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Criminal Case Update
Summer 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 May 15, 2007.

Criminal Offenses

Assaults

Sufficient Evidence of Strangulation to Support Conviction of Assault by Strangulation

State v. Braxton, ___ N.C. App. ___, 643 S.E.2d 637 (1 May 2007). The defendant was convicted of two counts of assault by strangulation, among other charges. The court upheld the defendant's convictions of assault by strangulation based on the victim's testimony that there were separate incidents in which the defendant grabbed her by the throat, causing her to have difficulty breathing. The court rejected the defendant's argument that the definition of strangulation should be the complete closure of one's airways causing an inability to breathe. The court noted with approval the definition of strangulation in footnote one to the offense in N.C.P.I.—Crim. 208.61 (2005): "strangulation is defined as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligature, or the manual assertion of pressure."

Sufficient Evidence of "Serious Bodily Injury" to Support Conviction of Assault Inflicting Serious Bodily Injury When Victim Lost Natural Tooth

State v. Downs, ___ N.C. App. ___, 635 S.E.2d 518 (17 October 2006). The court ruled there was sufficient evidence of "serious bodily injury," as defined in G.S. 14-32.4(a), to support the defendant's conviction of assault inflicting serious bodily injury when the victim lost his natural tooth as a result of the defendant's assault. The natural tooth was located in the top front row of teeth. The court stated that the defendant suffered "serious permanent disfigurement" (a term included in the statutory definition), despite the planned substitution of a dental implant in place of the natural tooth.

Using Hands to Beat Robbery Victim Was Not "Dangerous Weapon, Implement or Means" to Support Conviction of Armed Robbery

State v. Hinton, 361 N.C. 207, 639 S.E.2d 437 (26 January 2007), *affirming*, 176 N.C. App. 191, 625 S.E.2d 918 (21 February 2006) (unpublished opinion). The defendant was convicted of armed robbery based on using his fists to beat the robbery victim. The court ruled that the use of hands to beat a robbery victim is not a "dangerous weapon, implement or means" to support a conviction of armed robbery under G.S. 14-87. The court determined that the North Carolina General Assembly intended to require the state to prove that a defendant used an external dangerous weapon or means to convict a defendant of armed robbery. Thus, the use of hands,

fists, or feet is insufficient. [Author's note: This ruling does not affect prior rulings that the element of "deadly weapon" in various assault offenses may be satisfied by the use of hands or feet.]

Sufficient Evidence to Prove Defendant Inflicted Injuries to Child in Trial of Felony Child Abuse Inflicting Serious Bodily Injury

State v. Wilson, ___ N.C. App. ___, 640 S.E.2d 403 (6 February 2007). The defendant was convicted of felony child abuse inflicting serious bodily injury involving her twenty-three-month-old child. The court ruled that there was sufficient evidence to prove the defendant inflicted the injuries. The defendant had exclusive custody of the child when the injuries were sustained. The treating doctors and medical experts agreed that the injuries were not accidental, but rather intentionally inflicted. The defendant did not present rebuttal experts. The defendant during her testimony often changed her account of the cause of the injuries and also contradicted herself.

Other Offenses

Possession of Closed Pocketknife on Educational Property Violates G.S. 14-269.2(d) (Weapon on Educational Property); Operability of Pocketknife Is Irrelevant

In re B.N.S., ___ N.C. App. ___, 641 S.E.2d 411 (6 March 2007). A juvenile had a closed pocket knife in his coat pocket at a high school. The pocketknife's blade was 2.5 inches long. The court ruled that this evidence was sufficient to support the juvenile's adjudication of delinquency for a violation of G.S. 14-269.2(d) (weapon on educational property). The court also stated that the operability of the pocketknife was irrelevant. The court noted that none of the statutory exemptions to this offense in G.S. 14-269.2(g) and (h) applied in this case. [Author's note: As a result of this ruling, disregard a contrary view on this issue set out on page 412 of the Institute of Government's publication, *North Carolina Crimes: A Guidebook on the Elements of Crime* (5th ed. 2001).]

(1) Sufficient Evidence to Support Conviction of Obtaining Property by False Pretenses by Using Stolen Credit Cards at Store
(2) Sufficient Evidence of Breaking or Entering by Unauthorized Entry of Law Office Area Not Open to Public
(3) Sufficient Evidence of Felony Larceny By Acting in Concert With Accomplice
(4) Trial Judge Erred in Finding That Verdicts of Misdemeanor Breaking or Entering and Felony Larceny Were Inconsistent

