2014 SUPREME COURT REVIEW: US & NC CASES

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Contents

Criminal Procedure

Appeal Issues

State v. Howard, __ N.C. __, 754 S.E.2d 417 (Mar. 7, 2014). The court affirmed per curiam the decision below in *State v. Howard*, __ N.C. App. __, 742 S.E.2d 858 (June 18, 2013) (over a dissent, the court dismissed the defendant's appeal where the defendant objected to the challenged evidence at trial under Rule 403 but on appeal argued that it was improper under Rule 404(b); the court stated: "A defendant cannot 'swap horses between courts in order to get a better mount'"; the dissenting judge believed that the defendant preserved his argument and that the evidence was improperly admitted).

Indictment Issues

State v. Jones, __ N.C. __, 758 S.E.2d 345 (Mar. 7, 2014). (1) Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that an indictment charging

obtaining property by false pretenses was defective where it failed to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services. (2) The court also held that an indictment charging trafficking in stolen identities was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

Jury Instructions

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Based on long-standing precedent, the trial court's use of the term "victim" in the jury instructions was not impermissible commentary on a disputed issue of fact and the trial court did not err by denying the defendant's request to use the words "alleged victim" instead of "victim" in the jury charge in this child sexual abuse case. The court continued:

> We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

State v. Grainger, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder was supported by the evidence (including the defendant's own statements to the police and thus not solely based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

Sentencing

State v. Facyson, __ N.C. __, 758 S.E.2d 359 (June 12, 2014). Reversing the court of appeals, the court held the evidence necessary to prove a defendant guilty under the theory of acting in concert is not the same as that necessary to establish the aggravating factor that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Because the aggravating factor requires additional evidence beyond that necessary to prove acting in concert, the trial court properly submitted the aggravating factor to the jury. Specifically, the aggravating factor requires evidence that the defendant joined with at least two other individuals to commit the offense while acting in concert only requires proof that the defendant joined with at least one other person. Additionally, the aggravating factor requires proof that the defendant was not charged with committing a conspiracy, which need not be proved for acting in concert.

State v. Sanders, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). (1) The trial court erred by determining that a Tennessee offense of "domestic assault" was substantially similar to the North Carolina offense of assault on a female without reviewing all relevant sections of the Tennessee code. Section 39-13-111 of

the Tennessee Code provides that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Section 39-13-101 defines when someone commits an "assault." Here the State provided the trial court with a photocopy section 39-13-111 but did not give the trial court a photocopy of section 39-13-101. The court held: "We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." (2) Comparing the elements of the offenses, the court held that they are not substantially similar under G.S. 15A-1340.14(e). The North Carolina offenses does not require any type of relationship between the perpetrator and the victim but the Tennessee statutes does. The court noted: "Indeed, a woman assaulting her child or her husband could be convicted of 'domestic assault' in Tennessee, but could not be convicted of 'assault on a female' in North Carolina. A male stranger who assaults a woman on the street could be convicted of 'assault on a female' in North Carolina, but could not be convicted of 'domestic assault' in Tennessee."

State v. Bowden, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Reversing the court of appeals, the court held that the defendant, who was in the class of inmates whose life sentence was deemed to be a sentence of 80 years, was not entitled to immediate release. The defendant argued that various credits he accumulated during his incarceration (good time, gain time, and merit time) must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. The DOC has applied these credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, but not towards the calculation of an unconditional release date. The court found the case indistinguishable from its prior decision in *Jones v. Keller*, 364 N.C. 249, 254 (2010).

Probation

State v. Murchison, __ N.C. __, 758 S.E.2d 356 (June 12, 2014). Reversing an unpublished decision of the court of appeals, the court held that the trial court did not abuse its discretion by basing its decision to revoke the defendant's probation on hearsay evidence presented by the State. The court noted that under Rule 1101, the formal rules of evidence do not apply in probation revocation hearings.

