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Felony and Misdemeanor Case Update

2010 Spring Public Defender Attorney and Investigator Conference

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

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Miranda

(1) When Prisoner Serving Sentence Asserts Right to Counsel At Custodial Interrogation, Officer May Reinitiate Custodial Interrogation After There Has Been Break in Custody for 14 Days or More

(2) Prisoner's Return to General Prison Population After Officer's Custodial Interrogation at Prison Began Running of 14-Day Break in Custody

Maryland v. Shatzer, 130 S. Ct. 1213, ___ L. Ed. 2d ___ (24 February 2010). In 2003 a detective went to a Maryland prison to question the defendant about his alleged sexual abuse of his son, for which he then was not charged. The defendant was serving a prison sentence for a conviction of a different offense. The defendant asserted his right to counsel under *Miranda*, and the detective terminated the custodial interrogation. The defendant was released back to the general prison population to continue serving his sentence, and the child abuse investigation was closed. Another detective reopened the investigation in 2006 and went to another prison where the defendant was still serving his sentence. The detective gave *Miranda* warnings to the defendant, he waived his *Miranda* rights, and then he gave a statement that was introduced at his child sexual abuse trial. The United States Supreme Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), had ruled that once a defendant has asserted his or her right to counsel at a custodial interrogation, an officer may not conduct custodial interrogation of the defendant until a lawyer is made available for the interrogation or the defendant initiates further communication with the officer. The Court in *Shatzer* ruled that when a break in custody lasting 14 days or more has occurred after a defendant had previously asserted his right to counsel at a custodial interrogation, an officer may reinitiate custodial interrogation after giving *Miranda* warnings and obtaining a waiver of *Miranda* rights. The Court also ruled that although the defendant remained in prison after asserting his right to counsel, there was a break in custody under its ruling. The Court reasoned that when a prisoner is released after an officer's interrogation to return to the general prison population, the prisoner returns to his or her accustomed routine and regains the degree of control over his or her life that existed before the interrogation. Sentenced prisoners, in contrast to defendants being subjected to custodial interrogation under *Miranda*, are not isolated with their accusers (law enforcement officers). They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone. The "inherently compelling pressures" of custodial interrogation ended when this defendant returned to his normal life in prison.

***Miranda* Warning Concerning Presence of Lawyer During Interrogation Was Sufficient**

Florida v. Powell, 130 S. Ct. 1195, ___ L. Ed. 2d ___ (23 February 2010). A Florida law enforcement officer, when advising a defendant of his *Miranda* rights, told the defendant: "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." The Court stated, noting its rulings in *California v. Prysock*, 453 U.S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), that it has not dictated the words in which the essential information of a *Miranda* warning must be conveyed. Although the officer's warning concerning the presence of a lawyer during interrogation did not track the language in the *Miranda* ruling, the Court ruled that the warning satisfied the requirement that a defendant must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. Thus, the warning complied with the *Miranda* ruling.

(1) Defendant at Hospital for Treatment Was Not in Custody to Require *Miranda* Warnings When Officer Questioned Him

(2) Officer Did Not Violate Defendant's Assertion of Right to Counsel At Police Station When He Informed Defendant of Charge Against Him

State v. Allen, ___ N.C. App. ___, 684 S.E.2d 526 (3 November 2009). The defendant was involved in a knife fight in which the victim was killed and the defendant was also stabbed. The defendant went to a hospital for treatment for his wounds (the victim was also taken to the hospital). Officers arrived there and sought to determine what had occurred. An officer spoke to the defendant intermittently for about forty minutes. He was not handcuffed, nor was he told that he could not leave or that he was under arrest. (1) The court ruled that the defendant was not in custody when the officer questioned him at the hospital, and thus *Miranda* warnings were not required. The court noted that any restraint in movement that the defendant may have experienced at the hospital was due to his medical treatment and not the action of law enforcement officers. (2) After being advised of his *Miranda* rights at the police station, the defendant asserted his right to counsel by naming an attorney he wanted to be present before answering questions. During a conversation with the defendant about the officer's unsuccessful efforts to locate the attorney, the officer told the defendant that he was being detained and charged with second-degree murder. The defendant told the officer that he wanted to talk with the officer "right now." The court ruled, relying on *State v. Leak*, 90 N.C. App. 351 (1988), that the officer did not violate the defendant's assertion of the right to counsel when he informed the defendant of the charge against him.

Officer's Conduct and Statements to Defendant After Arrest Constituted Interrogation to Require *Miranda* Warnings

State v. Hensley, ___ N.C. App. ___, 687 S.E.2d 309 (5 January 2010). The court ruled that an officer's conduct and statements to the defendant after his arrest constituted interrogation to require *Miranda* warnings. The officer should have known that his conduct and statements were reasonably likely to elicit an incriminating response from the defendant; see the definition of interrogation in *State v. Golphin*, 352 N.C. 364 (2000), and *Rhode Island v. Innis*, 446 U.S. 291 (1980). The defendant took a drug overdose and was taken to a hospital. The following day the officer arrested the defendant at the hospital when informed that he was about to be released. The officer told the defendant (whom he knew from a prior investigation) that he hoped that the defendant would continue to cooperate even though he had been arrested. The officer inquired whether or not the defendant would agree to talk with him the next day if the officer came to work on overtime to obtain a statement from him. The defendant then made an incriminating statement. (See a detailed recitation of the facts in the court's opinion.)

Defendant's Mother Was Not Acting as Agent of Law Enforcement to Require *Miranda* Warnings to Be Given to Defendant

State v. Clodfelter, ___ N.C. App. ___, ___ S.E.2d ___ (16 March 2010). The defendant was convicted of first-degree murder and other offenses. The court ruled, distinguishing *State v. Morrell*, 108 N.C. App. 465 (1993), and *State v. Hauser*, 115 N.C. App. 431 (1994), that the defendant's mother was not acting as an agent of law enforcement to require *Miranda* warnings to be given to the defendant. The mother testified that all the officers asked her to do, and all she in fact did do, was ask her son to tell the truth about his involvement in the murder.

Right to Counsel

Court Rules That Defense Counsel's Advice About Conviction's Immigration Consequences to Defendant Pleading Guilty Was Not Objectively Reasonable Under Sixth Amendment and Remands to State Court to Determine Prejudice

Padilla v. Kentucky, 130 S. Ct. 1473, ___ L. Ed. 2d ___ (31 March 2010). The defendant, a native of Honduras who was a lawful permanent resident of the United States, pled guilty in a Kentucky state court to transportation of a large amount of marijuana. He later sought to set aside his guilty plea, asserting that his lawyer not only failed to advise him of the deportation consequence of his guilty plea, but also told him that he need not worry about his immigration status because he had been in the United States so long (over 40 years). The lawyer's advice was erroneous because his guilty plea made his deportation virtually mandatory. The defendant also alleged that he would have insisted on a trial if he had not received this erroneous advice. The Court ruled that the defendant sufficiently alleged constitutionally deficient counsel because when the deportation consequence was truly clear, as it was in this case, the duty to give correct advice was equally clear. The Court remanded the case to state court to determine prejudice under *Washington v. Strickland*, 466 U.S. 668 (1984).

Investigation Issues

Warrantless Stops and Searches

Officer Had Reasonable Suspicion to Stop Vehicle When Officer Had Reasonably Mistaken Belief That Street Was a Public Street

State v. Hopper, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). An officer stopped a vehicle for the driver's failure to have his taillights on while driving in the rain. The court ruled, citing *United States v. Ellington*, 396 F. Supp 2d 695 (E.D. Va. 2005), and other cases, that the officer had reasonable suspicion to stop the vehicle when the officer had a reasonably mistaken belief that the street was a public street (the court assumed without deciding that the street was not a public street). [Author's note: For an online analysis of this case by Jeff Welty of the School of Government faculty, see "Reasonable Mistakes and Reasonable Suspicion," at <http://sogweb.sog.unc.edu/blogs/ncclaw/>.]

