

Felony and Misdemeanor Criminal Case Update

2008 Spring Public Defender Attorney and Investigator Conference
(includes cases decided through April 15, 2008)

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

Warrantless Stops and Searches

Seizures

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.

Checkpoints

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. ___, 651 S.E.2d 243 (2 October 2007). (**Author's note: The North Carolina Supreme Court has granted the state's petition to review this ruling.**) 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.

Reasonable Suspicion

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

State v. Jones, ___ N.C. App. ___, 651 S.E.2d 589 (16 October 2007). The court ruled that an officer had reasonable suspicion for a DWI stop of a defendant operating a two-wheeled motorized vehicle, based on the following facts (quoted language is officer's testimony as recounted by the court): The officer saw the defendant operating a motorized vehicle in a "wobbly" manner, and the defendant had to "put her foot down" on the road to negotiate a right hand turn and "almost dropped the moped." The officer equated her operation of the vehicle as she was turning to that of "a child learning to ride a bicycle" for the first time. After the defendant made the turn, the officer saw the defendant for "two to three" minutes and followed her for "two to three blocks." During this time, he watched the defendant wobble on the moped and described her operation of it as "jerky."

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

State v. Barnard, ___ N.C. ___, 658 S.E.2d 643 (11 April 2008), *affirming*, ___ N.C. App. ___, 645 S.E.2d 780 (19 June 2007). An officer stopped his marked patrol vehicle behind the defendant's vehicle, which was stopped at a red light. When the light turned green, the vehicle remained stopped for approximately thirty seconds before making a legal left turn; the vehicle had remained at the light without

any reasonable explanation for doing so. The officer initiated a stop of the vehicle. The court ruled that reasonable suspicion supported the stop of the vehicle based on these facts and the officer's testimony, based on his training and experience, that the driver might be impaired. The officer said that impairment slows reaction time, and that a red light turning green and the driver hesitating for thirty seconds would definitely be an indication of impairment. The court noted that it was irrelevant that part of the officer's motivation to stop the vehicle may have been for a perceived, though apparently nonexistent, statutory violation of impeding traffic. The court stated that the constitutionality of a traffic stop depends on objective facts, not an officer's subjective motivation; the court cited *Whren v. United States*, 517 U.S. 806 (1996), and *State v. McClendon*, 350 N.C. 630 (1999).

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

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. ___, 649 S.E.2d 902 (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. ___, 649 S.E.2d 664 (18 September 2007), *temporary stay allowed*, ___ N.C. ___ (8 October 2007). A law enforcement officer during the late afternoon heard a radio report that an armed robbery had been committed at a convenience store. The robber was described as a black male. The officer also heard over the radio that another officer has seen a black male walking on Lake Ridge Drive shortly after the robbery. The officer turned onto Deanna Drive to begin a sweep of the area. The robber had reportedly left the rear of the store, heading in the general direction of the area that the officer was searching. The officer knew that there was a path running approximately from the store through

woods to Lake Ridge Drive. The officer approached the intersection of Deanna Drive and Lake Ridge Drive approximately five minutes after the robbery. The officer saw a black male near where the path exited onto Lake Ridge Drive. From the time the officer turned off Capital Boulevard until this point, the officer had seen no one else. He drove closer to the black male and motioned him to approach his car. In response, the defendant walked over to the car. The officer conducted a stop and frisk of the black male. The court ruled that the officer did not have reasonable suspicion to stop and frisk the defendant for the armed robbery. (See the court's discussion of the case law on this issue.)

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

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

Actions after Stop

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

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

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

State v. Campbell, ___ N.C. App. ___, 656 S.E.2d 721 (19 February 2008). The defendant was convicted of possession of burglary tools and possession of drug paraphernalia. (1) At approximately 3:40

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

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

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (1 April 2008). An officer was on bicycle patrol in a community known for drug activity. He saw a car speeding down a street, crossing over the road, and jumping the curb onto the grass. The driver then drove the vehicle behind a building out of the officer's view. The officer was informed by radio that the defendant owned the vehicle, and the officer recalled that his agency had received a tip that named this building as being a drug location and the defendant as selling a large amount of cocaine from it. The officer went to the building and saw the defendant talking to someone inside an apartment. The officer made eye contact with the defendant, who then stopped talking. The defendant straightened up abruptly and had a surprised or frightened look on his face. The officer thought he was going to take off running. When the officer asked him what he was doing, the defendant started to back away. He turned his right side away from the officer and reached into his right pocket. The officer told him to keep his hands out of his pockets. The officer did a pat frisk and felt a cylindrical object that made a rattling sound when moved. The object felt like a film canister. The officer asked if there was crack in his pocket. The defendant responded, "no," and lowered his head and slumped his shoulders. The officer then reached in the pocket, pulled out and opened the canister, and discovered rocks of crack cocaine. (1) The court ruled that the officer had reasonable suspicion to make an investigative stop and frisk of the defendant, based on the facts set out above. (2) The court ruled the officer's discovery of the crack cocaine in the film canister during the frisk of the defendant did not violate the Fourth Amendment. Under the "plain feel" doctrine set out in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), there was substantial evidence that the contents of the film canister were immediately identifiable by the officer as crack cocaine, based on the facts set out above.