State v. Pennell, __ N.C. __, 758 S.E.2d 383 (June 12, 2014). Reversing the court of appeals, the court held that on direct appeal from the activation of a suspended sentence, a defendant may not challenge the jurisdictional validity of the indictment underlying his original conviction. The court reasoned that a challenge to the validity of the original judgment constitutes an impermissible collateral attack. It explained:

> [D]efendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment. As such, defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise proper, we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his

probation and activating his sentence. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [G.S.] 15A-1415(b) or petitioning for a writ of habeas corpus. Our holding here does not prejudice defendant from pursuing these avenues.

Slip Op. at 9-10 (footnote and citation omitted).

Capital Law

Hall v. Florida, 572 U.S. __, 134 S. Ct. 1986 (May 27, 2014). The Court held unconstitutional a Florida law strictly defining intellectual disability for purposes of qualification for the death penalty. The Eighth and Fourteenth Amendments forbid the execution of persons with intellectual disability. Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. The Court held: "This rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Slip Op. at 1. The Court concluded:

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. [Defendant] Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.
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> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Slip Op. at 22.

Double Jeopardy

Martinez v. Illinois, 572 U.S. __, 134 S. Ct. 2070 (May 27, 2014). Double jeopardy barred the State's appeal of a trial court order dismissing charges for insufficiency of the evidence. After numerous continuances granted to the State because of its inability to procure its witnesses for trial, the defendant's case was finally called for trial. When the trial court expressed its intention to proceed the prosecutor unsuccessfully asked for another continuance and informed the court that without a continuance "the State will not be participating in the trial." The jury was sworn and the State declined to make an opening statement or call any witnesses. The defendant then moved for a directed not-guilty

verdict, which the court granted. The State appealed. The Court held that double jeopardy barred the State's attempt to appeal, reasoning that jeopardy attached when the jury was sworn and that the dismissal constituted an acquittal.

State v. Banks, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .
>
> Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

Ineffective Assistance

Hinton v. Alabama, 571 U.S. __, 134 S. Ct. 1081 (Feb. 24, 2014). Defense counsel in a capital case rendered deficient performance when he made an "inexcusable mistake of law" causing him to employ an expert "that he himself deemed inadequate." Counsel believed that he could only obtain $1,000 for expert assistance when in fact he could have sought court approval for "any expenses reasonably incurred." The Court clarified:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

Slip Op. at 12 (citation omitted). The court remanded for a determination of whether counsel's deficient performance was prejudicial.

State v. Hunt, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court affirmed per curiam that aspect of the decision below that generated a dissenting opinion. In the decision below, *State v. Hunt*, __ N.C. App. __, 728 S.E.2d 409 (July 17, 2012), the court of appeals held, over a dissent, that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

Evidence

Crawford Issues

State v. Whittington, __ N.C. __, 753 S.E.2d 320 (Jan. 24, 2014). (1) *Melendez-Diaz* did not impact the "continuing vitality" of the notice and demand statute in G.S. 90-95(g); when the State satisfies the requirements of the statute and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs. (2) The State's notice under the statute in this case was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request." However, the defendant did not preserve this issue for appeal. At trial he asserted only that the statute was unconstitutional under *Melendez-Diaz*; he did not challenge the State's notice under the statute. Justice Hudson dissented, joined by Justice Beasley, arguing that the majority improperly shifts the burden of proving compliance with the notice and demand statute from the State to defendant.

Character Evidence

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). In a child sexual abuse case, although evidence of the defendant's law abidingness was admissible under Rule 404(a)(1), evidence of his general good character and being respectful towards children was not admissible. On appeal, the defendant's argument focused on the exclusion of character evidence that he was respectful towards children. The court found that this evidence did not relate to a pertinent character trait, stating: "Being respectful towards children does not bear a special relationship to the charges of child sexual abuse . . . nor is the proposed trait sufficiently tailored to those charges." It continued:

> Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children.

Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (April 22, 2014). The Court held in this "close case" that an officer had reasonable suspicion to make a vehicle stop based on a 911 call. After a 911 caller reported that a truck had run her off the road, a police officer located the truck the caller identified and executed a traffic stop. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The defendants moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Even assuming that the 911 call was anonymous, the Court found that it bore adequate indicia of reliability for the officer to credit the caller's account that the truck ran her off the road. The Court explained: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." The Court noted that in this respect, the case contrasted with *Florida v. J. L.,* 529 U. S. 266 (2000), where the tip provided no basis for concluding that the tipster had actually seen the gun reportedly possessed by the defendant. It continued: "A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously." The Court noted evidence suggesting that the caller reported the incident soon after it occurred and stated, "That sort of contemporaneous report has long been treated as especially reliable." Again contrasting the case to *J.L.,* the Court noted that in *J.L.*, there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event. The Court determined that another indicator of veracity is the caller's use of the 911 system, which allows calls to be recorded and law enforcement to verify information about the caller. Thus, "a reasonable officer could conclude that a false tipster would think twice before using such a system and a caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." But the Court cautioned, "None of this is to suggest that tips in 911 calls are per se reliable."

The Court went on, noting that a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity is afoot. It then determined that the caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. It stated:

> The 911 caller . . . reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. As a result, we cannot say that the officer acted unreasonably under these

circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving. (Citations omitted).

Heien v. North Carolina, 574 U.S. ___ (Dec. 15, 2014). Affirming *State v. Heien*, 366 N.C. 271 (Dec. 14, 2012), the Court held that because an officer's mistake of law was reasonable, it could support a vehicle stop. In *Heien,* an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required. The case presented the question whether such a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. The Court answered the question in the affirmative. It explained:

> [W]e have repeatedly affirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." We have recognized that searches and seizures based on mistakes of fact can be reasonable. The warrantless search of a home, for instance, is reasonable if undertaken with the consent of a resident, and remains lawful when officers obtain the consent of someone who reasonably appears to be but is not in fact a resident. By the same token, if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect's description, neither the seizure nor an accompanying search of the arrestee would be unlawful. The limit is that "the mistakes must be those of reasonable men."
>
> But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Slip op. at 5-6 (citations omitted). The Court went on to find that the officer's mistake of law was objectively reasonable, given the state statutes at issue:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N. C. Gen. Stat. Ann. §20–129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," §20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Slip op. at 12-13.

Plumhoff v. Rickard, 572 U.S. __, 134 S. Ct. 2012 (May 27, 2014). Officers did not use excessive force in violation of the Fourth Amendment when using deadly force to end a high speed car chase. The chase ended when officers shot and killed the fleeing driver. The driver's daughter filed a § 1983 action, alleging that the officers used excessive force in terminating the chase in violation of the Fourth Amendment. Given the circumstances of the chase—among other things, speeds in excess of 100 mph when other cars were on the road—the Court found it "beyond serious dispute that [the driver's] flight posed a grave public safety risk, and . . . the police acted reasonably in using deadly force to end that risk." Slip Op. at 11. The Court went on to reject the respondent's contention that, even if the use of deadly force was permissible, the officers acted unreasonably in firing a total of 15 shots, stating: "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.*

State v. Verkerk, __ N.C. __, 758 S.E.2d 387 (June 12 2014). Reversing the court of appeals in a DWI case where the defendant was initially stopped by a firefighter, the court determined that the trial court properly denied the defendant's motion to suppress which challenged the firefighter's authority to make the initial stop. After observing the defendant's erratic driving and transmitting this information to the local police department, the firefighter stopped the defendant's vehicle. After some conversation, the driver drove away. When police officers arrived on the scene, the firefighter indicated where the vehicle had gone. The officers located the defendant, investigated her condition and charged her with DWI. On appeal, the defendant argued that because the firefighter had no authority to stop her, evidence from the first stop was improperly obtained. However, the court determined that it need not consider the extent of the firefighter's authority to conduct a traffic stop or even whether the encounter with him amounted to a "legal stop." The court reasoned that the firefighter's observations of the defendant's driving, which were transmitted to the police before making the stop, established that the police officers had reasonable suspicion to stop the defendant. The court noted that this evidence was independent of any evidence derived from the firefighter's stop.