Court Upholds Trial Court's Ruling That License Checkpoint Was Constitutional

State v. Veazey, ___ N.C. App. ___, 689 S.E.2d 530 (8 December 2009). [Author's note: This case was previously before the court in *State v. Veazey*, 191 N.C. App. 181 (2008), and the court had remanded the case to the trial court for additional findings of fact and conclusions of law concerning the constitutionality of a checkpoint.] The court upheld the trial court's ruling that the license checkpoint was constitutional. The trial court found that (1) the primary programmatic purpose of the checkpoint was valid (enforcement of state's motor vehicle laws), and (2) the checkpoint was reasonable—the state has a strong interest in enforcing motor vehicle laws, the checkpoint was tailored to meet this purpose, and the checkpoint constituted a minimal intrusion on drivers' liberty.

Officer Had Reasonable Suspicion to Stop Vehicle

State v. McRae, ___ N.C. App. ___, ___ S.E.2d ___ (6 April 2010). The court ruled that an officer A had reasonable suspicion to stop a vehicle for two independent reasons. First, the officer A had the authority to stop the vehicle because the officer had reasonable suspicion that the defendant had committed a violation of G.S. 20-154(a) by failing to use his turn signal when he pulled off the highway into a gas station parking lot. There was medium traffic and the defendant's vehicle was a short distance in front of the officer. The court relied on *State v. Styles*, 362 N.C. 412 (2008), and distinguished *State v. Ivey*, 360 N.C. 562 (2006). Second, the officer also had the authority to stop the vehicle based on an confidential informant's tip to another officer (officer B) that had been broadcast to officer A and other officers before the stop, as follows: be on the lookout for a black male driving a green Grand Am with Pembroke city limits. The informant has worked with officer B on several occasions and had provided reliable information in the past that led to the arrest of drug offenders. The informant identified the driver by name, a name that officer B recognized as someone associated with the drug trade. The informant also described the specific car (a green Grand Am) and advised the officer that the defendant would be driving the car within the city limits of Pembroke with 60 grams of cocaine in his possession.

Court, Per Curiam and Without Opinion, Reverses Ruling of Court of Appeals for Reasons Stated in Dissenting Opinion, Which Concluded That Officers Had Reasonable Suspicion to Conduct Frisk of Defendant

State v. Morton, 363 N.C. 737, 686 S.E.2d 510 (11 December 2009), *reversing*, ___ N.C. App. ___, 679 S.E.2d 437 (21 July 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals for reasons stated in section I of the dissenting opinion, which concluded that officers had reasonable suspicion to conduct a frisk of the defendant. The dissenting opinion stated that under the totality of circumstances, the officers were aware of the following: (1) at least one confidential informant who had provided information in the past had implicated the defendant in a recent drive-by shooting; (2) several informants and anonymous tipsters had reported that the defendant sold drugs in the area; (3) the defendant was traveling in a path from a food mart to his grandmother's house as the informants and tipsters had claimed he would; (4) the defendant picked up his pace when he saw the officers looking in his direction; (5) the defendant was visibly nervous when the officers attempted to question him; and (6) the defendant was wearing red pants, which indicated to one of the officers, a gang analyst, that the defendant may be affiliated with a local gang. (See the complete analysis of the frisk issue in the dissenting opinion.)

Defendant Fleeing From Officers Was Not Seized Under Fourth Amendment Until They Took Physical Control of Him

State v. Mewborn, ___ N.C. App. ___, 684 S.E.2d 535 (3 November 2009). Officers patrolling a high crime area in a marked car saw the defendant and another person walking in the middle of the street. They pulled alongside them and asked if they would wait a minute because they needed to speak with them for a few minutes. As the officers were getting out of their car, the defendant turned and started to run away. A chase ensued, and the officers eventually took physical control of the defendant. During the chase, the defendant appeared to throw a gun from his pocket. Based on this evidence, he was convicted of possession of a firearm by a felon. After he was stopped, he threw a bag of cocaine under the police car. Based on this evidence, he was convicted of possession of cocaine. The defendant moved to suppress all the evidence, arguing that the officers unconstitutionally stopped the defendant without reasonable suspicion. The court noted that the dispositive issue is a determination whether the

defendant was seized under the Fourth Amendment before or after he ran from the officers. The court ruled, relying on *California v. Hodari D.*, 499 U.S. 621 (1991), that the defendant did not submit to the officers' authority before fleeing from them and was not seized until the officers took physical control of him. Thus, the flight from the officers could properly be considered in determining whether the officers has reasonable suspicion to stop him, and the court ruled that the officers did have reasonable suspicion.

Court Rules That Roadside Strip Search of Vehicle Occupant in Daylight Hours Violated Fourth Amendment

State v. Battle, ___ N.C. App. ___, 688 S.E.2d 805 (16 February 2010). Officers received a tip from a confidential informant that three named people were going to Durham to obtain cocaine and then transport it back to Granville County, exiting at the Linden Avenue exit off Interstate 95. The officers stopped the vehicle shortly after exiting there. It was daylight (a summer day around 5:00 p.m.). Two male passengers were searched and no illegal drugs were found. The third passenger, a female, was strip searched by a female officer between the open doors of the vehicle at the roadside, which included pulling her underwear out from her body and discovering a folded five dollar bill and a crack pipe. (1) The opinion for the court, which was not joined by the two other judges on the three-judge panel, noted that for purposes of this appeal, it was assumed that the officers had probable cause to arrest the defendant and search her incident to arrest. However, the opinion stated that for a roadside strip search to be constitutional, there must be both probable cause and exigent circumstances to show some significant government or public interest would be endangered were law enforcement officers to wait until they could conduct the search in a more discreet location, usually at a private location within a law enforcement facility. The opinion, which extensively discussed the facts and case law from North Carolina and other jurisdictions, ruled that the strip search violated the defendant's Fourth Amendment rights. The opinion stated that the trial court's order denying the defendant's motion to suppress did not show that there were exigent circumstances justifying any search more intrusive than that allowed incident to any arrest. (2) A second judge on the three-judge panel concurred only in the result (granting the defendant's motion to suppress) without an opinion. (3) A third judge on the three-judge panel concurred with an opinion that noted the North Carolina Supreme Court in *State v. Stone*, 362 N.C. 50 (2007) (defendant's general consent to search did not include officer's flashlight search of genitals inside defendant's underwear), had ruled that an officer's search with at least questionable consent was not permissible under the Fourth Amendment. And because the search in *Battle* without the defendant's consent was more intrusive than that in *Stone*, it was not permissible under the Fourth Amendment. [Author's note: Although a majority of the three-judge panel agreed that the strip search violated the Fourth Amendment, there was not majority agreement why the search violated the Fourth Amendment.]

Officer Did Not Seize Defendant Under Fourth Amendment During Encounter

State v. Williams, ___ N.C. App. ___, 686 S.E.2d 905 (22 December 2009). An officer saw the defendant driving a vehicle displaying a 30-day tag he suspected was expired because it was dirty and torn. Before a computer inquiry about the tag came back, the defendant pulled into a driveway. The officer did not activate his blue lights or siren, nor did he give any other indication for the defendant to stop. The officer stopped his vehicle on the other side of the street and approached the defendant's vehicle. The officer asked the defendant about the status of the 30-day tag, and the defendant said that it was expired. The officer then asked the defendant for his license, and the defendant handed him an expired registration and admitted that he did not have a driver's license. The officer asked the defendant to step

out of his vehicle to speak with him. After a brief conversation, the defendant consented to a search of his person, which resulted in a seizure of cocaine. The court ruled, relying on *State v. Isehour*, ___ N.C. App. ___, 670 S.E.2d 264 (16 December 2008), that the officer did not seize the defendant under the Fourth Amendment during the encounter.