State v. Perkins, ___ N.C. App. ___, 638 S.E.2d 591 (2 January 2007). The defendant was seen in the morning with another person (Brooks) in a hallway of a law office and beyond the public reception area. Neither had permission to be there, and the defendant gave a false explanation for her presence. That afternoon a person matching Brooks' description was seen coming from a lawyer's office, where it was later discovered that the lawyer's credit and check cards were stolen and used by the defendant and Brooks to buy merchandise at a grocery store. The defendant admitted to an officer that she was given the cards by "Steve" (the first name of Brooks), and the stolen cards were found at the same house where the defendant and Brooks were arrested. The jury returned verdicts finding the defendant guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. The trial judge determined that the verdicts of misdemeanor breaking or entering and felony larceny were legally inconsistent and ordered further deliberations. The jury deliberated and found the defendant guilty of felony breaking or

entering and felony larceny. (1) The court ruled that there was sufficient evidence to support the defendant's conviction of obtaining property by false pretenses by using stolen credit cards at the store. The court rejected the defendant's argument that the evidence was insufficient because the state did not present evidence of any verbal misrepresentations by the defendant. The state's evidence at trial included a videotape of the purchases by the defendant and her signed receipts. Verbal misrepresentations need not be proved; conduct alone is sufficient. (2) The court ruled, relying on State v. Brooks, ___ N.C. App. ___, 631 S.E.2d 54 (20 June 2006) (sufficient evidence to support conviction of felonious breaking or entering when defendant entered inner office of law firm to which public access was not allowed and committed theft), that there was sufficient evidence to support the defendant's conviction of misdemeanor breaking or entering. (3) The court ruled there was sufficient evidence of felony larceny by acting in concert with Brooks. (4) The court ruled that the trial judge erred in finding that the verdicts of misdemeanor breaking or entering and felony larceny were inconsistent. The court stated that a jury could reasonably find that the defendant had committed an unauthorized entry in the morning but the state had failed to prove the defendant's intent to commit a larceny then. The jury also could have determined that the defendant did not act in concert with Brooks' entry in the afternoon but she did act in concert concerning the larceny.

(1) Fourteen-Year-Old Juvenile Who Had Consensual Fellatio With Twelve-Year-Old Was Properly Adjudicated Delinquent of Crime Against Nature
(2) Crime Against Nature Offense Was Not Unconstitutionally Applied to Juvenile

In re R.L.C., ___ N.C. ___, ___ S.E.2d ___ (4 May 2007), *affirming*, ___ N.C. App. ___, 635 S.E.2d 1 (5 September 2006). A fourteen-year-old juvenile was adjudicated delinquent of crime against nature for having consensual fellatio with a twelve-year-old. (1) The court ruled the fact that other offenses involving this sex act require certain age differentials as elements did not show a legislative intent that the juvenile could not be adjudicated delinquent of crime against nature with a person who was only two years younger than the juvenile. (2) The court ruled, distinguishing Lawrence v. Texas, that the crime against nature offense was not unconstitutionally applied to the juvenile. The court noted that, unlike *Lawrence v. Texas*, this case involved minors. The court also recognized that preventing sexual conduct between minors furthers a legitimate governmental interest and application of the crime against nature offense is a reasonable means of promoting that interest.

Poker Is a Game of Chance Under G.S. 14-292

Joker Club v. Hardin, ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The court ruled that poker is a game of chance, not a game of skill, and thus in violation of G.S. 14-292 when anything of value is bet.

Habitual Offenders

(1) Habitual DWI Offense Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*
(2) No Violation of State Constitutional Right to Unanimous Verdict When Habitual DWI Verdict Sheet Did Not Set Out Two Prongs of Offense

State v. Bradley, ___ N.C. App. ___, 640 S.E.2d 432 (6 February 2007). The defendant was convicted of habitual DWI. (1) The court ruled that the habitual DWI offense is not

unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court ruled, relying on State v. Oliver, 343 N.C. 202, 470 S.E.2d 16 (1996), that there was no violation of the defendant's state constitutional right to a unanimous verdict when the habitual DWI verdict sheet did not set out two prongs of offense (0.08 and impaired prongs). There is only one offense, and it does not violate the unanimity right if some jurors find one prong and other jurors find the other prong.

Habitual Misdemeanor Assault Offense Is Not Unconstitutional Under *Apprendi v. New Jersey, Blakely v. Washington,* or Double Jeopardy Clause

State v. Massey, ___ N.C. App. ___, 635 S.E.2d 528 (17 October 2006). The court ruled that the habitual misdemeanor assault offense is not unconstitutional under the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004), or under the Double Jeopardy Clause.