Search Incident to Arrest

Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (June 25, 2014). The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Next, the Court rejected the argument that preventing the destruction of evidence justified the search. It was unpersuaded by the prosecution's argument that a different result should obtain because remote wiping and data encryption may be used to destroy digital evidence. The Court noted that "[t]o the extent that law enforcement still has specific concerns about the potential

loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant. Turning from an examination of the government interests at stake to the privacy issues associated with a warrantless cell phone search, the Court rejected the government's argument that a search of all data stored on a cell phone is materially indistinguishable from the search of other types of personal items, such as wallets and purses. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." It also noted the complicating factor that much of the data viewed on a cell phone is not stored on the device itself, but rather remotely through cloud computing. Concluding, the Court noted:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
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> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

(Slip Op at. p. 25). And finally, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

Consent Search

Fernandez v. California, 571 U.S. __, 134 S. Ct. 1126 (Feb. 25, 2014). Consent to search a home by an abused woman who lived there was valid when the consent was given after her male partner, who objected, was arrested and removed from the premises by the police. Cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph*, 547 U. S. 103 (2006), the Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court held that *Randolph* does not apply when the objecting occupant is absent when another occupant consents. The Court emphasized that *Randolph* applies only when the objecting occupant is physically present. Here, the defendant was not present when the consent was given. The Court rejected the defendant's argument that *Randolph* controls because his absence should not matter since he was absent only because the police had taken him away. It also rejected his argument that it was sufficient that he objected to the search while he was still present. Such an objection, the defendant

argued should remain in effect until the objecting party no longer wishes to keep the police out of his home. The Court determined both arguments to be unsound.

Search Warrants

State v. Benters, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court held that an affidavit supporting a search warrant failed to provide a substantial basis for the magistrate to conclude that probable cause existed. In the affidavit, the affiant officer stated that another officer conveyed to him a tip from a confidential informant that the suspect was growing marijuana at a specified premises. The affiant then recounted certain corroboration done by officers. The court first held that the tipster would be treated as anonymous, not one who is confidential and reliable. It explained: "It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established 'track record.' Thus, the source cannot be treated as a confidential and reliable informant on these two bases." The court rejected the State's argument that because an officer met "face-to-face" with the source, the source should be considered more reliable, reasoning: "The affidavit does not suggest [the affiant] was acquainted with or knew anything about [the] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." Treating the source as an anonymous tipster, the court found that the tip was supported by insufficient corroboration. The State argued that the following corroboration supported the tip: the affiant's knowledge of the defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; subpoenaed utility records indicating that the defendant was the current subscriber and the kilowatt usage hours were indicative of a marijuana grow operation; and officers' observations of items at the premises indicative of an indoor marijuana growing operation, including "potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers." Considering the novel issue of utility records offered in support of probable cause, the court noted that "[t]he weight given to power records increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties." It continued: "By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records." Here, the affidavit summarily concluded that kilowatt usage was indicative of a marijuana grow operation and "the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records." Thus, the court concluded: "these unsupported allegations do little to establish probable cause independently or by corroborating the anonymous tip." The court was similarly unimpressed by the officers' observation of plant growing items, noting:

> The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly requires the magistrate to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

As to the affidavit's extensive recounting of the officers' experience, the court held:

> We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations.