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

State v. Stone, 362 N.C. 50 (7 December 2007). The court ruled that a defendant who gave consent to a generic search for weapons or drugs during a routine traffic stop in which an officer shined a flashlight inside his underwear was not within the scope of the defendant's consent to search and thus violated the

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

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

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

[Author's note: This ruling does not expand the authority of a North Carolina law enforcement officer to make an arrest or to conduct a search incident to arrest for a misdemeanor. To the extent that state law may restrict an officer's exercise of authority beyond the restrictions imposed by the Fourth Amendment, officers must follow state law. (1) Before this ruling, officers under G.S. 15A-401(b)(1) already had the authority to make an arrest for any misdemeanor committed in the officer's presence. Thus, North Carolina statutory law was already consistent with this Fourth Amendment ruling. (2) This ruling does not affect state law that does not authorize an officer to arrest a person who has committed an infraction, which is a noncriminal violation of law. (3) It does not affect state law restrictions on making a warrantless arrest for a misdemeanor not committed in the officer's presence, as set out in G.S. 15A-

401(b)(2). (4) It does not affect the ruling in *Knowles v. Iowa*, 525 U.S. 113 (1998), when the Court ruled that an officer who issues a citation to a defendant is not authorized under the Fourth Amendment to conduct a search incident to arrest, even if the officer could have made an arrest for that offense. (5) When an officer's conduct violates a statute under Chapter 15A but the conduct is not a constitutional violation, G.S. 15A-974(2) governs whether evidence must be suppressed.]

Miranda

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

State v. Cummings, ___ N.C. App. ___, 656 S.E.2d 329 (5 February 2008). The defendant was advised of his *Miranda* rights and waived them. Shortly after questioning began, he requested a lawyer and questioning stopped. However, an officer then asked for the defendant's consent to search his vehicle, which he granted. The court upheld the trial judge's denial of the defendant's motion to suppress evidence seized as a result of the consent search. The court noted that *State v. Frank*, 284 N.C. 137 (1973), had ruled that *Miranda* warnings are inapplicable to searches and seizures. The court also stated that it found persuasive many federal court cases that have ruled that asking for a consent search is not interrogation under *Miranda*; for example, *United States v. Shlater*, 85 F.3d 1251 (7th Cir. 1996), and *United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994).

Search Warrants

Court Upholds Anticipatory Search Warrant Whose Execution Was Contingent on Confidential Informant, Who Was Working Under Officers' Directions, To Give Prearranged Signal to Officers After Informant Entered Residence and Purchased Marijuana There

State v. Stallings, ___ N.C. App. ___, ___ S.E.2d ___ (18 March 2008). The court, relying on *State v. Falbo*, 526 N.W.2d 814 (Wisc. Ct. App. 1994), and *State v. Smith*, 124 N.C. App. 565 (1996), upheld an anticipatory search warrant whose execution was contingent on a confidential informant, who was working under officers' directions, to give a prearranged signal to the officers after the informant entered a residence and purchased marijuana there. The confidential informant during a prior one year period had purchased marijuana from the defendant at his residence. Based on the *Falbo* and *Smith* rulings, the court set out a test to consider the legality of this anticipatory search warrant and concluded that the warrant satisfied the test.

Due Process

One-Photo Identification Procedure Was Not Impermissibly Suggestive Under Due Process Clause

State v. Marsh, ___ N.C. App. ___, 652 S.E.2d 744 (20 November 2007). An officer stopped a truck matching the description of a truck that had been reported stolen. The defendant got out of the truck, but the officer ordered him back into the truck. Instead, the defendant ran away. The next day, the officer recalled that he had assisted another officer in making a traffic stop of the defendant. The officer viewed a Division of Motor Vehicles photo matching the name on the traffic citation resulting from that stop, and

the officer confirmed that the man in the photo was the defendant. The court ruled that the use of a single photo in this context was not impermissibly suggestive under the Due Process Clause. [Author's note: G.S. 15A-284.52, enacted by Session Law 2007-421 (House Bill 1625) and effective for offenses committed on or after March 1, 2008, sets out statutory requirements for photo lineups.]

Double Jeopardy

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

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

Impaired Driving

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

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

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.

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

White v. Tippett, ___ N.C. App. ___, 652 S.E.2d 728 (20 November 2007). Petitioner's driver's license was revoked because she willfully refused to take an Intoxilyzer test after being arrested for an implied consent offense (DWI). A superior court judge upheld her license revocation and she appealed to the court of appeals. (1) The court ruled that the arresting officer had reasonable grounds to believe that the petitioner had committed the DWI to support the license revocation. The petitioner evaded a license checkpoint and the officer later detected an odor of alcohol about her (see other facts in the court's opinion). (2) The court ruled that the officer was not required to wait thirty minutes before offering the Intoxilyzer test when the petitioner did not clearly indicate that she wanted to call an attorney.

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

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

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

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

the statute requires a written report and thus her oral statement to the officer did not constitute a report. The court also ruled that the identity of the driver is required to be included in a reportable accident report.

Other Traffic Offenses

Court Affirms Court of Appeals Ruling That There Was Sufficient Evidence of Defendant's Knowledge That His License Was Revoked to Support Conviction of Driving While License Revoked

State v. Coltrane, ___ N.C. ___, 658 S.E.2d 656 (11 April 2008), *affirming*, ___ N.C. App. ___, 645 S.E.2d 793 (19 June 2007). The court, per curiam and without an opinion, affirmed the ruling by the North Carolina Court of Appeals that there was sufficient evidence of the defendant's knowledge that his license was revoked to support his conviction of driving while license revoked. The state produced a signed certificate of an employee of the Division of Motor Vehicles (DMV) stating that the employee deposited the notice of revocation in the United States mail in a postage paid envelope, addressed to the address shown by DMV records as the defendant's address. The court of appeals ruled that this certification constituted the giving of notice under G.S. 20-48(a). Therefore, the state raised a prima facie presumption of receipt, and the defendant was obligated to rebut the presumption. The defendant chose not to present any evidence at trial and the presumption was clearly not rebutted. The court concluded that the state met its burden on the element of knowledge. [Author's note: The current version of G.S. 20-48(a) was not applicable to this case, but the result would be the same (that is, sufficient evidence of knowledge).]

