sniff took a minute and a half to two minutes. The court ruled that the defendant's Fourth Amendment rights were not violated. The court discussed cases from other jurisdictions that had been decided after Illinois v. Caballes, 543 U.S. 405 (2005) (walking drug dog around vehicle while driver was lawfully detained for officer's issuance of warning ticket for speeding did not violate Fourth Amendment), which have ruled that even if a traffic stop has been effectively completed, a brief period to conduct a dog sniff is not considered to have prolonged the detention beyond the time reasonably necessary for the stop. The court ruled that the brief additional time (one and one half minutes for the dog sniff) did not prolong the detention beyond that reasonably necessary for the traffic stop. Thus, reasonable suspicion was not required to justify this brief additional time while the defendant was detained.

(1) Officer Had Reasonable Suspicion to Make Investigative Stop and Frisk of Defendant
(2) Officer's Discovery of Crack Cocaine in Film Canister During Frisk of Defendant Did Not Violate Fourth Amendment

State v. Robinson, ___ N.C. App. ___, 658 S.E.2d 501 (1 April 2008). An officer was on bicycle patrol in a community known for drug activity. He saw a car speeding down a street, crossing over the road, and jumping the curb onto the grass. The driver then drove the vehicle behind a building out of the officer's view. The officer was informed by radio that the defendant owned the vehicle, and the officer recalled

that his agency had received a tip that named this building as being a drug location and the defendant as selling a large amount of cocaine from it. The officer went to the building and saw the defendant talking to someone inside an apartment. The officer made eye contact with the defendant, who then stopped talking. The defendant straightened up abruptly and had a surprised or frightened look on his face. The officer thought he was going to take off running. When the officer asked him what he was doing, the defendant started to back away. He turned his right side away from the officer and reached into his right pocket. The officer told him to keep his hands out of his pockets. The officer did a pat frisk and felt a cylindrical object that made a rattling sound when moved. The object felt like a film canister. The officer asked if there was crack in his pocket. The defendant responded, "no," and lowered his head and slumped his shoulders. The officer then reached in the pocket, pulled out and opened the canister, and discovered rocks of crack cocaine. (1) The court ruled that the officer had reasonable suspicion to make an investigative stop and frisk of the defendant, based on the facts set out above. (2) The court ruled the officer's discovery of the crack cocaine in the film canister during the frisk of the defendant did not violate the Fourth Amendment. Under the "plain feel" doctrine set out in Minnesota v. Dickerson, 508 U.S. 366 (1993), there was substantial evidence that the contents of the film canister were immediately identifiable by the officer as crack cocaine, based on the facts set out above.

(1) Officer Had Reasonable Suspicion to Stop Bicyclist in Early Morning Hours in Response to Report of Breaking and Entering at Nearby Residence
(2) Officer Did Not Violate Fourth Amendment By Handcuffing and Frisking Bicyclist During Investigative Stop
(3) Officer Had Probable Cause to Arrest Bicyclist for Possession of Burglary Tools

State v. Campbell, ___ N.C. App. ___, 656 S.E.2d 721 (19 February 2008). The defendant was convicted of possession of burglary tools and possession of drug paraphernalia. (1) At approximately 3:40 a.m., officer A responded to a report of a breaking and entering in progress at a residence. While driving to the residence (he arrived within three minutes of the report), the officer saw the defendant riding a bicycle on a road that was near the reported break-in (about a quarter-mile). The officer did not see anyone else in the vicinity. The officer continued on to the dwelling without making any contact with the bicyclist. He saw that a window had been opened with a small, flathead screwdriver or a pry tool and he notified other officers of that information. Officer B, aware of officer's A report about the bicyclist and the break-in, including the type of instrument that may have been used, eventually stopped the defendant, who had a backpack and was playing with something inside of it. Officer C arrived and recognized the defendant as having an extensive history of breaking and enterings as well as being a substance abuser. Officer B handcuffed the defendant and frisked him. A small flashlight and a Swiss Army-type knife were found in the defendant's pockets. The defendant was then arrested. (1) The court ruled that officer B had reasonable suspicion to stop the defendant, noting the defendant's proximity to the break-in, the time of day, and the absence of other people in the area. (2) The court ruled that the officer did not violate the Fourth Amendment by handcuffing and frisking the defendant during the investigative stop. Handcuffing was supported by knowledge of one of the officers that the defendant was a flight risk based on prior history. The frisk for weapons was justified by the late hour and the nature of the crime committed. The defendant could have been carrying anything from a pen that had an enclosed knife to a small handgun. (3) The court ruled that the officers had probable cause to arrest the defendant for possession of burglary tools.

