

Case and Legislative Update: Drugs and Other Things

Includes cases decided through November 9, 2007 (summaries prepared by Robert L. Farb) and legislation enacted by the 2007 General Assembly (summaries prepared by John Rubin)

Search and Seizure

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

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

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

State v. Burroughs, ___ N.C. App. ___, 648 S.E.2d 561 (21 August 2007). The trial judge ruled that a checkpoint (at which the defendant was arrested for DWI) violated the Fourth Amendment based on the ruling in *State v. Rose*, 170 N.C. App. 284 (2005). The state appealed. The court noted that the trial judge's ruling was based on the absence of evidence to support the primary programmatic purpose of the checkpoint. The court stated that the ruling misconstrued the principles of *Rose* and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), on which *Rose* heavily relied. The court stated that the *Rose* ruling provided that when contradictory evidence exists about a checkpoint's primary purpose, the trial judge must examine the available evidence to determine the actual purpose, because bare assertions of a constitutional purpose cannot be allowed to mask unconstitutional purposes. Neither *Rose* nor *Edmond* mandated that trial judges extensively inquire about the purpose of every checkpoint. The court in *Rose* required additional findings of the checkpoint's purpose because substantial evidence indicated that the checkpoint's purpose was to impermissibly check for illegal drugs. The court concluded that from the available evidence in the case before it, the actual purpose of the checkpoint clearly was the same as its stated purpose: to check for impaired drivers. Because such a purpose has been expressly ruled constitutional and the trial judge misconstrued the *Rose* ruling, the court reversed the trial judge's ruling. However, the court ruled there still remained on remand for the trial court to determine whether the individual circumstances surrounding the stop of the defendant at this checkpoint were constitutional; the court cited and quoted from *State v. Mitchell*, 358 N.C. 63 (2004).

Defendant Was Seized Under Fourth Amendment Based on Officer's Interaction With Defendant After Turning Before Checkpoint, and Defendant Had Standing to Challenge Constitutionality of Checkpoint

State v. Haislip, ___ N.C. App. ___, ___ S.E.2d ___ (2 October 2007). The defendant was convicted of

impaired driving. Officers established a checkpoint to apparently check for motor vehicle offenses. An officer assigned to the chase vehicle saw the defendant's car turn before the checkpoint and then followed the car and activated his blue lights. The defendant parked in front of an apartment building, exited her car, and walked toward one of the apartments. The officer parked his vehicle with blue lights flashing, approached the defendant, and said "excuse me." The defendant then stopped walking toward the apartment and turned to the officer. The court ruled that the defendant was seized under the Fourth Amendment when she stopped walking toward the apartment in response to the officer's presence and request. A reasonable person at 2:30 a.m. would not feel free to leave on being approached by a uniformed officer whose patrol lights were activated. The defendant submitted to the officer's show of authority. The court also ruled that because the officer stopped the defendant pursuant to the checkpoint plan, the defendant had standing to challenge the constitutionality of the checkpoint. The court remanded the case to the trial court for appropriate findings of fact and conclusions of law on the constitutionality of the checkpoint and for entry of an order or judgment consistent with the trial court's ruling on this issue.

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

State v. Hess, ___ N.C. App. ___, 648 S.E.2d 913 (21 August 2007). An officer on patrol at night ran a vehicle's registration plate and then the registered owner's driver's license, which was reported to be suspended. The officer could not determine the sex or race of the driver. The officer stopped the vehicle. The court ruled, relying on cases from other jurisdictions, that the officer had reasonable suspicion to stop the vehicle. The court stated that it was reasonable for the officer under these circumstances to infer that the owner was driving the vehicle.

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

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

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

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

law on this issue.)