Trial Judge Did Not Err in Not Giving Jury Instruction on Contributory Negligence in Prosecution of Felony Death by Vehicle

State v. Bailey, ___ N.C. App. ___, 646 S.E.2d 837 (17 July 2007). The defendant was convicted of felony death by vehicle. The defendant drove his vehicle in the rear of the victim's vehicle, which had stopped on a highway. The court ruled that the trial judge did not err in not giving a jury instruction on the victim's contributory negligence because that theory is not a defense to a criminal prosecution. The court noted that if the defendant had requested a jury instruction on intervening negligence, the judge would have been required to give that instruction [see *State v. Hollingsworth*, 77 N.C. App. 36 (1985)]. The court stated that even assuming that the victim was negligent, her negligence was at most a concurring proximate cause of her death, which still would have made the defendant criminally liable. The state's evidence tended to show that the defendant's blood alcohol level was over twice the legal limit, which inhibited him from exercising due care and keeping a proper lookout.

Criminal Offenses

Drug Offenses

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

State v. Harris, 361 N.C. 400 (28 June 2007), *affirming*, 178 N.C. App. 723 (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.]

Assaults

Sufficient Evidence of Element of Strangulation in Assault by Strangulation

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

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

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

Sex Offenses

Convictions of Both First-Degree Statutory Rape and First-Degree Forcible Rape Based on Same Act Is Not Authorized, and Same Rule Applies to First-Degree Statutory Sexual Offense and First-Degree Forcible Sexual Offense

State v. Ridgeway, ___ N.C. App. ___, 648 S.E.2d 886 (21 August 2007). The defendant was convicted of multiple offenses involving the murder and sexual assaults of a fourteen year old victim. The court ruled that convictions of both first-degree statutory rape and first-degree forcible rape based on the same act is not authorized, and the same rule applies to first-degree statutory sexual offense and first-degree forcible sexual offense.

Sexual Battery Is Not Lesser-Included Offense of Second-Degree Rape Under G.S. 14-27.3(a)(2) (Vaginal Intercourse With Mentally Helpless, Mentally Incapacitated, or Physically Helpless)

State v. Pettis, ___ N.C. App. ___, 651 S.E.2d 231 (18 September 2007). The court ruled that sexual battery is not a lesser-included offense of second-degree rape under G.S. 14-27.3(a)(2) (vaginal intercourse with mentally helpless, mentally incapacitated, or physically helpless). Sexual battery has a purpose element (battery committed for purpose of sexual arousal, sexual gratification, or sexual abuse) that is not an element of second-degree rape under G.S. 14-27.3(a)(2).

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

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

Defendant's Knowledge of Victims' Ages Is Element in State's Prosecution of Statutory Rape When State Relies on Aiding and Abetting Theory to Prove Defendant's Guilt and Evidence Is Offered Concerning Defendant's Lack of Knowledge That Victims Were Under Statutory Age of Consent

State v. Bowman, ___ N.C. App. ___, 656 S.E.2d 638 (19 February 2008), *temporary stay allowed*, ___ N.C. ___ (11 April 2008). The defendant was convicted of three counts of aiding and abetting statutory rape under G.S. 14-27.7A (statutory rape of 13, 14, or 15 year old). The court ruled, relying on *State v. Evans*, 279 N.C. 447 (1991), *State v. Capps*, 77 N.C. App. 400 (1985), *State v. Walker*, 35 N.C. App. 182 (1978), and other cases, that the defendant's knowledge of the victims' ages is an element in the state's prosecution of statutory rape when the state relies on the aiding and abetting theory to prove the defendant's guilt and evidence is offered concerning the defendant's lack of knowledge that the victims were under the statutory age of consent. The court stated that although statutory rape is a strict liability crime, aiding and abetting statutory rape is not. Evidence was presented that the defendant (prosecuted as an aider and abettor) did not know the victims' ages, and he thought they were over 18 years old. The court ruled that the defendant was entitled to a jury instruction requiring the state to prove the defendant knew that the victims were under 16 years old.

- (1) Probable Cause Existed to Issue Search Warrant to Search Computer in Defendant's Home Based on Instant Messages Between Defendant and Law Enforcement Officers Posing as Twelve-Year-Old Girl**
- (2) Impossibility Not Bar to Commission of Attempt Offenses Based on Conversations With Law Enforcement Officers Posing as Young Girl**

State v. Ellis, ___ N.C. App. ___, 657 S.E.2d 51 (19 February 2008). (1) The court ruled that probable cause existed to issue a search warrant to search a computer in the defendant's home based on instant messages between the defendant and law enforcement officers posing as a twelve-year-old girl. The search warrant affidavit contained many sexually explicit instant message conversations in which the defendant asked to meet the "children" to engage in sexual conduct and stated that he transmitted a video of himself masturbating. Other conversations including his statements to a "mother" of young girls involving sexual contact with the girls. In other conversations the defendant admitted that he had penetrated children with his penis. (2) The court also stated that although it was not necessary to find in upholding the search warrant, the defendant's conversations with officers posing as a young girl constituted attempted indecent liberties under G.S. 14-202.1 and attempted computer solicitation under the former version of G.S. 14-202.3. Impossibility of committing the completed offenses would not bar a person from attempting to commit these offenses; see *State v. Hageman*, 307 N.C. 1 (1982).

Other Criminal Offenses

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

In re B.D.N., ___ N.C. App. ___, 649 S.E.2d 913 (18 September 2007). Evidence showed that the juvenile typed "Bomb at Lunch" on a school calculator in a middle school math class. (1) The court ruled that there was sufficient evidence to support the juvenile's adjudication of making a false bomb report under G.S. 14-69.1(a) (false bomb report involving a building). Although no one saw the juvenile type the words on the calculator, testimony by students and teachers and admissions by the juvenile were sufficient to support the adjudication. (2) The court rejected the juvenile's argument that judgment should

have been arrested for the adjudication under G.S. 14-69.1(a) because the state should have charged a violation under G.S. 14-69.1(c) (false bomb report involving public building). The court ruled that the state could have charged the juvenile under either statutory provision, and the state proved all the elements of the offense under G.S. 14-69.1(a).