Grounds to Arrest

(1) Virginia Law Enforcement Officers Who Had Probable Cause to Arrest Defendant For a Misdemeanor Did Not Violate Fourth Amendment When They Arrested Him and Conducted a Search Incident to Arrest, Although State Law Did Not Authorize an Arrest

(2) Search Incident to Arrest for an Arrest That Was Valid Under Fourth Amendment, Although Arrest Was Not Valid Under State Law, Did Not Violate Fourth Amendment

Virginia v. Moore, ___ U.S. ___, 128 S. Ct. 1598 (23 April 2008). Virginia law enforcement officers learned that the defendant's driver's license was suspended, stopped his vehicle, arrested him, and later conducted a search incident to arrest. However, although the violation was a misdemeanor, Virginia law did not authorize an arrest under these circumstances. The officers were only authorized to issue a summons. (1) The Court ruled that the arrest did not violate the Fourth Amendment. The Court noted that in prior cases it had said that when an officer has probable cause to believe a person committed even a minor crime in the officer's presence, the arrest is constitutionally reasonable under the Fourth Amendment. None of the Court's prior cases have ruled that violations of state arrest law are also violations of the Fourth Amendment. When states exceed the Fourth Amendment minimum, the amendment's protections concerning search and seizure remain the same. The Court concluded that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Fourth Amendment, and while states are free to regulate such arrests however they desire, state restrictions do not alter Fourth Amendment protections. (2) The Court ruled that the search incident to the arrest for an arrest that was valid under the Fourth Amendment, although the arrest was not valid under state law, did not violate the Fourth Amendment. The Court noted that the arrest rules that the officers violated were those of state law alone, and it is not the province of the Fourth Amendment to enforce state law.

[Author's note: This ruling does not expand the authority of a North Carolina law enforcement officer to make an arrest or to conduct a search incident to arrest for a misdemeanor. To the extent that state law may restrict an officer's exercise of authority beyond the restrictions imposed by the Fourth Amendment, officers must follow state law. (1) Before this ruling, officers under G.S. 15A-401(b)(1) already had the authority to make an arrest for any misdemeanor committed in the officer's presence. Thus, North Carolina statutory law was already consistent with this Fourth Amendment ruling. (2) This ruling does not affect state law that does not authorize an officer to arrest a person who has committed an infraction, which is a noncriminal violation of law. (3) It does not affect state law restrictions on making a warrantless arrest for a misdemeanor not committed in the officer's presence, as set out in G.S. 15A-401(b)(2). (4) It does not affect the ruling in Knowles v. Iowa, 525 U.S. 113 (1998), when the Court ruled that an officer who issues a citation to a defendant is not authorized under the Fourth Amendment to conduct a search incident to arrest, even if the officer could have made an arrest for that offense. (5) When an officer's conduct violates a statute under Chapter 15A but the conduct is not a constitutional violation, G.S. 15A-974(2) governs whether evidence must be suppressed.]

Consent to Search

***Miranda* Ruling Was Inapplicable to Officer's Request for Consent Search After Defendant Had Asserted Right to Counsel**

State v. Cummings, ___ N.C. App. ___, 656 S.E.2d 329 (5 February 2008). The defendant was advised of his *Miranda* rights and waived them. Shortly after questioning began, he requested a lawyer and questioning stopped. However, an officer then asked for the defendant's consent to search his vehicle, which he granted. The court upheld the trial judge's denial of the defendant's motion to suppress evidence seized as a result of the consent search. The court noted that State v. Frank, 284 N.C. 137 (1973), had

ruled that *Miranda* warnings are inapplicable to searches and seizures. The court also stated that it found persuasive many federal court cases that have ruled that asking for a consent search is not interrogation under *Miranda*; for example, United States v. Shlater, 85 F.3d 1251 (7th Cir. 1996), and United States v. McCurdy, 40 F.3d 1111 (10th Cir. 1994).

Scope of Defendant's Consent to Search Included Strip Search

State v. Neal, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2008). The defendant was convicted of several cocaine offenses. The court ruled, relying on the standards set out in Florida v. Jimeno, 500 U.S. 248 (1991), and State v. Stone, 362 N.C. 50 (2007), that the scope of the defendant's consent to search included a strip search. An officer detected a mild odor of marijuana coming from the passenger side of a car in which the defendant was seated. The defendant consented to a pat-down search of her person to check for weapons and also consented to a search of her purse. A drug dog reacted to the passenger side. While the canine search was being conducted, the defendant acted very nervously and often put her hands in and out of the back of the waistband of her pants. A bulge was noticed in the back of her pants, and she was instructed to keep her hands away from the waistband. An officer informed the defendant that he wanted to conduct a better search to determine what was located in the back of her pants, and he had contacted a female officer for assistance. The female officer conducted a search of the defendant in the women's bathroom, with another officer standing outside the door to prevent others from coming in. The female officer explained to the defendant that she would be conducting a more thorough search. The defendant indicated that she understood. During the search, the defendant was asked to lower her underwear and a package containing cocaine fell out. The female officer testified that the defendant was "very cooperative, extremely cooperative" during the search and never expressed any misgivings about the scope of the search.