- (1) Magistrate Had Substantial Basis for Concluding There Was Probable Cause to Issue Search Warrant to Search Home for Illegal Drugs; Court Reverses Trial Judge's Grant of Defendant's Pretrial Motion to Suppress**
- (2) After Granting Defendant's Pretrial Motion to Suppress Evidence, Trial Judge Erred in Dismissing Indictments; State Had Right to Try Defendant Without Suppressed Evidence If It Chose to Do So**

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (4 September 2007). The trial judge granted the defendant's pretrial motion to suppress evidence on the ground that probable cause did not exist to issue a search warrant to search the defendant's home for illegal drugs. The judge then dismissed the indictments against the defendant. The state appealed. (1) The court ruled that the magistrate had a substantial basis for concluding there was probable cause to issue a search warrant to search the defendant's home for illegal drugs. The officer's affidavit stated that he had received information from a confidential and reliable informant who had seen hydrocodone (without a prescription) inside the defendant's home within the past 48 hours. He had known the informant for nine years, during which time the informant had provided "confidential and reliable" information that had proven true through independent investigations. The informant was familiar with hydrocodone and its uses. The officer had 24 years' experience with his law enforcement agency, including seven years of street level drug interdiction. The court stated that even though the officer did not set out in exact detail the connection between the informant and the prior drug investigations, the magistrate could properly infer that the informant had provided reliable information to the officer in these situations. (2) The court ruled that the trial judge erred in dismissing the indictments against the defendant after granting the defendant's pretrial motion to suppress evidence. The state had a right to try the defendant without the suppressed evidence if it chose to do so.

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.

- (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. ___, 644 S.E.2d 235 (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 there 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 (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 (1993).

Evidence Issues

Crawford

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

State v. Lewis, 361 N.C. 541, 648 S.E.2d 824 (24 August 2007). (Author's note: The North Carolina Supreme Court's initial decision in this case was reported at 360 N.C. 1 (2005). The defendant sought review with the United States Supreme Court, which remanded the case to the North Carolina Supreme Court for further consideration in light of *Davis v. Washington*, 126 S. Ct. 2266 (2006).] The defendant was convicted of felonious assault, armed robbery, and feloniously breaking and entering. The victim died before trial and thus did not testify and be subject to cross-examination (the cause of death was not related to these crimes). The state was allowed at trial to offer her statements made to a law enforcement officer who had responded to the crime scene shortly after it was reported by neighbors, although apparently several hours after the crimes had been committed. The victim told the officer what had

occurred. Several hours later, a detective showed a photographic lineup to the victim in which she identified the defendant's photo as the person who committed the crimes against her. The court ruled that the victim's statements and the photo identification were testimonial statements under *Davis v. Washington*, 126 S. Ct. 2266 (2006), and their admission violated the defendant's confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court's analysis of the victim's statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine "what happened" rather than "what is happening"; (3) the investigation was formal and conducted outside the defendant's presence; (4) the victim's statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred sometime after the crimes had been committed. The court ruled that it was also clear that the victim's later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim's statements was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

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

State v. Heinricy, ___ N.C. App. ___, 645 S.E.2d 147 (5 June 2007). The defendant was convicted of second-degree murder based on his driving recklessly while impaired and killing a tow truck operator. The state was permitted to introduce an affidavit containing the defendant's blood alcohol level involving a prior DWI conviction that was introduced to prove malice. The chemist who tested the defendant's blood with a gas chromatograph and prepared the affidavit did not testify at the defendant's trial. The court ruled, based on *State v. Forte*, 360 N.C. 427, 629 S.E.2d 137 (2006), *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984), and *State v. Cao*, 175 N.C. App. 434, 626 S.E.2d 301 (2006), that the affidavit was not a testimonial statement under *Crawford v. Washington*, 541 U.S. 36 (2004), and its admission did not violate the defendant's confrontation rights.

(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), that an 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) Statements Made by Victim to Friend Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 126 S. Ct. 2266 (2006)**
- (2) Statements Made by Victim to Friend Were Admissible as Present Sense Impressions, Rule 803(1)**

State v. Williams, ___ N.C. App. ___, 648 S.E.2d 896 (21 August 2007). The defendant was convicted of first-degree murder. (1) The court ruled that statements made by the victim to a friend were not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S. Ct. 2266 (2006). The statements were made before the commission of the murder and in the course of a private conversation outside the presence of a law enforcement officer. There was no indication that the statements were made with the thought of a future trial in mind. (2) The court ruled that the statements made by the victim to a friend were admissible as present sense impressions, Rule 803(1). The victim spoke by telephone to the friend immediately before the defendant and accomplice arrived at the victim's house to commit the murder, which was only two hours after the accomplice had initially spoken to the victim.