Defendant’s Admission That Grocery Bag in Vehicle Contained “Cigar Guts” Did Not, Without More Information, Establish Probable Cause to Search Bag for Illegal Drugs

State v. Simmons, ___ N.C. App. ___, 688 S.E.2d 28 (5 January 2010). An officer stopped a vehicle to issue the driver a seat belt citation. The officer noticed a white plastic grocery bag sticking out of the storage holder on the passenger side of the defendant’s vehicle. He was suspicious that the bag contained illegal contraband because he had found illegal contraband in that sort of container on at least three prior occasions. The officer asked the defendant what was in the bag. The defendant responded that the bag contained “cigar guts.” The officer took this response to mean that tobacco had been removed from a cigar. He had previously seized marijuana with cigars. Based on his training, he had learned that marijuana was sometimes placed in cigars to smoke them. However, the officer could not see inside the bag nor did he smell any illegal contraband. The officer searched the bag. The court ruled that the defendant’s response that the grocery bag contained “cigar guts” did not, without more information, establish probable cause to search the bag. The officer’s training and experience established a link between the presence of hollowed out cigars and marijuana, not a link between the presence of loose tobacco and marijuana. Furthermore, there was no evidence that the defendant was stopped in a drug area or at an unusual time of day.

Other Search and Seizure Issues

Officer’s Warrantless Entry Into House Did Not Violate Fourth Amendment

Michigan v. Fisher, 130 S. Ct. 546, ___ L. Ed. 2d ___ (7 December 2009). Officers responded to a disturbance call. A couple directed them to a house where a man was “going crazy.” Officers saw a pickup truck in the driveway with its front smashed, damaged fence posts along the side of the property, and three broken windows, the glass still on the ground outside. The officers also saw blood on the pickup’s hood and on clothes inside the pickup, as well as on one of the doors to the house. Through a window to the house, they could see the defendant screaming and throwing things. The back door was locked, and a couch had been placed to block the front door. The officers knocked, but the defendant refused to answer. They saw that he had a cut on his hand, and they asked him whether he needed medical attention. The defendant ignored these questions and demanded, with accompanying profanity, that the officers get a search warrant. One of the officers pushed the front door and entered the house. The Court ruled that a straightforward application of the emergency aid exception, as in *Brigham City v. Stuart*, 547 U.S. 398 (2006) (law enforcement officers may enter a home without a search warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury), dictates that the officer’s entry into the house was reasonable under the Fourth Amendment. The court stated that the state appellate court in this case erred in replacing the objective injury under *Brigham City* into what appeared to the officers with its hindsight determination that there was in fact no emergency. “It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. . . . It sufficed to invoke the emergency aid

exception that it was reasonable to believe that [the defendant] had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that [the defendant] was about to hurt, or had already hurt, someone else.”

Officers Had Probable Cause and Exigent Circumstances to Enter House

State v. Stover, ___ N.C. App. ___, 685 S.E.2d 127 (3 November 2009). The court ruled that officers had probable cause and exigent circumstance to enter a home based on the following facts: Officers stopped a vehicle, noticed a passenger with marijuana, who then told them the house at which she had purchased the marijuana. Officers went to the house to conduct a knock and talk. When they arrived there, they perceived a strong odor of marijuana emanating from the house. An officer heard a noise from the back of the house and saw the defendant, whose upper torso was partially out of a window. The court noted that the officer could reasonably believe that the defendant was attempting to flee the scene, and they were also concerned about a possible destruction of evidence.

Defendant’s Consent to Search Included Outbuilding Located Within Curtilage of Mobile Home

State v. Hagin, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendant was convicted of manufacture of methamphetamine. The defendant and his wife executed a written consent to search that permitted a search of the personal or real property located at an address in Wadesboro and described a single wide mobile home. The officer informed them that they could withdraw their consent at any time. The defendant accompanied the officer and another officer as they searched the mobile home. They then went outside to the rear of the mobile home and one of the officers saw a small outbuilding located about 15-20 feet from the home’s back porch. The officers searched the outbuilding, and neither the defendant nor his wife withdrew their consent to search their real property. The court ruled, relying on *State v. Williams*, 67 N.C. App. 519 (1984), and other cases, that the search of the outbuilding was within the scope of the consent given. A reasonable person who believed that his consent did not include the outbuilding would have objected to the search. The defendant’s silence was some evidence that he believed the outbuilding to be within the scope of his consent. [Author’s note: In preparing a written consent involving a residence, an officer may want to include a specific reference to “all outbuildings on the property, wherever located.” A person giving consent would have a better understanding of the scope of the proposed search, and a reviewing court would more likely find that an outbuilding was included in the consent to search.]

Use of Drug Dog in Common Area of Storage Facility to Sniff Defendant’s Storage Unit Did Not Violate Defendant’s Fourth Amendment Rights

State v. Washburn, ___ N.C. App. ___, 685 S.E.2d 555 (17 November 2009). An informant told an officer that the defendant kept a large quantity of drugs in a toolbox in his garage and rented a climate-controlled storage unit somewhere within the Kearnerville town limits. The informant provided additional details about the defendant, his vehicle, etc. Another officer, provided with this information, went to the only climate-controlled storage facility in Kearnerville. The officer had confirmed that the defendant rented a unit there as well as other details provided by the informant. With the consent of the facility’s manager, a drug dog was permitted to walk the hallway within one of the buildings containing the defendant’s unit. The dog alerted to the defendant’s unit, and officers then obtained a search warrant and searched it. Cocaine and drug paraphernalia were discovered, and officers then obtained a search warrant for the defendant’s residence and searched it. The court ruled, relying on *United States v. Place*, 462 U.S. 696 (1983), and other cases, that the use of the dog to sweep the

common area of the storage facility did not violate the defendant's Fourth Amendment rights. The dog sniff revealed only the presence of illegal drugs that does not compromise any legitimate privacy interest. In addition, the officers were legally in the common hallway of the building with the consent of the facility's manager. The defendant did not possess a reasonable expectation of privacy in the common hallway. The court also rejected the defendant's argument that there was no nexus between the presence of cocaine in the storage unit and the existence of illegal drugs at the defendant's residence to provide probable cause to issue a search warrant for the residence. The court discussed in its opinion the informant's reliability and basis of knowledge.

Trial Court Properly Denied Defendant's Motion to Suppress Cellular Telephone Records Obtained by State

State v. Stitt, ___ N.C. App. ___, 689 S.E.2d 539 (8 December 2009). The defendant was convicted of first-degree murder of one victim, second-degree murder of another victim, and armed robbery. After the killings, the defendant used two cell phones of one of the victims. The cell phones were seized from the defendant when he was arrested in New York. The defendant made a motion to suppress cellular telephone records obtained by the state. The court affirmed the trial court's ruling that the defendant failed to meet his burden to show that he had a Fourth Amendment privacy interest in the cell phones to contest the records obtained by the state. [Author's note: In any event, a person does not have a Fourth Amendment right to privacy in his or her telephone records. *Smith v. Maryland*, 442 U.S. 735 (1979).] The court also ruled, assuming arguendo that the state did not fully comply with federal law [18 U.S.C. § 2703(d)] in obtaining the telephone records, federal law does not authorize the suppression of evidence as a remedy for a violation of this federal law. It only provides civil remedies and criminal punishment. The court cited *United States v. Ferguson*, 508 F.Supp. 2d 7 (D.D.C. 2007), and *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998).