(1) Habitual Felon Statute Is Not Unconstitutional Under Double Jeopardy Clause Based on Rulings in *Apprendi v. New Jersey* or *Blakely v. Washington*
(2) Court Notes That Convictions of Habitual Misdemeanor Assault for Habitual Assault Offenses Committed Before December 1, 2004, May Be Used to Prove Habitual Felon Status

State v. Artis, ___ N.C. App. ___, 641 S.E.2d 314 (6 February 2007). The defendant was convicted of malicious conduct by prisoner and habitual misdemeanor assault. He then was found to be an habitual felon, based on three prior felony convictions—two for habitual misdemeanor assault and one for felony eluding arrest. (1) The court ruled that the habitual felon statute is not unconstitutional under the Double Jeopardy Clause based on the rulings in Apprendi v. New Jersey, 530 U.S. 466 (2000), or Blakely v. Washington, 542 U.S. 296 (2004). (2) The court discussed the ratification clause of 2004 legislation and noted that convictions of habitual misdemeanor assault for habitual assault offenses committed before December 1, 2004, may be used to prove habitual felon status. The prohibition against using these convictions to prove habitual felon status only applies to offenses of habitual misdemeanor assault committed on or after December 1, 2004.

Crawford

(1) No Violation of Sixth Amendment Confrontation Rights Under *Crawford v. Washington* in Admitting Videotaped Interviews of Child Sexual Abuse Victims Because They Took Stand at Trial and Were Available for Cross-Examination
(2) Videotaped Interviews Between Child Sexual Abuse Victims and Pediatric Nurses Were Admissible Under Rule 803(4) (Statement Made for Medical Diagnosis or Treatment) and *State v. Hinnant*
(3) Child Sexual Assault Victim's Statement to Mother Within 24 Hours of Assault Was Admissible Under Rule 803(2) (Excited Utterance)

State v. Burgess, ___ N.C. App. ___, 639 S.E.2d 68 (2 January 2007). The defendant was convicted of six counts of first-degree sexual offense involving three children under thirteen years old. (1) The court ruled that there was no violation of the defendant's Sixth Amendment confrontation rights under Crawford v. Washington, 541 U.S. 36 (2004), in admitting videotaped

interviews of child sexual abuse victims because they took the stand at trial and were available for cross-examination (the defendant did not cross-examine them). (2) The court ruled, relying on State v. Lewis, 172 N.C. App. 97, 616 S.E.2d 1 (2005), and State v. Isenberg, 148 N.C. App. 29, 557 S.E.2d 568 (2001), that videotaped interviews between child sexual abuse victims and pediatric nurses were admissible under Rule 803(4) (statement made for medical diagnosis or treatment) because they satisfied the standard set out in State v. Hinnant, 351 N.C. 277, 523 S.E.2d 663 (2000). The children made the statements with the understanding that they would lead to medical diagnosis or treatment. The pediatric nurses at the children's medical center had interviewed the children before they were examined by a doctor, and the children were told they were there for a check up with a doctor. (3) The court ruled, relying on State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and State v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995), that a child sexual assault victim's statement to her mother within 24 hours of assault was admissible under Rule 803(2) (excited utterance).

(1) Statements Made by Shooting Victim During 911 Call Were Nontestimonial under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and *Crawford v. Washington*, 541 U.S. 36 (2004)
(2) Report Detailing Timeline of 911 Call and Responses Made by Law Enforcement Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)
(3) Information Form Used by Neighborhood Security Guards Was Nontestimonial Under *Crawford v. Washington*, 541 U.S. 36 (2004), and Admissible as Business Record Under Hearsay Rule 803(6)

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). The defendant was convicted of the first-degree murder of his wife whom he shot while she was inside her home. (1) The wife called 911 to report that she had been shot by her husband. She died shortly after making the 911 call. The court ruled that her statements were nontestimonial under Davis v. Washington, 126 S. Ct. 2266 (2006), and Crawford v. Washington, 541 U.S. 36 (2004). The court stated that the 911 call described current circumstances requiring police assistance. (2) The court ruled, relying on State v. Forte, 360 N.C. 427, 629 S.E.2d 137 (2006), the event report detailing the timeline of the 911 call and the responses made by law enforcement was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). (3) The court ruled that a pass-on information form used by neighborhood security guards was nontestimonial under Crawford v. Washington, 541 U.S. 36 (2004), and was admissible as a business record under Rule 803(6). An entry by a security guard on the form included information that the victim's husband had been threatening her and to make sure that he does not use the pass system to get into the neighborhood.

(1) Rules of Evidence Do Not Apply to Sentencing Hearings
(2) Ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, ___ N.C. App. ___, 641 S.E.2d 370 (6 March 2007). (1) The court ruled, citing Rule 1101(b)(3) and G.S. 15A-1334(b), that the rules of evidence do not apply at a sentencing hearing. (2) The court ruled, relying on the rationale of State v. Phillips, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing State v. Bell, 359 N.C. 1, 603 S.E.2d 2004), that the ruling in Crawford v. Washington, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

Statements of Nontestifying Declarants Were Not Testimonial Under *Crawford v. Washington* Because They Were Not Offered to Prove Truth of Matters Asserted

State v. Leyva, ___ N.C. App. ___, 640 S.E.2d 394 (6 February 2007). The court ruled that statements of nontestifying declarants were not testimonial under Crawford v. Washington, 541 U.S. 36 (2004), because they were not offered to prove the truth of the matters asserted. They instead were offered to explain the officers' presence at certain places.