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

State v. Hinkle, ___ N.C. App. ___, ___ S.E.2d ___ (15 April 2008). The defendants were convicted of littering under G.S. 14-399 for placing dead animals in a private dumpster behind a grocery store. The court ruled that this evidence was insufficient to support the convictions because the state failed to prove that the dumpster was not a “litter receptacle” under G.S. 14-399. The court concluded that the “[i]nto litter receptacle” language of the statute was part of the definition of the littering offense for which the state had the burden of production and proof; it was not an exception to the offense constituting an affirmative defense. The court indicated that the defendants could have been charged with second-degree trespass (the dumpster had a sign affixed to it saying, “notice, private use only, violators will be prosecuted”) and a violation of G.S. 106-403 (unlawful disposition of dead domesticated animals).

Defendant’s Letter to Victim Was Insufficient to Support Conviction of Attempting to Intimidate State’s Witness

State v. Williams, ___ N.C. App. ___, 650 S.E.2d 607 (2 October 2007). The defendant was convicted of attempting to intimidate a witness. The defendant was in jail with another person (Scott), who was charged with the rape and kidnapping of a female. The state’s case against the defendant consisted solely of a letter that the defendant had written to the victim. The indictment charged that the defendant had “by menaces and coercive statements attempt[ed] to deter and prevent” her from attending court by sending the letter to her. The court examined the letter and found that it was not threatening, coercive, or menacing (see the discussion in the court’s opinion). The court ruled that the evidence was insufficient to support the defendant’s conviction.

Sufficient Evidence Existed That Defendant Had Reasonable Grounds to Believe Building Was Occupied to Support Conviction of Discharging Firearm into Occupied Property

State v. Everette, 361 N.C. 646 (9 November 2007). The defendant was convicted of discharging a firearm into occupied property. Officers responded to a fight in downtown Greenville. The defendant cursed at an officer and was told to leave. A vehicle arrived and the defendant entered the front passenger seat. As the vehicle departed, one of the officers saw the defendant shooting from the vehicle. Evidence showed that at least seven shots were fired and two people were seriously injured. In addition, two shots entered a restaurant where the owner was still present after it had closed. The restaurant was located in an area where other establishments were still open. The court ruled that there was sufficient evidence that the defendant had reasonable grounds to believe the restaurant was occupied to support the defendant’s conviction.

Insufficient Evidence of Intent to Commit Felony Inside House to Support Conviction of First-Degree Burglary; Court Suggests Modification of Pattern Jury Instruction

State v. Goldsmith, ___ N.C. App. ___, 652 S.E.2d 336 (6 November 2007). The court ruled that there was insufficient evidence of the defendant’s intent to commit the felony of armed robbery inside the house to support the defendant’s conviction of first-degree burglary. The court stated that the defendant’s act of pulling the victim outside the house was evidence to support an inference that the defendant

intended to commit the robbery outside the home. The court also suggested that the pattern jury instruction should require the jury to find that the defendant at the time of the breaking and entering intended to commit the felony in the building that was broken into and entered.

Sufficient Evidence of Culpable Negligence to Support Juvenile’s Delinquency Adjudication of Involuntary Manslaughter When Juvenile, After Giving Illegal Drug to Victim Who Then Became Seriously Ill, Failed to Aid Her

In re Z.A.K., ___ N.C. App. ___, ___ S.E.2d ___ (18 March 2008). The juvenile was adjudicated delinquent of involuntary manslaughter. The court ruled that there was sufficient evidence of culpable negligence to support the juvenile’s delinquency adjudication when the juvenile, after giving an illegal drug (Ecstasy) to the victim who then became seriously ill, failed to aid her. (See the court’s detailed discussion of the facts in its opinion.)

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

Joker Club v. Hardin, 183 N.C. App. 92 (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.

Evidence

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, 547 U.S. 813 (2006)

State v. Lewis, 361 N.C. 541 (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, 547 U.S. 813 (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, 547 U.S. 813 (2006), and their admission violated the defendant’s confrontation rights because the defendant had not been afforded an opportunity to cross-examine the victim. The court’s analysis of the victim’s statements to the law enforcement officer at the crime scene included: (1) the victim did not face an immediate threat to her safety (there was no ongoing emergency); (2) the officer sought to determine “what happened” rather than “what is happening”; (3) the investigation was formal and conducted outside the defendant’s presence; (4) the victim’s statements in response to questioning recounted how the crimes had begun and progressed; and (5) the questioning occurred some time after the crimes had been committed. The court ruled that it was also clear that the victim’s later photo identification of the defendant was testimonial. The court ordered a new trial because it determined that the constitutional error in admitting the victim’s statements

was not harmless beyond a reasonable doubt. The court noted that the issue of the defendant's forfeiture of confrontation rights remained an issue that may be developed by the parties during the defendant's new trial.

- (1) Statements Made by Victim to Friend Were Not Testimonial Under Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006)**
- (2) Statements Made by Victim to Friend Were Admissible as Present Sense Impressions, Rule 803(1)**
- (3) Trial Judge Did Not Err in Prohibiting Defense-Proffered Evidence of State's Witness's Plea Bargain Concerning Unrelated Federal Criminal Charge When No Evidence That Plea Bargain Was for Testimony in Current Trial**

State v. Williams, ___ N.C. App. ___, 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*, 547 U.S. 813 (2006). The statements were made before the commission of the murder and in the course of a private conversation outside the presence of a law enforcement officer. There was no indication that the statements were made with the thought of a future trial in mind. (2) The court ruled that the statements made by the victim to a friend were admissible as present sense impressions, Rule 803(1). The victim spoke by telephone to the friend immediately before the defendant and accomplice arrived at the victim's house to commit the murder, which was only two hours after the accomplice had initially spoken to the victim. (3) A state's witness, a jail inmate, testified about incriminating statements made by the defendant to the witness while they were in jail together. The defendant sought to introduce evidence that the witness received a reduced sentence for his cooperation with a federal prosecutor concerning an unrelated federal criminal charge against the witness. The defendant did not establish that the witness had entered into the plea bargain in return for his cooperation in the prosecution of the defendant. The court ruled that under these circumstances the trial judge did not err in prohibiting the introduction of this evidence to show bias.