Even Assuming Defendant Was Arrested Without Probable Cause Under Fourth Amendment, Exclusionary Rule Does Not Bar Evidence of Defendant's False Statements to Officer After Arrest That Supported Identity Theft Conviction

State v. Barron, ___ N.C. App. ___, 690 S.E.2d 22 (2 March 2010). The defendant was convicted of identity theft. Upon arrest, the defendant falsely gave his brother's name and birth date as his, and falsely confirmed in response to an officer's question about the last four digits of the defendant's social security number (which were his brother's). The court ruled that the defendant's false confirmation of the last four digits of his social security number was sufficient evidence to convict him of identity theft. It was "identifying information" under G.S. 14-113.20(b)(1). The court rejected the defendant's argument that the trial court erred in denying his motion to suppress his post-arrest statements concerning his false name, date of birth, and social security number. The court ruled, even assuming the defendant was arrested without probable cause under the Fourth Amendment, the exclusionary rule does not bar evidence of the defendant's false statements that supported his identity theft conviction. Relying on *State v. Miller*, 282 N.C. 633 (1973), and *In re J.L.B.M.*, 176 N.C. App. 613 (2006), the court stated that the exclusionary rule does not exclude evidence of crimes committed after an illegal search or seizure. The false statements were not fruits of the poisonous tree.

Identifications

Defendant's Constitutional Rights Were Not Violated When There Was No Government Involvement in Victim's View of Defendant

State v. Williams, ___ N.C. App. ___, 685 S.E.2d 534 (17 November 2009). The victim's friend called her to see the defendant the night he was arrested. The friend did so on her own volition and was not acting on behalf of law enforcement. The court rejected the defendant's argument that the trial court erred by admitting the victim's identification testimony because it resulted from an improper showup. Absent government involvement, there was no violation of the defendant's constitutional rights.

Pretrial and Trial Procedure

Pleadings

Trial Court Did Not Err in Allowing State to Amend Habitual Impaired Driving Indictment

State v. White, ___ N.C. App. ___, 689 S.E.2d 585 (16 February 2010). The habitual impaired driving indictment alleged that the three prior impaired driving convictions had occurred within seven years of the habitual impaired driving offense. A recent statutory change applicable to this impaired driving offense permitted the state to prove that the convictions occurred within ten years, and at least one conviction alleged in the indictment had occurred more than seven years but less than ten years of the impaired driving offense. The court ruled, distinguishing *State v. Winslow*, 360 N.C. 161 (2005), *adopting dissenting opinion in* 169 N.C. App. 137 (2005) (error to allow habitual impaired driving indictment to be amended to change date of conviction so it fell within seven years of impaired driving offense), that the trial court did not err in allowing the state to amend the habitual impaired driving indictment to allege that all the convictions had occurred with ten years of the impaired driving offense.

Convictions of Possession of Firearm by Felon and Habitual Felon Are Affirmed

State v. Taylor, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendant was convicted of possession of a firearm by felon and habitual felon. The court ruled: (1) the indictments for both charges were not insufficient based on errors in the allegations of the date of a felony offense that resulted in a conviction (the indictments alleged "12/8/1992" but the evidence showed "12/18/92"); (2) the discrepancies in the dates of offenses for both indictments did not result in a fatal variance; (3) the trial court did not err in allowing the state to amend the habitual felon indictment to correct the date of the commission of the felony; and (4) there was sufficient evidence of the defendant's constructive possession of a firearm to support the conviction of possession of a firearm by felon (see the facts set out in the court's opinion).

Errors in Indictment and Judgment Concerning Discharging Firearm into Occupied Property Did Not Require Entry of New Judgment and New Sentencing Hearing

State v. Curry, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendant was indicted for discharging a firearm into occupied property. The language erroneously alleged that the defendant discharged the weapon into a "residence," while the correct statutory term is "dwelling." The

indictment also alleged the violation as a Class E felony, when the offense is a Class D felony under G.S. 14-34.1(b). The court ruled that the indictment sufficiently alleged the offense as the Class D felony because the terms “residence” and “dwelling” are synonymous. The indictment errors concerning “residence” and class of felony, which were repeated in part in the jury instructions, verdict sheet, the trial court’s statements during sentencing, and the judgment did not require the entry of a new judgment and a new sentencing hearing.

Discovery

- (1) No Discovery Violation Because Victim’s Statement To Prosecutor, Which Was Not Disclosed to Defendant, Did Not Offer Any Significantly New or Different Information From Victim’s Prior Statement to Law Enforcement That Had Already Been Provided to Defendant**
- (2) Trial Court Did Not Err in Using Transferred Intent Instruction in Trial of Discharging Firearm into Occupied Property**
- (3) Muzzle Velocity Provision in G.S. 14-34.1 (Discharging Firearm or Barreled Weapon into Occupied Property) Does Not Apply to Firearms**

State v. Small, ___ N.C. App. ___, 689 S.E.2d 444 (8 December 2009). The defendant was convicted of discharging a firearm into occupied property and assault with a deadly weapon inflicting serious injury. (1) The court ruled that there was no discovery violation under G.S. 15A-903(a)(1) because the assault victim’s statement to the prosecutor, which was not disclosed to the defendant, did not offer any significantly new or different information from the victim’s prior statement to law enforcement that had already been provided to the defendant. (2) The state presented evidence that the defendant intentionally fired a weapon toward the assault victim, who was outside a home, and some projectiles penetrated the home’s exterior. Evidence was also introduced that the defendant knew people other than the victim were present inside the home. The court ruled that the trial court did not err in using a transferred intent instruction to transfer the intent to shoot a particular person to the offense of discharging a firearm into occupied property. (3) The court ruled that the provision in G.S. 14-34.1 (discharging firearm or barreled weapon into occupied property) requiring a muzzle velocity of at least 600 feet per second does not apply to firearms.

Guilty Pleas

- (1) Trial Court’s Failure to Follow Procedure in G.S. 15A-1022 in Accepting Guilty Plea Did Not Prejudice Defendant’s Decision to Enter Plea**
- (2) “Package Deal” in Which Prosecutor Offered Plea Arrangement to Defendant’s Wife Contingent on Defendant’s Agreement to Plead Guilty Did Not Violate Defendant’s Constitutional Rights**
- (3) Trial Court Did Not Err in Denying Defendant’s Post-Sentencing Motion to Set Aside His Guilty Plea**

State v. Salvetti, ___ N.C. App. ___, 687 S.E.2d 698 (19 January 2010). The defendant entered an *Alford* guilty plea to Class E felony child abuse and his wife entered guilty pleas to other child abuse offenses. The defendant was sentenced to a term of imprisonment. Two days after his plea, the defendant filed a motion to withdraw the plea, which the trial court denied. The defendant filed a notice of appeal and a writ of certiorari for review of other issues. (1) The court ruled that the trial court’s failure to follow the procedure in G.S. 15A-1022 in accepting the defendant’s guilty plea did not prejudice the defendant’s

decision to enter the plea. (See the court's extensive analysis in its opinion.) (2) The court rejected the defendant's argument that the prosecutor's offer of a "package deal" constituted undue pressure and violated the defendant's constitutional rights. The prosecutor offered the defendant's wife a plea deal contingent on the defendant's agreement to plead guilty. The court noted that other jurisdictions have found that package deal pleas are not per se involuntary, although they present a greater risk of inducing a false guilty plea by altering the defendant's assessment of the attendant risks. The court ruled that the prosecutor in this case did not use improper pressure to induce the defendant's plea. (3) The court ruled that the trial court did not err in denying the defendant's post-sentencing motion to set aside his guilty plea.