Search of Defendant's Genital Area Was Not Within Scope of Defendant's Consent to Search and Thus Violated Fourth Amendment

State v. Stone, 362 N.C. 50, 653 S.E.2d 414 (7 December 2007). The court ruled that a defendant who gave consent to a generic search for weapons or drugs during a routine traffic stop in which an officer shined a flashlight inside his underwear was not within the scope of the defendant's consent to search and thus violated the Fourth Amendment. An officer stopped a car for speeding. The officer asked the defendant, a passenger, whether he had any drugs or weapons on his person. The defendant said no, which prompted the officer to ask for consent to search. The defendant gave consent. The defendant was wearing a jacket and drawstring sweat pants. During the initial search, the officer found $552.00 in cash in the lower left pocket of the sweat pants. He again asked the defendant if he had anything on him. Once again, the defendant denied having drugs or weapons and authorized the officer to continue the search. The officer checked the rear of the sweat pants and moved his hands to the front of the defendant's waistband. The officer then pulled the defendant's sweat pants away from his body and trained his flashlight on the defendant's groin area. The defendant objected, but by that time, the officer had already seen the white cap of what appeared to be a pill bottle tucked in between the defendant's inner thigh and testicles. The court concluded that a reasonable person would not have understood that his consent included such an examination. The scope of a general consent to search does not necessarily include consent for an officer to move clothing to directly observe the genitals of a clothed person. The court noted that its ruling is necessarily predicated on its facts and that different actions by the officer could have led to a different result. [Author's note: The only basis on which the state justified the officer's search was consent. Thus, the court did not discuss whether probable cause and exigent circumstances supported the search. See State v. Smith, 342 N.C. 407 (1995), reversing the court of appeals for reasons stated in the dissenting opinion, 118 N.C. App. 106 (1995), discussed in the court's opinion.]

Right to Counsel

Trial Judge Erred by Allowing Defendant to Represent Himself at Trial for Speeding in Excess of 15 M.P.H. (Class 2 Misdemeanor) Without Complying With G.S. 15A-1242

State v. Taylor, ___ N.C. App. ___, 652 S.E.2d 741 (20 November 2007). The defendant was convicted of two charges of speeding in excess of 15 m.p.h. and appealed to superior court for trial de novo The court ruled that the superior court trial judge erred by allowing the defendant to represent himself at trial without fully complying with G.S. 15A-1242 (defendant's waiver of right to counsel). Although the trial judge properly informed the defendant of a maximum 60-day imprisonment for a Class 2 misdemeanor, the judge failed to properly inform the defendant that he was also subject to a maximum $1,000.00 fine for each charge. The court noted that under G.S. 7A-451(a)(1) an indigent defendant is entitled to appointment of counsel for any case in which imprisonment or a fine of $500.00 or more is likely to be adjudged. Because the sentencing options in this case were limited to community service and a fine, the possibility of such a fine was likely in this case, especially given that total maximum possible fine was $2,000.00 for the two charges. The defendant would have been entitled to appointment of counsel if it had been determined that he was indigent.

(1) Sufficient Evidence Existed to Support Perjury Conviction—Ruling of Court of Appeals Is Reversed
(2) Insufficient Evidence of Making False Statements Under G.S. 7A-456—Ruling of Court of Appeals Is Affirmed

State v. Denny, 361 N.C. 662 (9 November 2007), *reversing in part and affirming in part*, 179 N.C. App. 822 (17 October 2006). The defendant completed an affidavit of indigency to obtain court-appointed counsel. The evidence tended to show that he wrote "0" under the category of assets titled "real estate" although he was record co-owner of real property. (1) The court ruled, reversing the court of appeals ruling, that there was sufficient evidence to support the defendant's conviction of perjury under G.S. 14-209. (See the court's discussion of the facts supporting the conviction.) (2) The court ruled, affirming the court of appeals ruling, that there was insufficient evidence to support the defendant's conviction of making false statements under G.S. 7A-456. The court noted that the state did not present evidence as required by G.S. 7A-456(b) that the clerk making the indigency determination notified the defendant of the provisions of G.S. 7A-456(a), which sets out the elements of the offense.

Criminal Offenses

Motor Vehicle Offenses

(1) Officer Had Reasonable Grounds to Believe Petitioner Had Committed Implied Consent Offense (DWI) to Support Revocation of License
(2) Officer Was Not Required to Wait Thirty Minutes Before Offering Intoxilyzer Test When Petitioner Did Not Clearly Indicate That She Wanted to Call Attorney

White v. Tippett, ___ N.C. App. ___, 652 S.E.2d 728 (20 November 2007). Petitioner's driver's license was revoked because she willfully refused to take an Intoxilyzer test after being arrested for an implied consent offense (DWI). A superior court judge upheld her license revocation and she appealed to the court of appeals. (1) The court ruled that the arresting officer had reasonable grounds to believe that the petitioner had committed the DWI to support the license revocation. The petitioner evaded a license

checkpoint and the officer later detected an odor of alcohol about her (see other facts in the court's opinion). (2) The court ruled that the officer was not required to wait thirty minutes before offering the Intoxilyzer test when the petitioner did not clearly indicate that she wanted to call an attorney.