Opinion Testimony

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

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

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

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

Trial Judge Did Not Abuse Discretion in Not Allowing Defense Eyewitness Identification Expert to Testify

State v. McLean, ___ N.C. App. ___, 645 S.E.2d 162 (5 June 2007). The defendant was convicted of first-degree murder, three counts of armed robbery, and other offenses. The court ruled, relying on *State v. 147* N.C. App. 637, 556 S.E.2d 666 (2001), and *State v. Lee*, 154 N.C. App. 410, 572 S.E.2d 170 (2002), that the trial judge did not abuse his discretion in not allowing the defense eyewitness identification expert to testify. The expert did not interview the eyewitnesses, did not observe their trial testimony, and did not visit the crime scene.

Trial Judge Did Not Err in Imposing Sanction of Prohibiting Testimony by Defense Expert on Reliability of Confidential Informants When Defendant Failed to Give Proper Notice to State Under G.S. 15A-905(c)(2)

State v. Leyva, ___ N.C. App. ___, 640 S.E.2d 394 (6 February 2007). The defendant was convicted of cocaine trafficking offenses. The court ruled that the trial judge did not err in imposing the sanction of prohibiting testimony by a defense expert on the reliability of confidential informants when the defendant failed to give proper notice to the state under G.S. 15A-905(c)(2) (give notice to state of expert witnesses defendant reasonably expects to call as witness at trial). The defendant did not give notice to the state until it had presented the testimony of several officers about confidential informants. The trial judge ruled that the defendant could have anticipated the issue concerning confidential informants because the defendant was aware of the state's use of a confidential informant, and the defendant's proposed expert testimony was not required by the interests of justice.

Testimony about Gangs

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

State v. Brockett, ___ N.C. App. ___, 647 S.E.2d 628 (7 August 2007). The defendant was convicted of first-degree murder and felonious assault involving gang-related offenses. The court ruled that the trial judge did not err in allowing an officer with training and experience with gangs to explain the meaning of gang terminology in a taped telephone conversation between the defendant and his brother.

Trial Judge Erred in Drug Prosecution in Allowing State to Introduce Evidence of Defendant's Gang Membership and That Hollow Point Bullets Were Recovered in Guns Seized from Defendant and Accomplice

State v. Gayton, ___ N.C. App. ___, 648 S.E.2d 275 (7 August 2007). An undercover officer bought cocaine from the defendant and his accomplice. A gun was recovered from the passenger seat of a vehicle that the defendant had been occupying. The defendant was convicted of trafficking by possessing cocaine and carrying a concealed weapon. The court ruled that the trial judge erred by allowing the state to introduce evidence of the defendant's gang membership. The court stated that even if the officers felt forced to revamp the drug buy operation after learning of the defendant's gang membership to reduce the likelihood of violence, this information was irrelevant to the offenses being tried. The court also ruled that the trial judge erred in allowing an officer to testify that hollow point bullets were recovered from guns seized from the defendant and his accomplice; the evidence was irrelevant to the issues in this case.

State Was Properly Permitted to Cross-Examine Defense Character Witness Concerning Knowledge of Defendant's Gang Membership When Character Witness Had Testified About Defendant's Reputation as a Good Marine

State v. Perez, ___ N.C. App. ___, 641 S.E.2d 844 (20 March 2007). The defendant was convicted of second-degree murder. He offered evidence of self-defense. He also offered testimony through a character witness about his good character and reputation as a good Marine. The state on cross-examination was allowed to question the character witness about his knowledge of the defendant's gang associations and whether his gang membership was consistent with his reputation as a good Marine. The court rejected the defendant's argument that the ruling in *Dawson v. Delaware*, 503 U.S. 159 (1996) (irrelevant evidence of defendant's gang membership was inadmissible), barred this testimony

Rule 404(b)

Trial Judge Did Not Err in Admitting Under Rule 404(b) to Prove Identity Evidence of Prior Armed Robberies in Which Gun Defendant Used to Commit Those Offenses Was Same Weapon Defendant Used in Murder Being Tried, and Also Admitting Defendant's Guilty Pleas to the Armed Robberies