Jury Selection

Court Rules That Its Prior Rulings Were Not "Clearly Established" (Federal Habeas Review Standard) That Judge Must Reject Demeanor-Based Explanation for Peremptory Challenge Unless Judge Personally Observed and Recalled Aspect of Juror's Demeanor on Which Explanation Was Based

Thaler v. Haynes, 130 S. Ct. 1171, ___ L. Ed. 2d ___ (22 February 2010). The defendant was tried in a Texas court and convicted of murder. Two judges presided at different stages of the defendant's trial. One judge presided when the attorneys questioned the prospective jurors individually, but another judge took over when peremptory challenges were exercised. The defendant filed a federal habeas petition challenging the second judge's ruling that the prosecutor did not violate *Batson v. Kentucky*, 476 U.S. 79 (1986), when making a demeanor-based explanation for a peremptory challenge of an African-American juror. The Court ruled that its prior rulings were not "clearly established" (federal habeas standard of review) that a judge must reject a demeanor-based explanation for a peremptory challenge unless the judge personally observed and recalled the aspect of the juror's demeanor on which the explanation was based.

Court Rules That State Appellate Court's Ruling That Rejected Fair-Cross-Section Claim (Jury Pool Was Not Drawn From Fair Cross-Section of Community) Was Consistent With *Duren v. Missouri*, 439 U.S. 357 (1979), and Was Not Unreasonable Application of Clearly Established Federal Law

Berghuis v. Smith, 130 S. Ct. 1382, ___ L. Ed. 2d ___ (30 March 2010). The defendant (and later federal habeas petitioner) was convicted in state court of second-degree murder and his conviction was affirmed by a state appellate court. He alleged on appeal in state court and in federal court a violation of his Sixth Amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. The Court ruled that the appellate court's ruling that rejected the petitioner's fair-cross-section claim was consistent with *Duren v. Missouri*, 439 U.S. 357 (1979), and was not an unreasonable application of clearly established federal law under the standard set out in 28 U.S.C. § 2254(d)(1).

Other Procedure Issues

Defendant's Sixth Amendment Right to Public Trial Was Violated When Trial Court Closed Jury Voir Dire to Public

Presley v. Georgia, 130 S. Ct. 721, ___ L. Ed. 2d ___ (19 January 2010). The Court ruled that the trial court violated the defendant's Sixth Amendment right to a public trial when the court excluded the public from the voir dire of prospective jurors. The trial court must consider reasonable alternatives to closure even if none are offered by the parties.

(1) When Defendant and Defense Counsel Reached Absolute Impasse Whether to Exercise Peremptory Challenge of Prospective Juror, Trial Court Erred in Not Permitting Defendant to Make Decision Instead of Defense Counsel

(2) Trial Court Did Not Err in Allowing Offense of Attempted Sale of Cocaine That Had Been Committed With a Firearm to Be Used as Underlying Felony Under Felony Murder Rule

State v. Freeman, ___ N.C. App. ___, ___ S.E.2d ___ (2 March 2010). (1) The court ruled, relying on *State v. Ali*, 329 N.C. 394 (1991), that when the defendant and defense counsel reached an absolute impasse whether to exercise a peremptory challenge of a prospective juror, the trial court erred in not permitting the defendant to make the decision instead of defense counsel. (2) The court ruled that the trial court did not err in allowing the offense of attempted sale of cocaine that had been committed with a firearm to be used as the underlying felony under the felony murder rule. On April 8 and April 10, 2006, the defendant delivered cocaine to the victim, but payment was not made then. When the defendant sought payment on April 17 after phoning the victim in advance to tell her he was coming to collect the money, he shot and killed her. The court noted that the sales were not complete on April 8 and 10 because payment had not been made. The defendant's actions on April 17 constituted an attempt to complete the transactions of the sale of cocaine.

Evidence

Confrontation Clause

Defendant's Right to Confrontation Under Sixth Amendment Was Not Violated When State's Expert Testified to Analysis Performed by Non-Testifying Expert, Based on Facts in This Case

State v. Hough, ___ N.C. App. ___, 690 S.E.2d 285 (2 March 2009). The court ruled, relying on *State v. Mobley*, ___ N.C. App. ___, 684 S.E.2d 508 (3 November 2009), and other cases, that the defendant's right to confrontation under the Sixth Amendment was not violated when the trial court allowed a state's expert to testify to an analysis that provided the composition and weight of the controlled substances found in the defendant's residence when the analysis was performed by someone other than the testifying expert. The expert's opinion was based on her independent review and confirmation of the test results. The court stated that it is not its position that every peer review will suffice to establish the testifying expert is testifying to his or her expert opinion; however, in this case, the testifying expert's testimony was sufficient to establish that her expert opinion was based on her own analysis of the lab reports.

Admission of Drug Lab Report Under G.S. 95-90(g) When Defendant Failed to Object Under Statute Did Not Violate Defendant's Sixth Amendment Right to Confrontation

State v. Steele, ___ N.C. App. ___, 689 S.E.2d 155 (5 January 2010). The court ruled that the admission of a drug lab report under G.S. 95-90(g) when the defendant failed to object under the statute did not violate the defendant's Sixth Amendment right to confrontation. The court noted that *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), explicitly approved as constitutional notice-and-demand statutes and G.S. 95-90(g) qualifies as such a statute.

Other Evidence Issues

Trial Court Abused Discretion by Allowing Law Enforcement Officer to Testify That Defendant Was Person Depicted in Surveillance Video Tape

State v. Belk, ___ N.C. App. ___, 689 S.E.2d 439 (8 December 2009). The court ruled that the trial court abused its discretion by allowing a law enforcement officer to testify that the defendant was the person depicted in a surveillance video tape, based on its analysis of the facts in this case and the factors set out in *United States v. Dixon*, 413 F.3d 540 (6th Cir. 2005).

(1) G.S. 14-415.1(b) Provides Sufficient Basis for Admission of Felony Conviction in Trial of Possession of Firearm by Felon

(2) Defendant Was Not Unfairly Prejudiced Under Rule 403(b) by Admission of Felony Conviction in Trial of Possession of Firearm by Felon

State v. Fortney, ___ N.C. App. ___, 687 S.E.2d 518 (5 January 2010). The defendant was on trial for possession of firearm by felon, possession of a Schedule II controlled substance, possession of marijuana, possession of drug paraphernalia, and carrying a concealed weapon. The defendant offered to stipulate to having a prior felony conviction, an element of possession of a firearm by a felon. After the state declined to accept the stipulation, the trial court, over the defendant's objection, allowed the state to introduce into evidence the defendant's first-degree rape conviction. The court ruled: (1) G.S. 14-415.1(b) provides a sufficient basis for the admission of a felony conviction; and (2) the defendant was not unfairly prejudiced under Rule 403(b) by the admission of the felony conviction. Relying on *State v. Jackson*, 139 N.C. App. 721 (2000), *rev'd in part on other grounds*, 353 N.C. 495 (2001), and *State v. Little*, 191 N.C. 655 (2008), the court noted that the prior conviction in this case was not substantially similar to the other offenses being tried.

NarTest Machine Used by Officer to Determine Substance Was Cocaine Was Not Shown to Be Reliable to Allow Test Result to Be Admitted at Trial

State v. Meadows, ___ N.C. App. ___, 687 S.E.2d 305 (5 January 2010). The court ruled that the NarTest machine used by an officer to determine that a substance was cocaine was not shown to be reliable to allow a test result to be admitted at trial. The state did not present any evidence to indicate the machine uses an established technique to analyze controlled substances or that the machine has been recognized by experts in the field of chemical analysis of controlled substances as a reliable testing method. The court stated that it was unaware of any cases in which the machine had been recognized as an accepted method of analysis or identification of controlled substances in North Carolina or in any other jurisdiction in the United States.