Denial of DWI Defendant's Right to Have Witness Observe Intoxilyzer Testing Procedures Required Suppression of Intoxilyzer Test Result

State v. Hatley, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2008). The court ruled that the denial of the DWI defendant's right to have a witness observe the Intoxilyzer testing procedures required the suppression of the Intoxilyzer test result. The defendant was arrested for DWI and advised of her chemical testing rights at 3:01 a.m. The defendant indicated that she wanted to call a witness and was successful in reaching her daughter at approximately 3:04 a.m. She told the arresting officer that her daughter was on the way. During the remainder of the 30-minute period the defendant was allowed to call her daughter to ascertain her whereabouts, but the defendant was unable to reach her. The test was delayed 34 minutes before the defendant was asked to submit to the test, which she did, and with a test result of 0.11. The evidence showed that the daughter had arrived at the sheriff's office at approximately 3:20 a.m. and informed the front desk duty officer she was there for Deborah Hatley (the defendant's name) for a "DUI," but did not specifically state that she was there to witness an Intoxilyzer test. The court concluded that based on these facts—particularly the arresting officer's knowledge that a witness had been contacted and the officer's understanding that the witness was on her way to the sheriff's office to observe the test—the trial court erred in denying the defendant's motion to suppress the Intoxilyzer test result. The witness had arrived in a timely manner and had made reasonable efforts to gain access to the defendant.

Trial Judge Did Not Err in Not Dismissing DWI Charge Under State v. Knoll Based on Magistrate's Substantial Violations of Defendant's Pretrial Release Statutory Rights, Because Defendant Failed to Show Violations Caused Irreparable Prejudice to Defendant's Preparation of Defense

State v. Labinski, ___ N.C. App. ___, 654 S.E.2d 740 (15 January 2008). The defendant was convicted of DWI. The court ruled that the trial judge did not err in not dismissing the DWI charge under State v. Knoll, 322 N.C. 535 (1988), based on the magistrate's substantial violations of the defendant's pretrial release statutory rights because the defendant failed to show that the violations caused irreparable prejudice to the preparation of the defendant's defense. (See the court's discussion of the facts and its analysis of the legal issues.)

(1) Sufficient Circumstantial Evidence to Prove Element of Driving to Support DWI Conviction
(2) Sufficient Evidence to Convict Passenger of Giving False Information (Orally Telling Officer That She Was the Driver) in Report of Reportable Accident Under G.S. 20-279.31(b)(1)

State v. Hernandez, ___ N.C. App. ___, 655 S.E.2d 426 (15 January 2008). The male defendant and the female defendant were in a vehicle that was involved in an accident in which the vehicle hit a ditch and landed about thirty to forty feet in a bean field. Two officers arrived at the scene when no one was in the vehicle . Officer A saw that the steering wheel air bag had deployed and blood was on the air bag. He noticed that the male defendant had blood near his nose and on his shirt. Officer B saw that the female defendant had a fabric burn extending from her right shoulder to her collarbone. In addition, the driver's seat was pushed back too far for the female defendant to drive the vehicle. The female defendant later told the officer at the hospital that she was the driver of the vehicle. The male defendant took the Intoxilyzer and his BAC was 0.26. The male defendant was convicted of DWI. The female defendant was convicted under G.S. 20-279.31(b)(1) of giving false information in a report of a reportable accident. (1) The court ruled that there was sufficient circumstantial evidence to prove the element of driving to support the DWI

conviction of the male defendant. The jury could reasonably infer from the physical evidence that the male defendant was the driver. (2) The court ruled that there was sufficient evidence to convict the female defendant of giving false information (orally telling officer that she was the driver) in a report of a reportable accident under G.S. 20-279.31(b)(1). The court rejected the female defendant's argument that the statute requires a written report and thus her oral statement to the officer did not constitute a report. The court also ruled that the identity of the driver is required to be included in a reportable accident report.

State Did Not Have Right to Appeal to Superior Court a District Court Judge's Dismissal of DWI Charge When Dismissal Was Based on Finding of Insufficient Evidence to Support DWI Charge, Even Though Dismissal Was Erroneous

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (15 April 2008). The court ruled that the state did not have a right to appeal to superior court a district court judge's dismissal of a DWI charge when the dismissal was based on a finding of insufficient evidence to support the DWI charge, even though the dismissal was erroneous (see the court's opinion on the notary public issue that led to the dismissal). The state may not appeal a dismissal of a case to superior court if double jeopardy bars a retrial [G.S. 15A-1432(a)], and a finding of insufficient evidence bars a retrial under the Double Jeopardy Clause. The court noted that this case was tried before the enactment of G.S. 20-38.6, which requires (with limited exceptions) that motions to suppress evidence or dismiss DWI charges be made before trial.