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

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

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 (2006), *State v. Smith*, 312 N.C. 361 (1984), and *State*

v. Cao, 175 N.C. App. 434 (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.

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

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

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

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

Court Rules That *Crawford v. Washington*, 541 U.S. 36 (2004) Is Not Retroactive

Whorton v. Bockting, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (28 February 2007). In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court ruled that "testimonial statements" by witnesses who do not appear at trial may not be admitted unless the witness is unavailable to testify and there has been a prior opportunity for cross-examination. The Court ruled in this case that the *Crawford* ruling was not retroactive and thus did not apply to cases that had become final on direct review before the date of the *Crawford* ruling, March 8, 2004.

Teague v. Lane*, 489 U.S. 288 (1989), Does Not Bar State Courts From Giving Broader Retroactive Effect to New Rules of Criminal Procedure Than Is Required By *Teague

Danforth v. Minnesota, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (20 February 2008). The Court ruled that the ruling in *Teague v. Lane*, 489 U.S. 288 (1989) (setting out the rules for retroactive application of rulings of the United States Supreme Court), does not bar state courts from giving a broader effect to new rules of criminal procedure than is required by *Teague*. The defendant was convicted and given direct appellate review. The later ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), did not apply retroactively to his conviction under *Teague*. He later filed a state postconviction petition in which he argued that he was entitled to a new trial because the admission of a taped interview violated the *Crawford* ruling. The state appellate court ruled that state courts are not free to give a United States Supreme Court ruling broader retroactive application than given by the United States Supreme Court. The United States Supreme Court reversed the state appellate court ruling. The Court first noted that its ruling in *Whorton v. Bockting*, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (28 February 2007) (*Crawford* is not retroactive), does not require state

courts to apply the *Crawford* ruling to cases that were final when that case was decided. However, the Court ruled that neither *Teague* nor any other federal rule prohibits state courts from doing so. [Author's note: North Carolina appellate courts have not yet ruled on the retroactivity of the *Crawford* ruling in state proceedings.]

Rule 404(b)

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. ___, 645 S.E.2d 93 (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 (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).]

- (1) 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**
- (2) 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. (1) 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. (2) 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 Under Rule 404(b) in Allowing State in Assault Trial to Cross-Examine Defendant About Two Prior Assaults of Other People

State v. Goodwin, ___ N.C. App. ___, 652 S.E.2d 36 (6 November 2007). The defendant was convicted of a felonious assault. The court ruled, relying on *State v. Morgan*, 315 N.C. 626 (1986), that the trial judge erred under Rule 404(b) in allowing the state to cross-examine the defendant about two prior assaults of other people (the state had voluntarily dismissed these assault charges). After examining the

evidence in this case, the court concluded that the state's sole purpose for its cross-examination was to show the defendant's propensity for violence, which is not allowed under Rule 404(b).

Trial Judge 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 (28 June 2007), *reversing*, 179 N.C. App. 79 (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 Did Not Err Under Rule 404(b) in Admitting Evidence of Drug Transaction Occurring Seven Weeks After Drug Transaction Being Tried Based on Their Substantial Similarities

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

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

State v. Peterson, 361 N.C. 587 (9 November 2007), *affirming*, 179 N.C. App. 437 (2006). The defendant was convicted of first-degree murder of A. The court ruled, relying on *State v. Stager*, 329 N.C. 278 (1990), that the trial judge did not abuse his discretion in admitting under Rule 404(b) evidence of the death of B that occurred 16 years before the death of A. The court noted that the state was not required to present direct evidence of the defendant's involvement in the death of B, but could present circumstantial evidence that tends to support a reasonable inference that the same person committed both homicides. The trial judge's findings of fact indicated not only significant similarities between the deaths of A and B, but also sufficient circumstantial evidence that the defendant was involved in B's death.

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

State v. Bowman, ___ N.C. App. ___, 656 S.E.2d 638 (19 February 2008). The defendant was convicted of three counts of aiding and abetting statutory rape, three counts of indecent liberties, and two counts of second-degree kidnapping. The offenses occurred in 2005. (1) The court ruled that evidence of prior sexual activity with another person (not a victim in this trial) committed eight years before offenses being tried was properly admitted under Rule 404(b) and Rule 403. The evidence was admitted to show absence of mistake of age, specific intent in the kidnapping, and an intent for sexual gratification. Concerning temporal proximity, the defendant had been incarcerated for three years and had relocated to another state

during the eight-year time period. (2) The court ruled that the trial judge erred in admitting certified copies of the defendant's sexual battery convictions under Rule 404(b). The court stated that although North Carolina appellate courts are liberal in their inclusion of prior sexual offenses for Rule 404(b) purposes, it found in this case there was little probative value in the defendant's prior convictions for any Rule 404(b) purpose because there was significant testimony concerning the facts underlying the defendant's convictions. (3) The court ruled that the trial judge erred in admitting victim impact evidence during the guilt-innocence stage of the trial because it was irrelevant to any issue in the trial.

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

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

Privileges

Defendant's Statement to His Spouse Was Not Within Marital Communications Privilege Because It Was Made Within Known Hearing of Third Person

State v. Kirby, ___ N.C. App. ___, 653 S.E.2d 174 (4 December 2007). The court ruled that a defendant's statement to his spouse was not within the marital communications privilege because it was made within the known hearing of a third person. The defendant yelled to his spouse in a voice loud enough so anyone in the house could have heard him, and he knew that a third person was in the house. The court also rejected the defendant's argument, based on 1918 and 1929 rulings that predated *State v. Freeman*, 302 N.C. 591 (1981), that only the third person could testify concerning the defendant's statement. The court ruled that the spouse could testify as well.