Expert Testimony

(1) Medical Expert's Opinion Testimony That Child Had Been Sexually Abused Was Admissible When It Was Based on Physical Evidence
(2) Medical Expert's Opinion Testimony That, Based on Child's Statements to Her, She Would Believe Child and Diagnose Sexual Abuse Even in Absence of Physical Evidence Was Inadmissible, But Error Was Not Plain Error Requiring New Trial—Ruling of Court of Appeals Is Reversed

State v. Hammett, 361 N.C. 92, 637 S.E.2d 518 (15 December 2006), *reversing*, 175 N.C. App. 597, 625 S.E.2d 168 (7 February 2006). The defendant was convicted of multiple charges concerning sexual abuse of his daughter. (1) The court ruled that the medical expert's opinion testimony that the child had been sexually abused was admissible when it was based on physical evidence and the child's statements. The physical findings by the expert included a notch in the six o'clock position of the victim's hymenal ring. (2) The court ruled that the medical expert's opinion testimony that based on the child statements to her, she would believe the child and diagnose sexual abuse even in absence of physical evidence was inadmissible. This testimony improperly vouched for the child's credibility. The court, however, also ruled that this error was not plain error requiring a new trial.

Trial Judge in Child Abuse Homicide Trial Did Not Err in Allowing State's Expert To Testify on Rebuttal Concerning Normal Caretaking Reaction and Profile of Caretaking Behavior After Injury to Child

State v. Faulkner, ___ N.C. App. ___, 638 S.E.2d 18 (19 December 2006). The defendant was convicted of second-degree murder involving the child abuse homicide of a child who was twenty-two months old, and whose mother lived with the defendant. The defendant was alone with the child while the mother went shopping for about twenty to thirty minutes. When she arrived home and picked up the child, his eyes rolled into the back of his head, and his arms and legs were stiff. She called 911. An emergency responder testified that the defendant, when asked what had happened, appeared nervous, with color drained from his face, and did not respond. Cause of death was brain swelling caused by blunt force trauma to the head. A defense expert testified and suggested that there was an over diagnosis and perhaps rush to judgment of child abuse because of a belief that child abuse is underreported and everyone is "discombobulated" by the death of a child. The state on rebuttal called a medical expert, a developmental and forensic pediatrician, who outlined three parameters to determine whether a child's injuries were accidentally or intentionally inflicted: (1) the consistency of history given by the caretaker; (2) the extent to which the caretaker's explanation is consistent with the extent of injuries; and (3) the caretaker's behavior. When a child has been accidentally injured, a caretaker who witnesses the accident seeks help right away. When a child is injured intentionally, it is very common that the assailant will leave and not seek care. Often the caretaker is not concerned about what has

happened with the child, but with how it impacts on the caretaker. The court ruled, assuming without deciding such testimony would not be admissible on the state's direct case, that the defendant's evidence opened the door to its admissibility on rebuttal. Thus, the trial judge did not abuse his discretion in admitting the testimony.

Trial Judge Did Not Err in Allowing Opinion Testimony by State's Accident Reconstruction Expert

State v. Brown,___ N.C. App. ___, ___ S.E.2d ___ (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the trial judge did not err in allowing the state's accident reconstruction expert to offer his opinion that the driver of vehicle B was trying to get out of the way of oncoming traffic, based on statements made by the driver of vehicle B and the physical evidence. The court stated that the expert employed methods found to be reliable, such as a review of both the physical evidence and witness statements.

Pleadings

(1) Communicating Threats Charge Was Not Fatally Defective
(2) Sufficient Evidence to Support Adjudication of Communicating Threats

In re S.R.S., ___ N.C. App. ___, 636 S.E.2d 277 (7 November 2006). The juvenile was adjudicated delinquent of communicating threats. As the juvenile was being restrained in an elementary school from going into a hallway, he shouted at a teacher in the hallway that he was going to bring a gun to school the next day and kill the teacher's daughter. The teacher's daughter was a student in the school whom the juvenile had previously assaulted. (1) The juvenile petition charging communicating threats alleged that the juvenile threatened to physically injure the person and damage the property of the teacher and was communicated by orally stating to the victim that he was going to bring a gun to school the next day and kill the teacher's daughter. The court noted problems in the pleading that included allegations of damage to property as well as injury to a person and alleging the juvenile's threatening injury to the teacher instead of the teacher's child. However, the court ruled that the charge was not fatally defective because any confusion in the pleading was clarified by the allegation setting forth the precise conduct forming the basis of the charge—the threat to kill the teacher's daughter. The juvenile had sufficient notice of the offense to defend himself. [Author's note: The fact that the pleading alleged both injury to a person and damage to property does not create a fatal defect because the state is only required to prove one of the alleged alternative ways of committing an offense, and the language concerning damage to property is surplusage that does not adversely affect the validity of the charge. See the discussion in paragraph 13 on page five of Robert L. Farb, "Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues," posted on the Institute of Government's website at http://ncinfo.iog.unc.edu/programs/crimlaw/pleadjep.pdf.] (2) The court ruled that the evidence was sufficient to support the adjudication of communicating threats. Based on the juvenile's prior assault of the teacher's daughter, the juvenile's threat in the school's hallway would cause a reasonable person to believe that the threat was likely to be carried out, and that the teacher actually believed the threat was likely to be carried out.