Sexual and Physical Assaults

Sufficient Evidence of Constructive Force to Support Convictions of Sexual Battery

State v. Viera, ___ N.C. App. ___, 658 S.E.2d 529 (1 April 2008). The defendant was convicted of two counts of sexual battery involving two victims in separate incidents in which the defendant provided massage services in a spa. The court reviewed the facts of both incidents and ruled that there was sufficient evidence of constructive force to support both convictions. The court concluded that the defendant utilized his apparent status as a licensed, professional massage therapist to induce his victims to lie naked on the massage table, putting them in a position of complete vulnerability. Through his coercion, he forced them to submit to unwanted sexual contact. The defendant's implicit threat was delivered through his abuse of his position of trust and relative authority as a professional massage therapist. Also, both victims testified about their fear of saying anything to the defendant after he began touching them inappropriately. The court stated that the fear created by the victims' feelings of vulnerability also substantiated the element of constructive force.

Hands Are Not Dangerous or Deadly Weapon For Offenses of First-Degree Rape and First-Degree Sexual Offense

State v. Adams, ___ N.C. App. ___, 654 S.E.2d 711 (18 December 2007). The court ruled, relying on the ruling in State v. Hinton, 361 N.C. 207 (2007) (hands are not dangerous weapon for offense of armed robbery), that hands are not a dangerous or deadly weapon for the offenses of first-degree rape and first-degree sexual offense. The court reasoned that the legislature did not intend the term "dangerous or deadly weapon" to include parts of a human body, such as hands or feet. [Author's note: Neither this ruling nor the *Hinton* ruling affects prior rulings that hands or feet can be deadly weapons for assault offenses.]

Sufficient Evidence of Element of Strangulation in Assault by Strangulation

State v. Little, ___ N.C. App. ___, ___ S.E.2d ___ (15 January 2008). The court ruled that there was sufficient evidence to support the element of strangulation in assault by strangulation when the defendant wrapped his hands around the victim's throat and applied pressure until the victim lost consciousness.

Assault on Female Is Not Lesser-Included Offense of Assault by Strangulation

State v. Brunson, ___ N.C. App. ___, 653 S.E.2d 552 (4 December 2007). The court ruled that assault on a female is not a lesser-included offense of assault by strangulation. Each offense includes an element not present in the other.

Other Criminal Offenses

Insufficient Evidence to Support Conviction of False Report to Law Enforcement Agency or Officer (G.S. 14-225) Because State Failed to Prove That False Report Was Made With a Purpose Set Out in Statute

State v. Dietze, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of a false report to a law enforcement agency or officer (G.S. 14-225) because the state failed to prove that the false report was made with a purpose set out in the statute: "for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties." The court stated that the defendant's false report of misdemeanor stalking undoubtedly had the effect of interfering with the work of law enforcement because investigating her complaint took time and manpower away from work on actual crimes. However, there was no evidence that she acted with a purpose set out in the statute. Instead, the evidence suggested that the defendant believed that she had been stalked.

Insufficient Evidence to Support Conviction of Possession of Malt Beverage By Person Under 21 Years Old, G.S. 18B-302(b)(1)

State v. Hensley, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2008). The court ruled that there was insufficient evidence to support the defendant's conviction of possession of malt beverage by a person under 21 years old, G.S. 18B-302(b)(1). An officer who stopped the vehicle the defendant was driving found open beer bottles and "some type of wine" in the vehicle. The court noted that the state did not present any evidence that there was any liquid remaining in the beer bottles, nor any residue of a liquid, and not even the type of beer indicated by the label. In addition, the officer did not preserve the bottles as evidence. Although the state presented evidence that the defendant had an odor of alcohol about him, had admitted he had drank a half bottle of red wine earlier in the evening, and had a blood alcohol concentration of 0.11, these facts merely demonstrate that the defendant had consumed some type of alcoholic beverage, but did not prove that he possessed a malt beverage.

Insufficient Evidence to Support Convictions of Defendants For Littering When They Placed Litter in Private Dumpster, and State Failed to Prove Dumpster Was Not "Litter Receptacle" Under G.S. 14-399

State v. Hinkle, ___ N.C. App. ___, 659 S.E.2d 34 (15 April 2008). The defendants were convicted of littering under G.S. 14-399 for placing dead animals in a private dumpster behind a grocery store. The court ruled that this evidence was insufficient to support the convictions because the state failed to prove that the dumpster was not a "litter receptacle" under G.S. 14-399. The court concluded that the "[i]nto

litter receptacle" language of the statute was part of the definition of the littering offense for which the state had the burden of production and proof; it was not an exception to the offense constituting an affirmative defense. The court indicated that the defendants could have been charged with second-degree trespass (the dumpster had a sign affixed to it saying, "notice, private use only, violators will be prosecuted") and a violation of G.S. 106-403 (unlawful disposition of dead domesticated animals).