Defendant's Conversations With Wife in Prison's Visitor Area Were Protected by Marital Communications Privilege When Third Person Was Not Involved in Conversations and Conversations Were Not Intercepted by Prison's Recording Devices

State v. Rollins, ___ N.C. App. ___, ___ S.E.2d ___ (18 March 2008). The court ruled that the defendant's conversations with his wife in a prison's visitor area were protected by the marital communications privilege under G.S. 8-57(c) when a third person was not involved in the conversations and the conversations were not intercepted by the prison's recording devices. The privilege was not defeated when the wife revealed to law enforcement the confidential communications that she had secretly tape-recorded while conversing with the defendant.

Other Evidence Issues

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.

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

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

Trial Judge 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.

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 Under Rule 412(b)(1) or 412(b)(3) in Excluding Evidence of Victim's Prior Sexual History in Prosecution for First-Degree Sexual Offense

State v. Harris, ___ N.C. App. ___, 657 S.E.2d 701 (4 March 2008). The defendant was convicted of first-degree sexual offense. The defendant denied having a sexual encounter with the victim and did not raise consent as a defense. The court ruled that the trial judge did not err under Rule 412(b)(3) in excluding evidence of the victim's prior sexual history with others and did not err under Rule 412(b)(1) in excluding evidence of the victim's prior sexual history with the defendant. Such evidence under these subdivisions is only relevant to the issue of consent between a victim and a defendant.

Right to Counsel

Trial Judge Erred in Effectively Requiring Represented Defendant to Proceed *Pro Se* If He Wished to Testify at His Trial

State v. Colson, ___ N.C. App. ___, 650 S.E.2d 656 (2 October 2007). The day before the defendant’s trial was to begin, his counsel moved to withdraw because counsel told the court that the defendant wished to testify and in counsel’s opinion the defendant’s testimony would be false. The trial judge told the defendant that counsel could not knowingly present testimony that counsel believed to be false and another lawyer could not be appointed to do the same thing. The judge told the defendant that if he insisted on testifying in his own behalf, the defendant could discharge his counsel and proceed *pro se*. The defendant told the judge that he wanted to testify on his own behalf and wanted counsel to represent him. After further conversation, the defendant indicated he would testify and proceed without a lawyer. The court ruled that the trial judge erred in effectively requiring the defendant to proceed *pro se* if he wished to testify at his trial. By choosing to exercise his constitutional right to testify in his own behalf, the defendant was forced to relinquish his constitutional right to counsel. The court discussed the role of counsel on remand of this case for a new trial, specifically Rule 3.3(a)(2) of the Rules of Professional Conduct and Comment 9 to that rule, which states that unless a lawyer knows the client’s testimony will be false, the lawyer must honor the client’s decision to testify.

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

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

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

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

required by G.S. 7A-456(b) that the clerk making the indigency determination notified the defendant of the provisions of G.S. 7A-456(a), which sets out the elements of the offense.

Discovery

- (1) Trial Judge Erred in Allowing State’s Witness to Testify Because State Had Failed to Notify Defendant Under G.S. 15A-903(a)(2) That Expert Testimony Would Be Offered Concerning Identity of Substance Found in Defendant’s Shoe**
- (2) Sufficient Evidence Supported Defendant’s Conviction of Possession of Controlled Substance on Premises of Local Confinement Facility**
- (3) Only One Conviction for Possession of Marijuana Is Allowed Because Defendant Possessed All the Marijuana Simultaneously and for Same Purpose**
- (4) Defendant Is Permitted to Raise on Appeal That One Felony Alleged in Habitual Felon Indictment Was Actually a Misdemeanor Even Though in Trial Court Defendant Stipulated to Convictions in Indictment**

State v. Moncree, ___ N.C. App. ___, 655 S.E.2d 464 (15 January 2008). The defendant was convicted of two misdemeanor counts of possession of marijuana and one count of possession of a controlled substance (marijuana) on the premises of a local confinement facility. After a vehicle stop in which an officer discovered a marijuana joint and a chunk of marijuana in the front passenger seat, the defendant was arrested and transported to the sheriff’s department where the jail was also located. He was required to take off his shoes and socks, and marijuana was found in his left shoe. The marijuana found in the defendant’s shoe was not sent to the SBI for testing. Instead, an SBI agent with education and experience in forensic analysis was allowed to offer his opinion that the substance was marijuana. (1) The court determined that the SBI agent was an expert witness based on his education, training, and experience; he was not simply a lay person offering expert testimony. The court ruled that the trial judge erred in allowing the expert to testify because the state had failed to notify the defendant under G.S. 15A-903(a)(2) that expert testimony would be offered concerning the identity of substance found in the defendant’s shoe. (2) The court ruled that sufficient evidence supported the defendant’s conviction of possession of a controlled substance (marijuana) on the premises of a local confinement facility. “Premises” of a local confinement facility include secured areas in which arrestees are temporarily detained for search, booking, and other purposes. After appearing before a magistrate, he had been taken before a deputy sheriff to be processed because he was under a secured bond. (3) The defendant was convicted of three marijuana offenses. One for the marijuana found in his vehicle, one for the marijuana in his shoe, and one for possessing the marijuana found in his shoe on the premises of a local confinement facility. The court ruled, distinguishing the facts in *State v. Rozier*, 69 N.C. App. 38 (1984), that only one conviction was allowed because the defendant possessed all the marijuana simultaneously and for the same purpose. The state did not present evidence that the defendant came into possession of the marijuana in his shoe after he was arrested near the vehicle. (4) After his conviction of the felony of possession of a controlled substance in a local confinement facility, the defendant stipulated to the convictions alleged in the habitual felon indictment and pled guilty to being a habitual felon. On appeal, the defendant was permitted to argue (successfully) that one of the convictions, which occurred in New Jersey, was actually a misdemeanor, not a felony. The court ruled that the defendant was permitted to raise this issue for the first time on appeal because the indictment failed to confer jurisdiction on the trial court by failing to allege three predicate felonies as required by the habitual felon statute.