Indictment for Eluding Arrest (G.S. 20-141.5) Need Not Allege Duty Officer Was Lawfully Performing When Defendant Committed Offense

State v. Teel, ___ N.C. App. ___, 637 S.E.2d 288 (5 December 2006). The defendant was indicted for felony eluding arrest (G.S. 20-141.5) based on the factors of reckless driving and speeding in excess of fifteen miles per hour over the speed limit; reckless driving (G.S. 20-140(b)); and resisting a public officer (G.S. 14-223). He was convicted of misdemeanor eluding arrest and reckless driving and found not guilty of resisting a public officer. The court ruled, distinguishing State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972) (charge of resisting public officer must describe duty the officer was discharging or attempting to discharge), that an indictment for eluding arrest (G.S. 20-141.5) need not allege the duty the officer was lawfully performing when the defendant committed the offense.

Work-Release Escape Indictment's Improper Statutory Citation to Non-Work-Release Escape Under G.S. 148-45(b) Was Irrelevant When Indictment's Allegations Correctly Charged Offense Under G.S. 148-45(g)

State v. Lockhart, ___ N.C. App. ___, 639 S.E.2d 5 (2 January 2007). The defendant was convicted under G.S. 148-45(g) of escape by failing to return to the prison unit while on work release. The indictment alleged the statutory citation as G.S. 148-45(b), escape from a prison unit. The court ruled, relying on State v. Allen, 112 N.C. App. 419, 435 S.E.2d 802 (1993), and other cases, that the defendant was properly charged. An indictment's incorrect statutory citation is immaterial when the charging language properly alleges the correct offense.

No Error In Allowing State to Amend Indictment to Change Name of Victim

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). The court ruled, relying on State v. Bailey, 97 N.C. App. 472, 389 S.E.2d 131 (1990) (amendment permitted to change name from "Pettress Cebron" to "Cebron Pettress"), and other cases, and distinguishing State v. Abraham, 338 N.C. 315, 451 S.E.2d 131 (1994) (error to allow amendment to change name from "Carlose Antoine Latter" to "Joice Hardin"), and other cases, that the trial judge did not err in allowing the state to amend the indictment to change the victim's name from "Gail Hewson Tice" to "Gail Tice Hewson."

Juvenile Trial Court Lacked Subject Matter Jurisdiction to Enter Adjudication and Disposition Orders Because Juvenile Petition Was Untimely Filed

In re M.C., ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The court noted that under G.S. 7B-1703(b), a juvenile petition must be filed within 15 days after the complaint is received by the juvenile court counselor, and an extension of an additional 15 days may be granted at the chief court counselor's discretion. Thus, the juvenile petition must be filed within a maximum of 30 days after the complaint is received by the juvenile court counselor. In this case, the court stated that the only indication when the juvenile court counselor received the complaint was the date (November 1, 2005) that the petition was verified by a detective. The juvenile petition was filed with the trial court on December 2, 2005, which was more than 30 days from November 1, 2005. The court ruled that the trial court was without jurisdiction to hear the matter. Although the juvenile did not raise the issue before the trial court, it may be raised for the first time on appeal. The court vacated the trial court's adjudication and disposition orders and ordered that the case be dismissed.

Defenses

Trial Judge Erred in Assault Trial in Failing to Instruct Jury on Defendant's Lack of Duty to Retreat on His Own Premises

State v. Beal, ___ N.C. App. ___, 638 S.E.2d 541 (2 January 2007). The defendant was convicted of a felonious assault. The defendant and the alleged victim lived in the same mobile home, which was owned by the alleged victim. The defendant paid rent to live there. The assault occurred in the mobile home and its curtilage. The court ruled, relying on State v. Browning, 28 N.C. App. 376, 221 S.E.2d 375 (1976) and other cases, that the trial judge erred in failing to instruct the jury on the defendant's lack of duty to retreat on his own premises.