Criminal Procedure

No Double Jeopardy Bar to Prosecute Resisting, Delaying, or Obstructing Public Officer After Acquittal of Assault on Government Officer Based on Same Incident

State v. Newman, ___ N.C. App. ___, 651 S.E.2d 584 (16 October 2007). The defendant was tried in district court for resisting, delaying, or obstructing a public officer (RDO), second-degree trespass, and assault on a government officer. The defendant was convicted of the RDO and trespass charges and found not guilty of the assault. The defendant appealed the two convictions for trial de novo in superior court. The superior court judge dismissed the RDO charge, and the state appealed. The court ruled that the state had the right to appeal the dismissal. The court then ruled that there was no double jeopardy bar to prosecute RDO after the acquittal of the assault charge. The court noted North Carolina case law that RDO is neither the same nor a lesser offense of the assault charge. The court noted, however, that there could still be a double jeopardy bar based on the same-evidence test for double jeopardy set out in State v. Summrell, 282 N.C. 157 (1982). After examining the evidence, the court ruled there was no double jeopardy violation because there was different evidence to support the RDO and assault charges. [Author's note: The court was bound by the *Summrell* ruling and thus was required to apply the same-evidence test. However, that test does not appear to be a component of double jeopardy analysis, because the United States Supreme Court applies an elements test—but not an additional same-evidence test. See, for example, United States v. Dixon, 509 U.S. 688 (1993).]

Evidence

Crawford and Hearsay

Jail Detention Center Incident Reports and Statements Contained in These Reports Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004)

State v. Raines, 362 N.C. 1 (7 December 2007). During a capital sentencing hearing, a state's witness in charge of the county detention center testified about the defendant's behavior while awaiting trial. He referred to jail detention center reports and statements contained in these reports. The court ruled that these reports and statements were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004). The court noted that there was no indication in the record that these reports were prepared for use in later legal proceedings. Instead, the record indicated that they were created as internal documents concerning the administration of the detention center. The statements contained in the reports from detention officers and inmates were not taken in such a manner to be testimonial or to be used in later criminal proceedings.

(1) Statements by Dying Shooting Victim to Private Citizen Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004)
(2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment

State v. Calhoun, ___ N.C. App. ___, 657 S.E.2d 424 (4 March 2008). The defendant was convicted of first-degree murder. The victim was shot in witness A's home when she was not there. Witness A and a law enforcement officer responded to the shooting and arrived at the home at the same time. The victim lay motionless on the living room floor. Witness A asked the victim who had shot him, and the victim told her it was "Chico" and "Worm." Witness A asked the victim to squeeze her hand to confirm that information, and the victim did so. The officer witnessed the identification. (1) The court ruled that the statements by the dying shooting victim to witness A, a private citizen, were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004). (2) The court alternatively ruled, relying on cases from other jurisdictions, that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

(1) Murder Victim's Statements to Law Enforcement Officers Were Admissible as Dying Declarations Under Rule 804(b)(2)
(2) Dying Declaration Is Exception to Defendant's Right to Confrontation Under Sixth Amendment

State v. Bodden, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2008). The defendant was convicted of second-degree murder. (1) The court ruled that the murder victim's statements to law enforcement officers near the scene of the murder and at a hospital were admissible as dying declarations under Rule 804(b)(2). There was sufficient evidence that the victim believed his death was imminent. Three and a half minutes after the victim called 911, he told his mother that he was going to die. The victim had been shot five times and was bleeding. He was taken to the hospital, received medical treatment in the emergency room, and later died the same day. (2) The court ruled, relying on the ruling in State v. Calhoun, ___ N.C. App. ___, 657 S.E.2d 424 (4 March 2008), that a dying declaration is an exception to a defendant's right to confrontation under the Sixth Amendment.

No Crawford v. Washington, 541 U.S. 36 (2004), Violation When SBI DNA Expert Testified in Place of Another SBI DNA Expert Who Had Analyzed Sample in Rape Kit

State v. Little, ___ N.C. App. ___, ___ S.E.2d ___ (15 January 2008). The court ruled, distinguishing State v. Cao, 175 N.C. App. 434 (2006), that there was no Crawford v. Washington, 541 U.S. 36 (2004), violation when an SBI DNA expert testified in place of another SBI DNA expert who had analyzed the sample in a rape kit. The testifying expert confirmed that she could review the other expert's work, check the technical aspects of it, and verify his findings without conducting a new analysis of the sample.