Trial Judge Did Not Abuse Discretion in Allowing Two State’s Witnesses to Testify and Rejecting Defendant’s Objections That State Failed to Comply With Discovery Requirements for Expert Witnesses

State v. Hall, ___ N.C. App. ___, 650 S.E.2d 666 (2 October 2007). The defendant was convicted of common law robbery. The court ruled, distinguishing *State v. Blankenship*, 178 N.C. App. 351 (2006), that the trial judge did not abuse his discretion in allowing two state’s witnesses to testify and rejecting the defendant’s objections that the state failed to comply with discovery requirements for expert witnesses (for example, providing a curriculum vitae). One witness was a physician’s assistant, who the trial judge determined was a fact witness, not an expert witness, in testifying about the victim’s injuries. Also, any opinion testimony by the physician’s assistant was not germane to any issue before the jury. The other witness testified to lifting latent fingerprints from a car and did not offer any expert opinion.

Trial Judge Erred Under G.S. 15A-910 In Sanctioning Defendant By Excluding Testimony of Two of Defendant’s Mental Health Experts—Ruling of Court of Appeals Is Modified and Affirmed

State v. Gillespie, 362 N.C. 150 (25 January 2008), *modifying and affirming*, 638 S.E.2d 481 (19 December 2006). The court ruled that the trial judge erred under G.S. 15A-910 (sanctions for failing to comply with discovery) in sanctioning the defendant by excluding the testimony of two of the defendant’s mental health experts. The court reviewed the facts in this case and concluded that it was readily apparent that the trial judge based his ruling to sanction the defendant solely on the conduct of the defendant’s expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a criminal proceeding can trigger a trial judge’s authority under G.S. 15A-910 to sanction a party.

Jurisdiction and Venue

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

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

No Reversal of Conviction When There Was a Variance Between Indictment’s Allegation and Proof of County Where Offense Was Committed

State v. Spencer, ___ N.C. App. ___, 654 S.E.2d 69 (18 December 2007). The indictment charged that the defendant committed felony larceny in Cleveland County. The evidence at trial in Cleveland County Superior Court proved that the offense was committed in Gaston County. The court ruled that the defendant was not entitled to a reversal of his conviction. First, the defendant waived any question of venue because he failed to make a pretrial motion to dismiss for improper venue; see G.S. 15A-631 and *State v. Brown*, 85 N.C. App. 583 (1987). Second, the variance in this case between the indictment and proof at trial was not fatal; see *State v. Brown*, *supra*.

Trial Procedure

Trial Judge Committed Clear Error in Overruling Defendant's *Batson* Objection to Prosecutor's Exercise of Peremptory Challenge of Prospective Black Juror

Snyder v. Louisiana, 128 S. Ct. 1203, ___ L. Ed. 2d ___ (19 March 2008). The Court ruled that the trial judge committed clear error in overruling the defendant's *Batson* objection to the prosecutor's exercise of a peremptory challenge of a prospective black juror. The Court determined that the prosecutor proffered a pretextual explanation for exercising the peremptory challenge that gave rise to an inference of discriminatory intent.

Defense Counsel's Cross-Examination of State's Witness Did Not Result in Forfeiture of Right to Last Jury Argument

State v. Hennis, ___ N.C. App. ___, 646 S.E.2d 398 (3 July 2007). The defendant was convicted of various drug charges resulting from an officer's stop of a vehicle in which the defendant was a passenger. On cross-examination, defense counsel requested the officer to draw a diagram of the arrest scene, which was marked as defendant's exhibit A. The diagram illustrated where a crack rock had been found. Defense counsel also questioned the officer about his incident report, which was marked as an exhibit. The report was never published to the jury, however. The defendant did not testify or offer witnesses on his behalf. The court ruled that the trial judge erred in ruling that the defendant had forfeited his right to last jury argument based on defense counsel's cross-examination. (See the court's discussion of case law on the issue of forfeiture of last jury argument.)

When Jury During Its Deliberations in Capital Case Sent Written Note to Trial Judge With Questions About Jury Instructions, Trial Judge's Failure to Reveal Contents of Note to Defendant Violated Defendant's Unwaivable State Constitutional Right to Be Present at All Stages of Trial

State v. Smith, ___ N.C. App. ___, 654 S.E.2d 730 (15 January 2008). The jury during its deliberations in a capital case sent a written note to the trial judge with questions about the jury instructions. The judge did not share the contents of the note with the state, defense counsel, or the defendant.. The court ruled the trial judge's failure to reveal the contents of the note to the defendant violated the defendant's unwaivable state constitutional right to be present at all stages of a capital trial.

Trial Judge Did Not Err in Allowing Trial to Continue in Defendant's Absence When He Failed to Appear When Trial Had Reconvened

State v. Davis, ___ N.C. App. ___, 650 S.E.2d 612 (2 October 2007). The court ruled that the trial judge did not err in allowing the trial to continue in the defendant's absence when he failed to appear when the trial had reconvened. The record showed that the defendant knew of the date and time that the trial reconvened and failed to appear or provide a reasonable excuse for his absence.

Appeals

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 (24 August 2007), *affirming*, 174 N.C. App. 658 (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.