Defendant Was Not Entitled to Defense of Duress in Second-Degree Vehicular Murder Trial

State v. Brown,___ N.C. App. ___, ___ S.E.2d ___ (6 March 2007). The defendant was convicted of second-degree murder and other offenses (willful speed competition, reckless driving, and driving left of center) as a result of a collision of his vehicle (vehicle A) with another vehicle (vehicle B) as they sped together on a highway, and vehicle B crashed into the decedent's vehicle (vehicle C), which was traveling in the opposite direction from vehicles A and B. The court ruled that the defendant was not entitled to a jury instruction on the defense of duress. The defendant did not have a well-grounded apprehension of death or serious bodily harm. Also, he had a reasonable opportunity to avoid his conduct without undue exposure to death or serious bodily harm: he had ample opportunity to either maintain a safe speed or to pull over off the highway. (See the court's discussion of the facts in its opinion.)

Right to Counsel

Trial Judge Erred in Not Conducting a Hearing Concerning Defense Counsel's Potential Conflict of Interest When the Potential Conflict Had Been Brought to Judge's Attention

State v. Mims, ___ N.C. App. ___, 637 S.E.2d 244 (5 December 2006). In a pretrial hearing on a motion to dismiss drug charges, evidence showed that law enforcement officers arrested Chavis, who was in a residence when the officers found illegal drugs there. The owner of the residence, who was neither Chavis nor the defendant, was not there. The defendant arrived at the residence a few minutes later and told law enforcement officers that the drugs found in the house were hers. Her defense to be offered at trial was that she did so to protect Chavis, the father of her child, but the drugs did not belong to her or Chavis. Both Chavis and the defendant were charged with possessing the drugs, and they were represented by different lawyers in the same law firm. The prosecutor mentioned to the judge that there may be a conflict of interest with the same law firm representing both the defendant and Chavis, but the judge stated that it was an ethical issue and not a concern of the state. The defendant was tried alone, and Chavis did not testify for her at the defendant's trial. The court ruled, relying on State v. James, 111 N.C. App. 785, 433 S.E.2d 755 (1993), and State v. Hardison, 126 N.C. App. 52, 483 S.E.2d 459 (1997), that the trial judge erred by failing to conduct a hearing concerning defense counsel's potential conflict of interest that had been brought to the judge's attention by the prosecutor. The court remanded the matter to the trial court for a hearing on this issue.

Trial Judge Erred in Denying Defense Counsel's Motion to Withdraw Based on Counsel's Representation of Both Defendant and Potential Defense Witness

State v. Ballard, ___ N.C. App. ___, 638 S.E.2d 474 (19 December 2006). The defendant was convicted of two counts of first-degree murder and other offenses. At the close of the state's case, the prosecutor told the trial judge and defense counsel that he had learned that James Turner, who was represented on federal criminal charges by the same defense counsel, had revealed potentially exculpatory information during an interview with officers on other matters. Defense counsel spoke to Turner and stated that Turner had credible, material, and exculpatory information, but Turner's testimony could implicate Turner in unrelated criminal charges. Thus, defense counsel could not call Turner as a witness for the defendant, creating a clear conflict of interest. Defense counsel sought to withdraw and moved for a mistrial, which was denied. The defendant wanted to keep defense counsel as his lawyer and have Turner testify. The court ruled that the trial judge erred in denying defense counsel's motion to withdraw. The court rejected the state's argument that the defendant had waived the conflict of interest issue, noting that the trial judge failed to properly question and advise the defendant on this matter.

Defendant Was Not Denied Assistance of Counsel for Probation Revocation Hearing When, After Waiving Right to Appointed Counsel, Defendant Failed to Retain Counsel Over Eight-Month Period; Defendant's Own Acts Forfeited His Right to Counsel

State v. Quick, ___ N.C. App. ___, 634 S.E.2d 915 (3 October 2006). The court ruled, relying on State v. Montgomery, 138 N.C. App. 521, 530 S.E.2d 66 (2000), that the defendant was not denied assistance of counsel for his probation revocation hearing when, after waiving his right to appointed counsel, the defendant failed to retain counsel over a eight-month period. The court stated that the defendant through his own acts forfeited his right to proceed with counsel of his choice.

Search and Seizure

(1) Officer Conducted Valid Traffic Stop of Vehicle
(2) Officer Conducted Valid Search of Vehicle for Weapons
(3) Officer Conducted Valid Consent Search of Passenger's Purse
(4) Officer Had Probable Cause to Search Vehicle for Illegal Drugs, Including Locked Briefcase Found Inside Vehicle

