

Case Law Update

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Search & Seizure

Georgia v. Randolph, ___ U.S. ___, 126 S. Ct. 1515 (2006): When physically-present occupant refuses to consent to search of dwelling, Fourth Amendment prohibits search of dwelling based on co-occupant's consent.

State v. Johnson, ___ N.C. App. ___, 627 S.E.2d 488 (2006), *temporary stay allowed*, ___ N.C. ___, 2006 WL 1286354 (2006): Officers exceeded scope of consent to search vehicle by pulling apart wall panel of vehicle; consent could not reasonably have been interpreted to include intentional infliction of damage to vehicle.

In re J.L.B.M., ___ N.C. App. ___, 627 S.E.2d 239 (2006): Officer did not have grounds to stop juvenile (officer had relied solely on dispatch that there was suspicious person at gas station, juvenile matched "Hispanic male" description of suspicious person, juvenile was wearing baggy clothes, and juvenile walked away from patrol car); nevertheless, juvenile still could be convicted of violation of G.S. 14-223 (resist, delay, or obstruct officer) by giving false name to officer after illegal stop.

Discovery

State v. Pendleton, ___ N.C. App. ___, 622 S.E.2d 708 (2005): Notes in DSS file and not in prosecutor's file were not discoverable under G.S. 15A-903(a)(1) because DSS did not act as prosecutorial agency in case.

State v. Brown, ___ N.C. App. ___, 2006 WL 995093 (April 18, 2006): Because defendant did not make written request for discovery, state's voluntary production of witness list was not deemed to be under court order; in any event, state's failure to include witness in witness list was not done in bad faith (state learned of witness on morning of trial), and trial court did not err in allowing witness to testify.

State v. Jaaber, ___ N.C. App. ___ 627 S.E.2d 312 (2006): Because sanctions are not mandatory under revised discovery statutes, what sanctions to impose are within the trial judge's discretion.

Pretrial Procedure

State v. McNeill, 170 N.C. App. 574 (2005), *review denied*, 360 N.C. 73 (2005): Because pretrial ruling on suppression motion was interlocutory, judge could change own ruling granting pretrial suppression motion and admit evidence at trial.

State v. Vereen, ___ N.C. App. ___, 628 S.E.2d 408 (2006): Arraignment is required in cases appealed for trial de novo in superior court; the requirement under G.S. 15A-941(d) that defendant make written request for arraignment in superior court does not apply to trial de novo cases because an indictment is not involved.

State v. Branch, ___ N.C. App. ___, 627 S.E.2d 506 (2006), *temporary stay denied*, ___ N.C. ___, 2006 WL 1286243 (2006): Order entered out of term denying suppression motion was void when parties had not explicitly consented to entry of order out of term; parties had only consented to trial judge's taking of motion under advisement and issuing later order. *See also State v. Trent*, 359 N.C. 583 (2005) (order entered out of term denying suppression motion was void; defendant's failure to object when trial judge stated that he would announce ruling later did not constitute consent).

Trial Procedure

Deck v. Missouri, 544 U.S. 622 (2005): Due Process Clause prohibits use of physical restraints visible to jury unless justified by interest specific to trial of particular case, including capital sentencing hearing.

Miller-El v. Dretke, 545 U.S. 231 (2005): Defendant proved that State used peremptory challenges in racially discriminatory manner and defendant was entitled to new trial.

Evidence

State v. McCoy, ___ N.C. App. ___, 620 S.E.2d 863 (2005), *review denied*, ___ N.C. ___, 628 S.E.2d 8 (2006): Although facts of prior assault were admissible under Evidence Rule 404(b), fact of conviction for prior assault was inadmissible under *State v. Wilkerson*, 356 N.C. 418 (2002), *rev'g and adopting dissenting opinion per curiam*, 148 N.C. App. 310 (2002).

State v. Shelly, ___ N.C. App. ___, 627 S.E.2d 287 (2006): State's failure to give defendant written notice of intent to impeach defendant with conviction that was over ten years old, as required under Evidence Rule 609(b), did not bar state's use of conviction under circumstances of case.

Holmes v. South Carolina, ___ U.S. ___, 126 S. Ct. 1727 (2006): State supreme court's rule on admissibility of proposed defense evidence of third-party guilt was arbitrary and violated defendant's right to present defense.