Trial Court Did Not Commit Plain Error in Evidentiary Rulings in Child Sexual Abuse Trial

State v. Espinoza-Valenzuela, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendant was convicted of multiple charges involving child sexual abuse involving two children. The court ruled that the trial court did not commit plain error by: (1) admitting evidence that the defendant had struck the victims' mother in the victims' presence; and (2) allowing a child protective services employee to testify that the victims' mother had been a victim of sexual abuse as a child.

Crimes

Impaired Driving

Officer's Warrantless Compelling of DWI Defendant to Give Blood Sample at Hospital for Alcohol Testing After Defendant Had Refused to Take Breath Test Was Lawful Under G.S. 20-139.1(d1) and United States and North Carolina Constitutions

State v. Fletcher, ___ N.C. App. ___, 688 S.E.2d 94 (19 January 2010). The defendant was arrested at a checkpoint for DWI, taken to a police station for Intoximeter breath testing, which the defendant refused. An officer then transported the defendant to a hospital to compel a blood test. The defendant's blood was drawn, and the blood test result was 0.10. The court ruled the officer reasonably believed under G.S. 20-139.1(d1) that the delay necessary to obtain a court order would result in the dissipation of alcohol in the defendant's blood. The officer testified that the entire process of driving to the magistrate's office, standing in line, completing the required forms, returning to the hospital, and having the defendant's blood drawn would have taken from two to three hours. The court also ruled that probable cause and exigent circumstances supported the warrantless compelling of the blood sample and did not violate the Fourth Amendment or various provisions of the Constitution of North Carolina.

Intoxilyzer Test Results From First and Third Breath Samples Were From "Consecutively Administered Tests" Under Former Version of G.S. 20-139.1(b3) When Defendant Failed to Provide Adequate Sample for Second Test

State v. Shockley, ___ N.C. App. ___, 689 S.E.2d 455 (8 December 2009). The defendant was arrested for DWI and requested to take the Intoxilyzer test. The defendant provided a valid breath sample and the result was 0.16. The defendant failed to provide an adequate breath sample for the second test. The defendant provided a valid breath sample for the third test and the result was 0.15. The defendant failed to provide an adequate breath sample for the fourth test. The court ruled that the test results from the first and third breath samples were from "consecutively administered tests" under the former version of G.S. 20-139.1(b3). An insufficient sample does not produce a valid reading. [Author's note: The current version of G.S. 20-139.1(b3) requires "at least duplicate sequential" breath samples. The court's ruling in *Shockley* would likely apply to the current version as well.]

Court Reverses Five Convictions of Felony Serious Injury by Vehicle When Jury at Same Trial Acquitted Defendant of DWI, Which Was Element That State Was Required to Prove for Jury to Convict Defendant of Felony Serious Injury by Vehicle

State v. Mumford, ___ N.C. App. ___, 688 S.E.2d 458 (5 January 2010). The defendant was convicted of five counts of felony serious injury by vehicle in which five people were injured and the defendant was driving impaired. At the same trial, the jury found the defendant not guilty of DWI. The court, relying on *State v. Marsh*, 187 N.C. App. 235 (2007), and other cases and distinguishing cases in which inconsistent verdicts had been upheld, reversed the convictions of felony serious injury by vehicle because they were inconsistent with and legally contradictory to the verdict of not guilty of DWI, which was an element that the state was required to prove for the jury to convict the defendant of felony serious injury by vehicle.

Convictions of Both Second-Degree Murder and DWI Did Not Violate Double Jeopardy; Use of Alabama DUI Convictions in Sentencing Was Proper

State v. Armstrong, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendant drove while impaired and crashed his vehicle, resulting in the death of his passenger. The court ruled: (1) double jeopardy does not prohibit the convictions of both second-degree murder and DWI; the court relied on *State v. McAllister*, 138 N.C. App. 252 (2000); (2) for sentencing purposes, the defendant's Alabama convictions of driving under the influence of alcohol were substantially similar to an offense classified as a Class 1 misdemeanor in North Carolina; the court found that DWI was found, albeit in a different context, to be a Class 1 misdemeanor in *State v. Gregory*, 154 N.C. App. 718 (2002).

Other Offenses

Insufficient Evidence of Possession of Stolen Goods

State v. Wilson, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The court reversed the defendant's conviction of possession of stolen goods because it ruled that there was insufficient evidence to establish that the defendant knew or had reasonable grounds to believe that gun was stolen.

Insufficient Evidence of Secret Assault

State v. Holcombe, ___ N.C. App. ___; ___ S.E.2d ___ (20 April 2010). The defendants were convicted of secret assault under G.S. 14-31 and other offenses. The court reversed the secret assault convictions because it found insufficient evidence of the "secret manner" element of the offense. The state failed to present evidence that the victims were surprised, that they had no opportunity to defend themselves, or that the defendants took steps to make the assault secretive. (See the court's opinion for a discussion of the facts in this case.)

- (1) Sufficient Evidence to Support Conviction of Malicious Conduct by Prisoner When Officer Testified That Handcuffed Defendant Spit on His Leg**
- (2) Indictments Alleging Malicious Conduct by Prisoner and Assault on Governmental Official Need Not Allege Duty Officer Was Performing**

State v. Noel, ___ N.C. App. ___, 690 S.E.2d 10 (2 March 2010). The defendant was convicted of malicious conduct by a prisoner and assault on a governmental official. After stopping a vehicle that had attempted to evade law enforcement and from which plastic bags had been thrown, officers removed the defendant-passenger, placed him on the curb, and handcuffed him. As an officer approached the defendant to question him, the defendant yelled at the officer and spit on the officer's right leg. (1) The court ruled that the state presented sufficient evidence to support the defendant's conviction of malicious conduct by prisoner, G.S. 14-258.4(a). (2) The court ruled, distinguishing *State v. Ellis*, 168 N.C. App. 651 (2005) (charge of resisting an officer under G.S. 14-223 must allege duty officer was discharging), that indictments alleging malicious conduct by a prisoner and assault on a governmental official need not allege the duty the officer was performing. Thus, the indictments' allegations of the duty the officer was performing were surplusage, and there was not a fatal variance between the allegations and the proof of the duty at trial.

Drug Loitering Ordinance Was Unconstitutionally Overbroad and Unconstitutionally Vague

State v. Mello, ___ N.C. App. ___, 684 S.E.2d 477 (3 November 2009). The court ruled, distinguishing *State v. Evans*, 73 N.C. App. 214 (1985) (upholding loitering for prostitution statute, G.S. 14-204.1), that a city drug loitering ordinance was unconstitutionally overbroad and unconstitutionally vague. Unlike G.S. 14-204.1, the city ordinance does not require proof of an intent to violate a drug law, but imposes liability solely for conduct that "manifests" such purpose. Because the ordinance fails to require proof of intent, it attempts to curb drug activity by criminalizing constitutionally permissible conduct. (See the court's opinion for its analysis why a provision in the ordinance was unconstitutionally vague.)

Trial Court Committed Plain Error by Not Submitting Assault on a Government Official as Lesser Offense of Assault with Deadly Weapon on Government Official

State v. Clark, ___ N.C. App. ___, 689 S.E.2d 553 (8 December 2009). The court ruled that the trial court committed plain error by not submitting assault on a government official as a lesser offense of assault with a deadly weapon on a government official. Based on the facts in this case, the jury could have found that the truck used to assault the officer was not a deadly weapon.