Statement Made by Another Person That Was Included in Defendant's Statement to Officer Was Not Hearsay Because It Was Not Offered to Prove Truth of Matter Asserted

State v. Hazelwood, ___ N.C. App. ___, 652 S.E.2d 63 (6 November 2007). The defendant was convicted of second-degree vehicular murder in which he crashed his vehicle into a tree while attempting to elude chasing officers, killing his two passengers. The defendant gave a statement to an officer in which he said that before the crash, one of the passengers told the defendant to stop, but the defendant told her he was not going to jail tonight. The court ruled that the statement by the passenger was not hearsay within hearsay because the passenger's statement was not offered to prove the truth of the matter asserted (that the passenger wanted the defendant to stop the car). Instead, it was offered to prove that the

defendant acted with malice (the defendant's continued high-speed flight despite the passenger's request to stop).

Rule 404(b)

Trial Judge Did Not Abuse Discretion in Admitting Under Rule 404(b) Evidence of Death of Another That Occurred 16 Years Before Death of Victim For Whom Defendant Was Being Tried for Murder

State v. Peterson, 361 N.C. 587 (9 November 2007), *affirming*, 179 N.C. App. 437 (2006). The defendant was convicted of first-degree murder of A. The court ruled, relying on State v. Stager, 329 N.C. 278 (1991), that the trial judge did not abuse his discretion in admitting under Rule 404(b) evidence of the death of B that occurred 16 years before the death of A. The court noted that the state was not required to present direct evidence of the defendant's involvement in the death of B, but could present circumstantial evidence that tends to support a reasonable inference that the same person committed both homicides. The trial judge's findings of fact indicated not only significant similarities between the deaths of A and B, but also sufficient circumstantial evidence that the defendant was involved in B's death.

(1) Evidence of Prior Sexual Activity With Another Person Committed Eight Years Before Offenses Being Tried Was Properly Admitted Under Rule 404(b) and Rule 403
(2) Error to Admit Certified Copies of Defendant's Sexual Battery Convictions Under Rule 404(b)
(3) Error to Admit Victim Impact Evidence During Guilt-Innocence Stage of Trial

State v. Bowman, ___ N.C. App. ___, 656 S.E.2d 638 (19 February 2008), *temporary stay allowed,* ___ N.C. ___ (11 March 2008). The defendant was convicted of three counts of aiding and abetting statutory rape, three counts of indecent liberties, and two counts of second-degree kidnapping. The offenses occurred in 2005. (1) The court ruled that evidence of prior sexual activity with another person (not a victim in this trial) committed eight years before offenses being tried was properly admitted under Rule 404(b) and Rule 403. The evidence was admitted to show absence of mistake of age, specific intent in the kidnapping, and an intent for sexual gratification. Concerning temporal proximity, the defendant had been incarcerated for three years and had relocated to another state during the eight-year time period. (2) The court ruled that the trial judge erred in admitting certified copies of the defendant's sexual battery convictions under Rule 404(b). The court stated that although North Carolina appellate courts are liberal in their inclusion of prior sexual offenses for Rule 404(b) purposes, it found in this case there was little probative value in the defendant's prior convictions for any Rule 404(b) purpose because there was significant testimony concerning the facts underlying the defendant's convictions. (3) The court ruled that the trial judge erred in admitting victim impact evidence during the guilt-innocence stage of the trial because it was irrelevant to any issue in the trial.

Trial Judge Erred Under Rule 404(b) in Allowing State in Assault Trial to Cross-Examine Defendant About Two Prior Assaults of Other People

State v. Goodwin, ___ N.C. App. ___, 652 S.E.2d 36 (6 November 2007). The defendant was convicted of a felonious assault. The court ruled, relying on State v. Morgan, 315 N.C. 626 (1986), that the trial judge erred under Rule 404(b) in allowing the state to cross-examine the defendant about two prior assaults of other people (the state had voluntarily dismissed these assault charges). After examining the evidence in this case, the court concluded that the state's sole purpose for its cross-examination was to show the defendant's propensity for violence, which is not allowed under Rule 404(b).

Trial Judge Did Not Err Under Rule 404(b) in Admitting Evidence of Drug Transaction Occurring Seven Weeks After Drug Transaction Being Tried Based on Their Substantial Similarities

State v. Mack, ___ N.C. App. ___, 656 S.E.2d 1 (5 February 2008). The defendant was convicted of several drug offenses. The court ruled that the trial judge did not err under Rule 404(b) in admitting evidence of a drug transaction involving the defendant that occurred after the drug transaction being tried (approximately seven weeks later) based on their substantial similarities. (See the court's discussion of the substantial similarities.)

Evidence of Prior DWI Was Admissible to Show Malice Under Rule 404(b) in Second-Degree Vehicular Murder Trial

State v. Lloyd, ___ N.C. App. ___, 652 S.E.2d 299 (6 November 2007). The defendant was convicted of two counts of second-degree murder, felony fleeing to elude officers, and other offenses, based on a high-speed chase by officers in which the defendant crashed his vehicle into another vehicle, killing its two passengers. The state was allowed to introduce evidence of a DWI committed by the defendant about five months earlier and his conviction of the DWI. The trial judge limited the evidence under Rule 404(b) to show the defendant's knowledge that his license was suspended when he committed the second-degree murders and to show malice. The court ruled that the evidence was properly admitted.