Pleadings

State v. Price, 170 N.C. App. 672 (2005): Indictment alleging "City of Asheville Transit and Parking Services" as owner of parking meters was insufficient for failure to allege legal entity capable of owning property, and defendant's convictions of larceny and injury to personal property had to be vacated.

State v. Silas, ___ N.C. ___, 627 S.E.2d 604 (2006): Indictment for felony breaking and entering need not allege specific felony that defendant intended to commit; however, if indictment does allege specific felony, state may not amend indictment to allege different felony.

State v. Winslow, 360 N.C. 161 (2005): Trial judge erred in allowing state to amend habitual DWI indictment to change date of prior DWI; indictment mistakenly alleged that DWI conviction occurred on April 1, 1993, which was more than seven years before current offense, and state couldn't amend indictment to allege that DWI conviction was actually August 11, 1993, which was within seven years of current offense.

State v. Turshizi, ___ N.C. App. ___, 625 S.E.2d 604 (2006), *review denied*, ___ N.C. ___, 2006 WL 1216661 (2006): Drug indictments did not allege the correct name of methylenedioxymethamphetamine (the correct name has a "3, 4" in front of the term) and were fatally defective. *See also State v. Ledwell*, 171 N.C. App. 328 (2005) (to same effect), *review denied*, 360 N.C. 73 (2005).

State v. Frink, 627 S.E.2d 472 (2006): Indictment for statutory rape under G.S. 14-27.7A (statutory rape of 13, 14, or 15 year old) was insufficient to support judgment of second-degree rape.

State v. Langley, ___ N.C. App. ___, 618 S.E.2d 253 (2005), *review denied*, 360 N.C. 366 (2006): Fatal variance existed where indictment charging possession of firearm by felon alleged weapon as handgun and evidence showed weapon was sawed-off shotgun.

Criminal Offenses

State v. Sanders, 360 N.C. 170 (2005), *aff'g per curiam* 171 N.C. App. 46 (2005): Evidence that defendant possessed thirty diazepam pills, with no other evidence connected to sale of diazepam, was insufficient to support conviction of possession with intent to sell and deliver.

State v. Palmer, 622 S.E.2d 676 (2005): Evidence was insufficient to convict defendant, an account manager, of embezzlement where, although defendant had access to incoming checks, she was not entrusted with the checks and did not obtain possession of them as part of her duties; proper charge was larceny.

State v. Lopez, 626 S.E.2d 736 (2006): Trial judge erred in failing to instruct jury that to convict defendant it had to find that defendant knew that what he possessed was heroin; defendant is entitled to such an instruction (in N.C.P.I.—Crim. 260.17) when he or she presents some evidence that he lacked knowledge of the identity of the substance.

State v. Artis, ___ N.C. App. ___, 622 S.E.2d 204 (2005), *review denied*, 360 N.C. 365 (2006): Double jeopardy did not bar convictions for both malicious conduct by prisoner and habitual misdemeanor assault based on same conduct.

State v. Fuller, ___ N.C. App. ___, 626 S.E.2d 655 (2006): Extrapolation testimony supported conviction of DWI based on .08 prong.

State v. Whiteley, ___ N.C. App. ___, 616 S.E.2d 576 (2005): Crime against nature statute may be used to prosecute conduct involving a minor, non-consensual or coercive sexual acts, public conduct, or prostitution or solicitation; trial court erred in failing to instruct jury that state had to prove that acts between two adults were without the alleged victim's consent.

State v. Duff, 171 N.C. App. 662 (2005), *review denied*, 359 N.C. 854 (2005): Hands, fists, and feet do not constitute dangerous weapon for purposes of armed robbery.

State v. Phillips, ___ N.C. App. ___, 615 S.E.2d 880 (2005): Evidence supported one conviction of possession of stolen goods, not five convictions, where defendants came into possession of several stolen items as part of continuous act or transaction.

Sentencing

State v. Jordan, ___ N.C. App. ___, 621 S.E.2d 229 (2005), *review denied*, 360 N.C. 293 (2006): Defendant failed to meet burden of proof to suppress prior convictions at sentencing based on denial of right to counsel; only evidence was defendant's testimony that he did not have attorney for prior convictions and was not able to afford one at time.