- (1) Scar Resulting from Deep Cut Over Left Eye Was Permanent Disfigurement to Support Conviction of Assault Inflicting Serious Bodily Injury**
- (2) No Fatal Variance Between Allegations in Assault by Strangulation Indictment Concerning Method of Strangulation and Evidence at Trial**
- (3) Sufficient Evidence to Support Conviction of Assault by Strangulation**
- (4) Punishment Was Not Permitted for Convictions of Both Assault Inflicting Serious Bodily Injury and Assault by Strangulation for Same Conduct**
- (5) Punishment Was Permitted for Convictions of Assault Inflicting Serious Bodily Injury and First-Degree Kidnapping**
- (6) Punishment Was Not Permitted for Convictions of Both Assault With A Deadly Weapon Inflicting Serious Injury and Assault Inflicting Serious Bodily Injury Based on Single Assault**
- (7) Insufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury**
- (8) Convictions of Two Counts of First-Degree Sexual Offense Were Permitted Based on Defendant's Insertion of Fingers into Victim's Vagina and Rectum at Same Time**
- (9) Convictions of Both First-Degree Kidnapping and First-Degree Sexual Offense Were Permitted Based on Jury Instruction**

(10) Sufficient Evidence of Serious Bodily Injury to Support Conviction of Assault Inflicting Serious Bodily Injury

State v. Williams, ___ N.C. App. ___, 689 S.E.2d 412 (8 December 2009). The defendant was convicted in a single trial of multiple offenses involving five different victims over a time period from 2004 to 2006. The offenses included sexual assault, robbery, assault, and kidnapping. The court ruled: (1) There was sufficient evidence to support a conviction of assault inflicting serious bodily injury when the injury to the victim, L.T., included a scar resulting from a deep cut over her left eye, which was a permanent disfigurement (she had other injuries as well). (2) An indictment alleging assault by strangulation alleged the defendant strangled the victim, L.T., by placing his hands around her throat. The court ruled that even if there was a variance between the allegation concerning the method of strangulation and evidence introduced at trial, the variance was immaterial and not fatal. The method of strangulation alleged in the indictment was surplusage and should be disregarded. (3) There was sufficient evidence to support the defendant's conviction of assault by strangulation of L.T. She stated that she felt that the defendant was trying to crush her throat, he pushed down with his weight on her neck with his foot, she thought he was trying to "chok(e) her out" or make her go unconscious, and she thought she was going to die. The court rejected the defendant's argument that the state must prove that the victim had difficulty breathing. (4) G.S. 14-32.4(b) (unless conduct is covered under some other provision of law providing greater punishment) shows a legislative intent to prohibit a court from sentencing a defendant for the same conduct under both G.S. 14-32.4(b) (assault inflicting serious bodily injury, Class F felony) and G.S. 14-32.4(a) (assault by strangulation, Class H felony). Punishment can only be imposed for the assault inflicting serious bodily injury, which provides for greater punishment than assault by strangulation. (5) Punishment was permitted for convictions of both assault inflicting serious bodily injury and first-degree kidnapping, which was elevated from second-degree to first-degree based on a finding that the victim was seriously injured. Assault inflicting serious bodily injury requires the additional proof of "serious bodily injury" beyond the element of "serious injury" to prove first-degree kidnapping. Also, proof in the kidnapping case that the victim was abducted "for the purpose of doing serious bodily injury" and the act of committing serious bodily injury are two different elements, the latter being more serious than the former. (6) Punishment was not permitted for convictions of both assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury based on a single assault. Punishment was only permitted for the more serious offense of assault with a deadly weapon inflicting serious injury. (7) There was insufficient evidence of serious bodily injury of victim M.L.W. to support the defendant's conviction of assault inflicting serious bodily injury. Although the victim received a vicious beating, the evidence did not show that her injuries placed her at a substantial risk of death. Though her ribs were still sore five months after the assault, to satisfy the statutory definition the victim must experience "extreme pain" in addition to the "protracted condition." The state did not present evidence of extreme pain. (8) Convictions of two counts of first-degree sexual offense were permitted based on the defendant's insertion of his fingers into the victim's vagina and rectum at the same time. The court relied on *State v. Gobal*, 186 N.C. App. 308 (2008). (9) Convictions of both first-degree kidnapping and first-degree sexual offense were permitted based on the jury instruction for first-degree kidnapping that required proof of serious injury or not released in a safe place, with no reference to the sexual assault. (10) There was sufficient evidence of serious bodily injury to victim K.L.A. to support the defendant's conviction of assault inflicting serious bodily injury. She suffered a puncture wound to the back of her scalp and a parietal scalp hematoma. She also went into premature labor as a result of the assault. This was sufficient evidence of a bodily injury that created a substantial risk of death, which is included in the definition of serious bodily injury.

(1) G.S. 14-269.4 (Possessing Deadly Weapon in Courthouse), As Applied to Defendant, Did Not Violate North Carolina Constitution

(2) G.S. 14-269.4 Does Not Require State to Prove That Defendant Committed Statutory Violation “Knowingly” or “Willfully”

State v. Sullivan, ___ N.C. App. ___, ___ S.E.2d ___ (16 February 2010). The defendant openly displayed a firearm while in the clerk’s office in a courthouse. He was convicted of possessing a deadly weapon in a courthouse under G.S. 14-269.4. The court ruled: (1) G.S. 14-269.4, as applied to the defendant, was not an unconstitutional violation of his right to bear arms under Article I, Section 30 of the North Carolina Constitution; and (2) the trial court did not err when it refused the defendant’s request to instruct the jury that it must consider whether the defendant “knowingly” or “willfully” violated G.S. 14-269.4 because the defendant’s intent was not an element of the offense.

Jury Instruction in Eluding Arrest Trial Was Not Erroneous

State v. Graves, ___ N.C. App. ___, ___ S.E.2d ___ (16 March 2010). The defendant was convicted of felony eluding arrest and other offenses. The court ruled that the pattern jury instruction was not erroneous when it required proof that the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer. The court rejected the defendant’s argument that the jury should not be allowed to base its verdict on the defendant’s having reasonable grounds to know that the officer was a law enforcement officer.

Defenses

Trial Court Erred in Denying Defendant’s Requested Jury Instructions on Self-Defense and Defense of Family Member—Ruling of Court of Appeals Is Reversed

State v. Moore, 363 N.C. 793, 688 S.E.2d 447 (29 January 2010), *reversing*, ___ N.C. App. ___, 671 S.E.2d 545 (6 January 2009). The defendant was convicted of voluntary manslaughter. The court ruled that the trial court erred in denying the defendant’s requested jury instructions on self-defense and defense of a family member. The defendant, his wife, and grandson were working at their produce stand. The couple’s cash box was bolted to a folding table located behind the truck containing much of the produce. Harris (the person killed by the defendant) approached the produce stand, walked over to the meat container, and began comparing different pieces of meat, stating he was attempting to find a piece suitable for his mother. Shortly thereafter, a struggle erupted between the defendant’s wife and Harris when he attempted to steal the cash box and its contents. The defendant’s wife testified she was frightened during the altercation and praying that she would not get hurt. Harris became more aggressive as the attempted robbery progressed, including picking the table off the ground. She testified that when Harris had reached for the cash box and began the struggle, she shouted for her husband, who rushed to her aid and shouted for Harris to back off. Harris backed off, but then came back toward her with his left hand in his pocket and began to pull his hand from his pocket. The defendant then shot and killed him. The defendant testified that he “wasn’t going to wait to see no gun,” and he feared for his, his grandson’s, and his wife’s safety. The court concluded that the defendant’s evidence was sufficient to show that he believed it was necessary to use force to prevent death or great bodily injury to himself or a family member.