Other Evidence Issues

Trial Court Abused Discretion in Excluding Defense Cross-Examination of Assault Victim Under Rule 403; Cross-Examination Related to Victim's Credibility Under Rule 611(b) and Should Have Been Admitted Under Rule 403—Ruling of Court of Appeals Is Reversed

State v. Whaley, 362 N.C. 156 (25 January 2008), *reversing*, 178 N.C. App. 563 (18 July 2006) (unpublished opinion). The defendant was convicted of simple assault. The trial judge barred under Rule 403 the defendant's proposed cross-examination of the assault victim concerning statements she had made in a questionnaire during her visit to a counselor. The court noted that the excluded testimony, specifically the victim's prior indication that she had difficulty recalling whether certain events actually occurred, bore on the victim's capacity to observe, recollect, and recount and should have been admitted under Rule 611(b) and Rule 403. The victim's testimony was crucial to the state's case and attacking her credibility represented the primary theory of the defense.

Trial Judge Did Not Err in Allowing State to Impeach Defendant Under Rule 609 With Conviction Over Ten Years Old

State v. Muhammad, ___ N.C. App. ___, 651 S.E.2d 569 (16 October 2007). The defendant was convicted of first-degree murder based on shooting the victim with a pistol. The court ruled that the trial judge did not err in allowing the state to impeach the defendant under Rule 609 with a conviction over ten years old, a New Jersey felony aggravated assault conviction. The court stated the fact that the conviction was for a crime not involving dishonesty and was a different crime than the offense on trial was not dispositive of its admissibility. The trial judge had found that: (1) as a result of the prior conviction the defendant's status as a convicted felon made it illegal for him to possess a firearm at the time of the offense being tried; (2) the prior conviction, like the facts in the case on trial, involved eluding the police; and (3) the prior conviction manifested extreme indifference to human life and recklessly causing serious bodily injury.

Sentencing and Probation

(1) Trial Judge Did Not Err in Awarding Restitution
(2) Court Sets Out Allocation of Burdens of Proof Concerning Award of Restitution

State v. Tate, ___ N.C. App. ___, 653 S.E.2d 892 (18 December 2007). (1) The court ruled that the trial judge did not err in awarding restitution in the amount of $40,588.60 for damages resulting from felonious assault and other offenses for which the defendant was convicted. The court noted that although the trial judge did not make specific findings of fact concerning the defendant's ability to pay restitution, such findings were not required [see G.S. 15A-1340.36(a)], and it was clear from the record that the trial judge considered the defendant's financial ability to pay restitution. The defendant failed to present evidence showing that he would not be able to make the required restitution payments. (2) Concerning the allocation of burdens of proof for an award of restitution, the court agreed with an analogous federal statute. The burden proof on showing the amount of loss is on the state. The burden of proof on showing the defendant's financial resources is on the defendant as well as the financial needs of the defendant's dependents.

Trial Judge Erred in Awarding Restitution

State v. Southards, ___ N.C. App. ___, 657 S.E.2d 419 (4 March 2008). The defendant was convicted of felonious possession of stolen goods. The court ruled that the trial judge erred in awarding restitution to the victim. The defendant could not be required to make restitution for the victim's unrecovered tools or lost wages when those losses were neither related to the criminal offense for which the defendant was convicted nor supported by evidence in the record.

Trial Court Had Jurisdiction to Revoke Probation After Probation Period Would Have Otherwise Ended Because G.S. 15A-1344(d) Provides That Probation Period Is Tolled When Probationer Has Pending Criminal Charges That Upon Conviction Could Result in Revocation of Probation

State v. Patterson, ___ N.C. App. ___, ___ S.E.2d ___ (6 May 2008). The court ruled that the trial court had jurisdiction to revoke the defendant's probation after the probation period would have otherwise ended because G.S. 15A-1344(d) provides that the probation period is tolled when a probationer has pending criminal charges that upon conviction could result in revocation of probation. During the period of probation, the probation officer filed probation revocation reports about the pending charges and that their disposition was not expected until after the probationary period had ended. (See the court's detailed discussion of the facts in this case.) *Compare* State v. Satanek, ___ N.C. App. ___, ___ S.E.2d ___ (20 May 2008) (trial court lacked subject matter jurisdiction to extend probation and later to revoke probation where original probationary period had expired before first extension; state neither filed written motion before expiration of probation nor made reasonable effort to notify the probationer).

Trial judge did not err in sentencing defendant to consecutive suspended prison terms

State v. Cousar, ___ N.C. App. ___, ___ S.E.2d ___ (3 June 2008). The court ruled that the trial judge did not err in sentencing the defendant to two separate probationary judgments, because although the judgments required the suspended prison terms in the probationary judgments to run consecutively to each other, they did not impose two consecutive 36 months of probation.