State v. Parker, ___ N.C. App. ___, ___ S.E.2d ___ (1 May 2007). The defendant was convicted of various drug and drug-related offenses. A narcotics detective was conducting surveillance of the defendant in response to a citizen's complaint that the defendant was trafficking methamphetamine. He stopped a vehicle that the defendant was driving because it was going approximately 60 m.p.h. in a 45 m.p.h. zone and then passed another vehicle at approximately 80 m.p.h. in a 55 m.p.h. zone. The defendant stepped out of his vehicle and approached the detective's vehicle. The detective ordered the defendant to return to his vehicle, but he refused to do so. The detective then secured the defendant in the backseat of the defendant's vehicle. Two passengers (A and B) were also seated in the vehicle. The defendant told the detective there was a gun in the vehicle. The detective opened the door to the front passenger seat where A was sitting and saw a 12-gauge shotgun located between the seat and door. He assisted A out of the vehicle and, while doing so, saw a piece of newspaper fall to the ground and made a mental note of it. The detective removed B from the vehicle as well. The detective then conducted a "weapons

frisk" of the vehicle for his own safety to make sure that were no other weapons there. He examined the newspaper and saw that it was covering a drawstring bag. Inside the bag he found a substance he believed to be methamphetamine and a smoking device. He found a pistol under the front passenger seat. Thereafter, A consented to a search of her purse, which the detective had seen in the vehicle. The detective discovered in the purse a straw containing white powder residue that he believed to be drug paraphernalia used to ingest an illegal controlled substance. The detective then searched the vehicle's interior and found a locked briefcase in the hatchback portion. The defendant claimed ownership of the briefcase and gave the combination to the detective. When the combination did not unlock it, the detective's partner pried it open with a screwdriver. Inside was a plastic cylinder containing a bag of a substance the detective believed to be methamphetamine. The detective arrested the defendant for various drug offenses but did not charge him with any traffic violations. (1) The court ruled that the narcotics detective had probable cause to stop the defendant's vehicle for the speeding violations. The court noted prior case law [Whren v. United States, 517 U.S. 806 (1996); State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999)] that an officer's subjective motivation is irrelevant when a stop is supported by probable cause. Also, the fact that an officer conducting a traffic stop did not later issue a traffic citation is irrelevant to the validity of the stop [State v. Baublitz, 172 N.C. App. 801, 616 S.E.2d 615 (2005)]. (2) The court ruled that the officer conducted a valid "vehicle frisk" for weapons inside the defendant's vehicle under Michigan v. Long, 463 U.S. 1032 (1983). The detective had a reasonable belief that the defendant was dangerous and had immediate access to a weapon in the car. And the search of the drawstring bag was a valid part of the weapons search. (3) The court ruled that although the detective's request for consent to search A's purse was unrelated to the traffic infraction for which the detective initially stopped the defendant, the request was supported by reasonable suspicion that the purse would contain contraband or evidence of a drug crime. (4) The court ruled that the detective had probable cause to search the vehicle for illegal drugs, including the locked briefcase found inside the vehicle. The court relied on California v. Acevedo, 500 U.S. 565 (1991), and State v. Holmes, 109 N.C. App. 615, 428 S.E.2d 277 (1993).

Detective's Seizure of Cigarette Butt Thrown by Defendant on His Patio Floor During Interview With Two Detectives Violated Defendant's Fourth Amendment Rights

State v. Reed, ___ N.C. App. ___, 641 S.E.2d 320 (6 March 2007). Two detectives investigating a burglary, sexual offense, and robbery, arrived at the defendant's apartment to talk with him. The defendant led the detectives to a small patio at the back of his apartment. After the defendant finished a cigarette, he flicked the butt at a pile of trash located in the corner of the concrete patio. The butt struck the pile of trash and rolled between the defendant and one of the detectives, who kicked the butt off of the patio into the grassy common area. The conversation ended and the detective, who had kept his eye on the still-burning cigarette butt, retrieved the butt after the other detective and the defendant turned to go back inside the apartment. A DNA test of the cigarette butt resulted in evidence introduced against the defendant at trial. The court ruled, relying on State v. Rhodes, 151 N.C. App. 208, 565 S.E.2d 266 (2002) (officer's warrantless search of trash can located immediately by steps to side-entry door of defendant's house violated Fourth Amendment), and other cases, and distinguishing State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995), ruled that the seizure of the cigarette butt violated the defendant's Fourth Amendment rights. The court rejected the state's argument that the defendant discarded the cigarette butt and thus lost his reasonable expectation of privacy. The cigarette butt was not abandoned within the curtilage of the defendant's home. [Author's note: The issue whether the detective had probable cause to seize the cigarette butt was not involved in this case.]

After Writing and Delivering Warning Ticket to Defendant, Officer Had Reasonable Suspicion to Detain Defendant Further So Drug Dog Could Conduct Sniff of Exterior of Vehicle

State v. Euceda-Valle, ___ N.C. App. ___, 641 S.E.2d 858 (20 March 2007). An officer stopped the defendant's vehicle for speeding and issued him a warning ticket. There was a passenger in the vehicle. After writing and delivering the warning ticket to the defendant, the officer ordered the defendant to remain so a drug dog could conduct a sniff of the exterior of the vehicle. The court ruled, relying on State v. McClendon, 350 N.C. 630, 517 S.E.2d 128 (1999), and State v. Hernandez, 170 N.C. App. 299, 612 S.E.2d 420 (2005), that the officer had reasonable suspicion to detain the defendant. The defendant was extremely nervous and refused to make eye contact with the officer. There was the smell of air freshener coming from the vehicle, which was not registered to the occupants. There was a disagreement between the defendant and the passenger about their itinerary.