State v. Brockett, ___ N.C. App. ___, 647 S.E.2d 628 (7 August 2007). The defendant was convicted of first-degree murder and felonious assault involving gang-related offenses. The court ruled that the trial judge did not err in admitting under Rule 404(b) to prove identity evidence of prior armed robberies in which the gun that the defendant used to commit those offenses was same weapon the defendant used in the murder being tried. The court stated that the evidence demonstrated that the defendant had used or had access to the same firearm within two months of the shootings and was relevant to prove identity and supported a reasonable inference that the same person committed both the armed robberies and the murder and felonious assault. The court also ruled, distinguishing *State v. Wilkerson*, 356 N.C. 418 (2002) (adopting dissenting opinion in Court of Appeals, 148 N.C. App. 310) and *State v. McCoy*, 174 N.C. App. 105 (2005), that the trial judge did not err in admitting not only the testimony of an accomplice and investigators of the armed robberies, but also the transcript of the defendant's plea of guilty to the armed robberies. The court stated that the transcript of plea was more than bare evidence of the defendant's prior armed robbery convictions. Rather, it was an admission by the defendant that he had committed the armed robberies.

(1) Evidence of Killing Committed Ten Years Before Murder Being Tried Was Not Too Dissimilar or Remote to Be Admitted Under Rule 404(b)

(2) Trial Judge Erred in Allowing Conviction to Be Admitted Under Rule 404(b)

State v. Badgett, 361 N.C. 234, 644 S.E.2d 206 (4 May 2007). The defendant was convicted of a first-degree murder committed in 2002. The trial judge admitted under Rule 404(b) evidence of the facts involving the defendant's killing of another person in 1992 as well as the defendant's conviction of voluntary manslaughter for that killing. (1) The court ruled that evidence of the killing was not too dissimilar or remote to be admitted. The court reviewed the evidence and concluded that there were remarkable similarities between the two killings, including fatal stab wounds to an unarmed victim's neck with a folding pocketknife that occurred during an argument with the victim in the victim's home. Concerning the temporal requirement, the defendant was in prison for five of the ten years between the two killings (such time is excluded by case law), leaving only five years between them. (2) The court ruled that the trial judge erred in allowing the state to introduced evidence of the defendant's conviction of voluntary manslaughter for the 1992 killing. The court relied on its ruling in *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583, *reversing per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion of the Court of Appeals). Evidence of the prior conviction was inadmissible when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609.

Evidence of Recent Armed Robberies and Convictions of Those Armed Robberies Was Admissible Under Rule 404(b) in Armed Robbery Trial [But See Author's Note]

State v. Morgan, ___ N.C. App. ___, ___ S.E.2d ___ (15 May 2007). The defendants were convicted of two counts of armed robbery and other offenses. The court ruled that evidence of recent armed robberies as well as the convictions of those armed robberies was admissible under Rule 404(b) to show the defendants' identity, motive, intent, common plan, knowledge, and opportunity. [Author's note: The ruling relating to the admissibility of the convictions appears to be in conflict with *State v. Badgett*, 361

N.C. 234, 644 S.E.2d 206 (4 May 2007) (evidence of the prior conviction was inadmissible under Rule 404(b) when the state had introduced evidence of the underlying facts and circumstances of the conviction and, in this case, the defendant did not testify so the conviction was not admissible under Rule 609).]

Trial Judge Erred in Trial of Possession with Intent to Sell or Deliver Cocaine in Admitting Evidence Under Rule 404(b) of Defendant's Prior Sale of Cocaine and Resulting Conviction That Occurred Eight Years Earlier Because Evidence Lacked Sufficient Similarity With Offense Being Tried

State v. Carpenter, 361 N.C. 382, 646 S.E.2d 105 (28 June 2007), *reversing*, 179 N.C. App. 79, 632 S.E.2d 538 (2006). The court ruled that the trial judge erred in a trial of possession with intent to sell or deliver cocaine in admitting evidence under Rule 404(b) of the defendant's prior sale of cocaine and the resulting conviction that occurred eight years earlier, because the evidence lacked sufficient similarity with the offense being tried. The offense being tried involved an officer's discovery of cocaine on the person of the defendant who was a passenger in a vehicle stopped by the officer. The Rule 404(b) offense involved an officer's use of an informant to make a controlled buy from the defendant. (See the court's discussion of other differences between the two offenses and its detailed analysis.)