Mistake of Age Is Not a Defense to Indecent Liberties Under G.S. 14-202.1

State v. Breathette, ___ N.C. App. ___, ___ S.E.2d ___ (2 March 2010). The court ruled, relying on *People v. Olsen*, 685 P.2d 52 (Cal. 1984), and other cases, that mistake of age is not a defense to the offense of indecent liberties under G.S. 14-202.1. Thus, the trial court did not err in rejecting the defendant's proposed jury instruction that it was a defense to the charge if the jury found that the defendant had a reasonable but mistaken belief that the victim was older than 15 years old.

Sentencing and Other Consequences

Generally

Trial Court Did Not Err in Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted)

State v. Williams, ___ N.C. App. ___, 684 S.E.2d 898 (3 November 2009). The defendant was convicted of delivery of a controlled substance, cocaine, and a sentencing hearing was held. The defendant had a prior conviction for delivery of a controlled substance, marijuana. The court ruled, relying on *State v. Ford*, ___ N.C. App. ___, 672 S.E.2d 689 (2009), that the trial court did not err in assigning one point to the defendant's prior record level under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted).

Trial Court Abused Discretion in Finding Extraordinary Mitigating Factors in Sentencing Defendant

State v. Riley, ___ N.C. App. ___, 688 S.E.2d 477 (2 February 2010). The defendant was convicted of first-degree burglary and another offense. The trial court found two factors in extraordinary mitigation, which were statutory mitigating factors: (1) the defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense [G.S. 15A-1340.16(e)(3)]; and (2) the defendant aided in the apprehension of another felon [G.S. 15A-1340.16(e)(7)]. The trial court sentenced the defendant to special probation, as permitted under G.S. 15A-1340.13(g) (dispositional deviation for extraordinary mitigation), instead of an active sentence that was otherwise required for first-degree burglary. The state appealed the finding of extraordinary mitigation and the sentence imposed. Relying on *State v. Melvin*, 188 N.C. App. 827 (2008), the court ruled that the trial court abused its discretion in finding the two factors in extraordinary mitigation. The statutory mitigating factors are not by themselves sufficient to support a finding of extraordinary mitigation. There must be additional facts over and above the facts required to support a statutory mitigating factor.

Defendant Does Not Have Right to Appeal Order Denying Relief After Hearing on Results of Post-Conviction DNA Testing

State v. Norman, ___ N.C. App. ___, 688 S.E.2d 512 (2 February 2010). The defendant filed a motion for post-conviction DNA testing under G.S. 15A-269. Testing was conducted, a hearing was held on the results, and the trial court denied relief. The defendant filed a notice of appeal challenging the denial of relief. The court noted that G.S. 15A-270.1 provides a defendant with the right to appeal a denial of a defendant's motion for DNA testing. However, there is no statutory provision providing a right to appeal the denial of relief after a hearing on the DNA test results. The court dismissed the defendant's appeal.

The court also ruled, based on *Bailey v. State*, 353 N.C. 142 (2000), that the court is without authority to issue a writ of certiorari or to suspend the appellate rules under Rule 2 to review the denial of relief.

Sentence Enhancement Under G.S. 14-3(c) (Misdemeanor Committed Because of Victim's Race) Was Properly Applied When White Defendant Committed Misdemeanor Assault Against White Victim Because Victim Had Interracial Relationship With Black Person

State v. Brown, ___ N.C. App. ___, 689 S.E.2d 210 (16 February 2010). The defendant was convicted of assault with a deadly weapon, a Class A1 misdemeanor. He was sentenced as a Class H felon under G.S. 14-3(c) (offense was committed because of the victim's race). The evidence showed that the white defendant assaulted the white victim because the victim had an interracial relationship with a black person. The court ruled, relying on cases from other jurisdictions, that the sentencing enhancement was properly applied to the defendant.

Sentence Imposed at Re-Sentencing Hearing Violated G.S. 15A-1335

State v. Daniels, ___ N.C. App. ___, ___ S.E.2d ___ (6 April 2010). The defendant was convicted of first-degree rape and first-degree kidnapping. He was sentenced to consecutive terms of imprisonment of 307 to 378 months for the first-degree rape conviction and 133 to 169 months for the first-degree kidnapping conviction. He appealed his sentences to the North Carolina Court of Appeals, which remanded for new sentencing hearing for both convictions, requiring the trial court to either (1) arrest judgment for the first-degree kidnapping conviction and resentence for second-degree kidnapping; or (2) arrest judgment for the first-degree rape conviction and resentence for first-degree kidnapping. The trial court chose the first option, sentencing the defendant from 370 to 453 months for first-degree rape and a consecutive 46 to 65 months for second-degree kidnapping. The court ruled that the trial court's sentence for first-degree rape violated G.S. 15A-1335 because it exceeded the sentence imposed at the first sentencing hearing. The court distinguished *State v. Moffitt*, 185 N.C. App. 308 (2007) (court may consider whether new sentences in the aggregate are greater than original sentences in the aggregate), noting that the ruling in that case addressed the consolidation of the defendant Moffitt's multiple convictions at his resentencing hearing, whereas defendant Daniels' convictions were not consolidated.

- (1) Defendant's Statements Were Not Inadmissible Under Rule 410**
- (2) Convictions Are Reversed Due to Absence of Acting-in-Concert Instruction**
- (3) Concurrent Habitual Felon Sentences for Convictions at Same Trial Are Authorized**
- (4) Sentence May Have Been Improperly Based on Defendant's Failure to Accept Pretrial Plea Offer**

State v. Haymond, ___ N.C. App. ___, ___ S.E.2d ___ (6 April 2010). The defendant was convicted of multiple offenses involving break-ins, larcenies, and possession of stolen property concerning multiple victims. He received ten consecutive habitual felon sentences. The court ruled: (1) the defendant's statements during a pretrial hearing were not inadmissible under Rule 410 (statement made by defendant during plea discussions) because they were made during the defendant's various requests to the trial court and the defendant did not subjectively believe he was negotiating a plea with the prosecutor or with the prosecutor's express authority; (2) when the trial court did not instruct the jury on the theory of acting in concert and the evidence did not show that the defendant committed the offenses himself, the defendant's convictions must be reversed; (3) the trial court has the authority to impose concurrent habitual felon sentences for convictions that occur at the same trial; and (4) the trial court's statements at the sentencing hearing raised an inference that the trial court based its sentences

at least in part on the defendant's failure to accept the state's plea offer at a pretrial hearing, and thus a new sentencing hearing must be held.

Satellite-Based Monitoring

Trial Court Improperly Determined That Defendant Must Be Enrolled in Satellite-Based Monitoring for Life

State v. Davison, ___ N.C. App. ___, 689 S.E.2d 510 (8 December 2009). The defendant was convicted of attempted first-degree sexual offense and indecent liberties with a child and sentenced to imprisonment. The trial court ordered enrollment in a satellite-based monitoring program for life after his release from his prison sentence. The court ruled that the trial court erred by failing to follow the statutory procedure under G.S. 14-208.40A when it failed to properly make determinations pursuant to subsection (b), and by doing so prematurely ordered a risk assessment and improperly considered sentencing pursuant to subsections (c) and (d). The court also ruled that the trial court incorrectly found that the defendant had been convicted of an "aggravated offense" because neither offense fits the statutory definition in G.S. 14-208.6(1a). In determining what constitutes an "aggravated offense," a court may only consider the elements of the offense and not the underlying facts of the offense. For other rulings finding error in trial court orders to enroll defendants in satellite-based monitoring, see *State v. Smith*, ___ N.C. App. ___, 687 S.E.2d 525 (5 January 2010), and *State v. Singleton*, ___ N.C. App. ___, 689 S.E.2d 562 (5 January 2010).