Confessions

Defendant's Statement in Response to Officer's Question Was Admissible Under Public Safety Exception to *Miranda*

State v. Hewson, ___ N.C. App. ___, 642 S.E.2d 459 (20 March 2007). Officers responded to a home in response to a 911 call by the victim of a shooting while she was inside her home, reporting that she had been shot by her husband. They saw the defendant outside the house and ordered him to lie face down on the ground. After handcuffing him, an officer asked him, without giving *Miranda* warnings, "Is there anyone else in the house, where is she?" The court ruled the defendant's statement in response to the officer's question was admissible under public safety exception to *Miranda* under New York v. Quarles, 467 U.S. 649 (1984). [See a discussion of the public safety exception on page 200 of Robert L. Farb, *Arrest, Search, and Investigation in North Carolina* (3d ed. 2003).

Juvenile Was In Custody in Assistant Principal's Office to Require *Miranda* and Juvenile Statutory Warnings When Law Enforcement Officer Participated in Questioning and Circumstances of Juvenile's Detention in Office Would Lead Reasonable Person in Juvenile's Position to Believe That He Was Restrained to Degree Associated With Formal Arrest

In re W.R., ___ N.C. App. ___, 634 S.E.2d 923 (3 October 2006). As a result of information that the juvenile, a fourteen-year-old middle school student, may have brought a knife to school, an assistant principal took the juvenile out of his classroom and to her office. The principal and assistant principal questioned him for a while and then a law enforcement officer (school resource officer) joined in the questioning. The officer also conducted a search of the juvenile's pockets for weapons. None were found. The questioning took about thirty minutes and then the juvenile admitted possessing a knife at school on the prior day. The juvenile was never left unsupervised during that time, and the officer was there for most of that time period with the juvenile under his supervision while the principal and assistant principal left the office to conduct the investigation. The court ruled, distinguishing In re Phillips, 128 N.C. App. 732, 497 S.E.2d 292 (1998) (juvenile not in custody when questioned by school officials in school office and no law enforcement officers were present), that the juvenile was in custody to require *Miranda* and juvenile statutory

warnings. Given the totality of circumstances, a reasonable person in the juvenile's position would have believed that he was restrained to a degree associated with a formal arrest.

Sentencing and Probation

When Calculating Points for Prior Convictions to Establish Prior Record Level, Convictions Obtained During a Single Trial Cannot Be Used in Establishing Prior Record Level for One of the Convictions

State v. West, ___ N.C. App. ___, 638 S.E.2d 508 (19 December 2006). The defendant at a single trial was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. Before recessing for lunch, the trial judge sentenced the defendant for the convictions of the two larcenies and breaking and entering a vehicle. After lunch, the judge sentenced the defendant for second-degree murder and calculated the defendant's prior record level for the second-degree murder by assigning two points for one of the felony larceny convictions. The court ruled that the judge erred in doing so in contravention of legislative intent in calculating a prior record level for convictions obtained at a single trial.

Trial Court Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended, and Judge Failed to Make Required Finding Under G.S. 15A-1344(f)(2)—Ruling of Court of Appeals Is Affirmed

State v. Bryant, 361 N.C. 100, 637 S.E.2d 532 (15 December 2006), *affirming*, 176 N.C. App. 190, 625 S.E.2d 916 (21 February 2006) (unpublished opinion). The court ruled that the trial court did not have jurisdiction to revoke the defendant's probation when the revocation hearing was conducted after the probationary period had ended, and the judge revoking probation failed to make a finding required under G.S. 15A-1344(f)(2) that the state had made a reasonable effort to notify the probationer and to conduct the hearing earlier. *Accord* State v. Reinhardt, ___ N.C. App. ___, 644 S.E.2d 26 (2007) (trial court lacked subject matter jurisdiction to revoke probation).

Trial Judge Did Not Err in Ordering Defendant to Pay Restitution to One of Five Victims of Felonious Hit and Run For Which Defendant Was Convicted, Even Though Jury Was Unable to Reach Verdict on Felonious Assault of Same Victim

State v. Valladares, ___ N.C. App. ___, 642 S.E.2d 489 (3 April 2007).The defendant was convicted of one count of felonious hit and run involving five victims. The court ruled that the trial judge did not err in ordering the defendant to pay restitution to one of those five victims, even though the jury was unable to reach a verdict on a felonious assault of the same victim.