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. ___, ___ S.E.2d ___ (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).

Other Evidence Issues

To the Extent That North Carolina Evidence Rule 103(a)(2) Directly Conflicts with North Carolina Appellate Rule 10(b)(1), It Is Unconstitutional

State v. Oglesby, 361 N.C.550, 648 S.E.2d 819 (24 August 2007), *affirming*, 174 N.C. App. 658, 622 S.E.2d 152 (2005). North Carolina evidence Rule 103(a)(2) provides that once a trial court rules definitively on the record admitting or excluding evidence, either at or before trial, a party need not review an objection or offer of proof to preserve a claim of error for appeal. The court ruled that this rule is in direct conflict with North Carolina Rule of Appellate Procedure 10(b)(1), which has been interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of the admissibility of evidence for appeal unless a defendant renews the objection during trial. Because the Constitution of North Carolina exclusively vests the authority to make appellate rules with the North Carolina Supreme Court, the court ruled that to the extent evidence Rule 103(a)(2) conflicts with appellate Rule 10(b)(1), it is unconstitutional.

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

State v. Hernandez, ___ N.C. App. ___, 646 S.E.2d 579 (3 July 2007). The defendant was on trial for rape. The court ruled that the trial judge erred in not allowing three defense witnesses to offer under Rule

405(a) their personal opinions of the character of truthfulness or untruthfulness of the state's witness (the alleged rape victim) who had testified on the state's case in chief. The defendant needed to show only that each of the three witnesses had personal knowledge of the witness and they had formed an opinion about her character for truthfulness or untruthfulness. The defendant was not required to show that the witness had been untruthful to the defense witnesses as a foundation for their testimony.

Criminal Offenses

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

State v. Harris, 361 N.C. 400, 646 S.E.2d 526 (28 June 2007), *affirming*, 178 N.C. App. 723, 632 S.E.2d 534 (2006). The court ruled that a positive urinalysis result for marijuana metabolites is insufficient alone to support a conviction of possessing marijuana. [Author's note: The other ruling by the North Carolina Court of Appeals in this case was not reviewed by the North Carolina Supreme Court and remains a valid precedent: defendant's positive urine test for cocaine and a witness's testimony that she saw the defendant snort cocaine was sufficient evidence to support his conviction of possessing cocaine.]

- (1) State Laid Proper Foundation in Trafficking Case for Testimony on Weighing Marijuana on Scale**
- (2) State Presented Sufficient Evidence of Weight of Marijuana Excluding Mature Stalks**

State v. Manning, ___ N.C. App. ___, 646 S.E.2d 573 (19 June 2007). The defendant was convicted of trafficking in marijuana in excess of 10 pounds. (1) The court ruled that the state laid a proper foundation for testimony on weighing marijuana on a scale. The state's evidence showed that the scale was functioning properly. (2) The court ruled that the state presented sufficient evidence of the weight of the marijuana excluding the mature stalks. (See the court's discussion of the state's and defendant's evidence on this issue.)

Insufficient Evidence to Support Conviction of Conspiracy to Traffic in Cocaine

State v. Euceda-Valle, ___ N.C. App. ___, 641 S.E.2d 858 (20 March 2007). The defendant was convicted of trafficking by possessing over 400 grams of cocaine and conspiracy to traffic in cocaine by transporting over 400 grams of cocaine. The defendant was stopped for a traffic offense, and cocaine was found in the vehicle's trunk. There also was a passenger in the vehicle. The court ruled there was insufficient evidence to support the trafficking conspiracy conviction. There was no evidence of: (1) conversations between the defendant and passenger; (2) unusual movements or actions by either of them; (3) large amounts of cash on the passenger; (4) possession of weapons; or (5) anything else suggesting an agreement.