Sentencing

- (1) Trial Court Erred in Sentencing Habitual Felon to Less Than Required Minimum and Maximum Terms of Imprisonment for Class C Felon, Prior Record Level IV**
- (2) Trial Court Erred in Requiring Habitual Felon Sentence to Run Concurrently with Federal Prison Sentence That Defendant Was Then Serving**

State v. Watkins, ___ N.C. App. ___, ___ S.E.2d ___ (15 April 2008). The defendant pled guilty to financial card theft and habitual felon status. The trial judge sentenced him as a Class C felon with Prior Record Level IV to a minimum term of 64 months and a maximum term of 86 months. The judge also entered findings of extraordinary mitigation and ordered the sentence to run concurrently with the federal sentence the defendant was then serving. (1) The court ruled that the state had a right of appeal from the trial court's sentencing the defendant below the statutory minimum and maximum sentences. The court then ruled that the trial court erred in sentencing the defendant below the required minimum and maximum sentences, which for a Class C felony in Prior Record Level IV was 80 months for the minimum and 107 months for the maximum. (2) The court ruled that the state did not have a right of appeal from the trial judge's imposing a concurrent sentence for habitual felon. However, the court suspended the appellate rules and elected to treat the state's appeal as a petition for a writ of mandamus, for the reasons set out in *State v. Ellis*, 361 N.C. 200 (2007). The court ruled that defendant's concurrent sentence was contrary to G.S. 14-7.6, and the court directed the trial judge on remand to enter a judgment that comports with that statute.

- (1) Defendant's Stipulation at Sentencing Hearing That Ohio Convictions Were Substantially Similar to North Carolina Offenses Was Ineffective Because Sentencing Judge Must Make Finding**
- (2) Trial Judge Did Not Err in Using Fact That Defendant Was on Probation and Pretrial Release When He Committed Offenses To Increase Both His Prior Record Level and To Aggravate His Sentence**

State v. Moore, ___ N.C. App. ___, 656 S.E.2d 287 (5 February 2008). The court ruled: (1) the defendant's stipulation that his Ohio convictions were substantially similar to North Carolina offenses was ineffective because the sentencing judge must make that finding, based on the ruling in *State v.*

Palmateer, 179 N.C. App. 579 (2006); and (2) the trial judge did not err in using the fact that the defendant was on probation and pretrial release when he committed the offenses to increase both his prior record level and to aggravate his sentence.

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

State v. Prush, ___ N.C. App. ___, 648 S.E.2d 556 (21 August 2007). The court ruled, relying on *State v. Hanton*, 175 N.C. App. 250 (2006), that a stipulation to the existence of one point for a prior record level based on all the elements in the current offense are included in a prior offense was ineffective because a stipulation to a legal issue is not permitted.

Conviction After Original Sentencing Was Properly Used to Calculate Defendant's Prior Record Level at Resentencing Hearing

State v. Pritchard, ___ N.C. App. ___, 649 S.E.2d 917 (18 September 2007). The defendant was convicted of two offenses and sentenced under Prior Record Level I. He appealed to the North Carolina Court of Appeals, which ordered a new sentencing hearing. The defendant was convicted of another offense after the original sentencing hearing and before the resentencing hearing. The trial judge at the resentencing hearing determined based on the new conviction that the defendant must be sentenced under Prior Record Level II. The court ruled that the trial judge did not err in using the new conviction to calculate the defendant's prior record level at the resentencing hearing. (Author's note: The length of the defendant's sentence imposed at the resentencing hearing did not exceed the original sentence.)

(1) Trial Judge Did Not Err in Awarding Restitution

(2) Court Sets Out Allocation of Burdens of Proof Concerning Award of Restitution

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

Trial Judge Erred in Awarding Restitution

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

Probation

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

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

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

State v. Howell, ___ N.C. App. ___, 646 S.E.2d 622 (3 July 2007). The defendant was convicted of several sexual offenses and placed on probation. One of the probation conditions (admit responsibility for offenses) was invalid under *In re T.R.B.*, 157 N.C. App. 609 (2003). The court ruled, however, that when the defendant violated many other conditions warranting revocation, imposition of the improper condition was harmless error.

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

State v. Sellers, ___ N.C. App. ___, 649 S.E.2d 656 (4 September 2007). A probation violation report was filed against the defendant. The defendant through counsel admitted to two of the violations alleged in the report. The trial judge heard from the probation officer concerning the violations. The trial judge found that the defendant willfully violated the terms of his probation, revoked the probation, and activated his suspended sentence. The court ruled that unlike when a defendant pleads guilty, a trial judge is not required to personally examine a defendant concerning his admission that he violated probation. The defendant's admission through counsel was sufficient.

Defendant Appealing Revocation of Probation May Not Collaterally Attack on *Blakely* Grounds Suspended Sentence in Aggravated Range Imposed When Defendant Was Convicted and Placed on Probation

State v. Holmes, 361 N.C. 410 (28 June 2007), *reversing*, 177 N.C. App. 565 (2006). The defendant was convicted and placed on probation with suspended sentences in the aggravated range. He did not appeal his sentences. His probationary sentences were later revoked. He argued on appeal that the suspended sentences in the aggravated range violated the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). The court ruled, relying on the reasoning in *State v. Noles*, 12 N.C. App. 676 (1971), and *State v. Rush*, 158 N.C. App. 738 (2003), that a defendant appealing a revocation of probation may not collaterally attack on *Blakely* grounds an aggravated suspended sentence imposed when the defendant was convicted and placed on probation. The court stated that a direct appeal from an original judgment lies only when the sentence is originally entered.

Defenses

Trial Judge Did Not Err in Not Instructing Jury on Voluntary Intoxication

State v. Muhammad, ___ N.C. App. ___, 651 S.E.2d 569 (16 October 2007). The defendant was convicted of first-degree murder. The court ruled that the trial judge did not err in denying the defendant's request for a jury instruction on diminished capacity by voluntary intoxication. There was testimony that the defendant was drinking tequila straight from a one-gallon bottle and also drank three or four beers in approximately a one-and-one-half hour period. The court noted that the defendant had the ability to drive and communicate with other people. There was no evidence suggesting that the defendant was incapable of forming a deliberate and premeditated purpose to kill.