Canines

State v. Miller, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The court held that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Responding to a burglar alarm, officers arrived at the defendant's home with a police dog, Jack. The officers deployed Jack to search the premises for intruders. Jack went from room to room until he reached a side bedroom where he remained. When an officer entered to investigate, Jack was sitting on the bedroom floor staring at a dresser drawer, alerting the officer to the presence of drugs. The officer opened the drawer and found a brick of marijuana. Leaving the drugs there, the officer and Jack continued the protective sweep. Jack stopped in front of a closet and began barking at the closet door, alerting the officer to the presence of a human suspect. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers opened the closet and found two large black trash bags on the closet floor. When Jack nuzzled a bag, marijuana was visible. The officers secured the premises and obtained a search warrant. At issue on appeal was whether Jack's nuzzling of the bags in the closet violated the Fourth Amendment. The court of appeals determined that Jack's nuzzling of the bags was an action unrelated to the objectives of the authorized intrusion that created a new invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry. That court viewed Jack as an instrumentality of the police and concluded that "his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." The Supreme Court disagreed, concluding that "Jack's actions are different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police." It held:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (. . . acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed. (citation omitted)

Ultimately, the court remanded for the trial court to decide whether Jack's nuzzling in this case was in fact instinctive, undirected, and unguided by the officers.

Criminal Offenses

Homicide

State v. Childress, ___ N.C. ___, ___ S.E.2d ___ (Dec. 19, 2014). The defendant's actions provided sufficient evidence of premeditation and deliberation to survive a motion to dismiss an attempted murder charge. From the safety of a car, the defendant drove by the victim's home, shouted a phrase used by gang members, and then returned to shoot at her and repeatedly fire bullets into her home when she retreated from his attack. The court noted that the victim did not provoke the defendant in any way and was unarmed; the defendant drove by the victim's home before returning and shooting at her; during this initial drive-by, the defendant or a companion in his car yelled out "[W]hat's popping," a phrase associated with gang activity that a jury may interpret as a threat; the defendant had a firearm with him; and the defendant fired multiple shots toward the victim and her home. This evidence supported an inference that the defendant deliberately and with premeditation set out to kill the victim.

Kidnapping

State v. Stokes, __ N.C. __, 756 S.E.2d 32 (April 11, 2014). The court reversed and remanded the decision below, *State v. Stokes*, __ N.C. App. __, 745 S.E.2d 375 (Jun. 4, 2013) (vacating the defendant's conviction for second-degree kidnapping on grounds that the evidence was insufficient to establish removal when during a robbery the defendant ordered the clerk to the back of the store but the clerk refused). (1) The court held that the court of appeals erred by failing to consider whether the State presented sufficient evidence to support a conviction of attempted second-degree kidnapping. The court went on to find that the evidence supported conviction of the lesser offense. The court rejected the defendant's argument that it could not consider whether the evidence was sufficient to establish the lesser offense because the State had not argued for that result on appeal, stating: "While we agree it would be better practice for the State to present such an alternative argument, we have not, however, historically imposed this requirement." It continued:

> When acting as an appellee, the State should bring alternative arguments to the appellate court's attention, and we strongly encourage the State to do so. Nonetheless, we are bound to follow our long-standing, consistent precedent of acting ex mero motu to recognize a verdict of guilty of a crime based upon insufficient evidence as a verdict of guilty of a lesser included offense. Hence, the Court of Appeals incorrectly refused to consider whether defendant's actions constituted attempted second-degree kidnapping.

(2) The court rejected the defendant's argument that his removal of the victim was inherent in the robbery and thus could not support a separate kidnapping conviction. It explained:

> Defendant ordered [the victim] at gunpoint to the back of the store and then into an awaiting automobile outside the store after stealing the cigarettes and money, the only two items defendant demanded during the robbery. At this point defendant was attempting to flee the scene of the crime. The armed robbery was complete, and defendant's attempted removal of [the victim] therefore cannot be considered inherent to that crime. By ordering [the victim] into an awaiting automobile after completing the

armed robbery, defendant attempted to place [the victim] in danger greater than that inherent in the underlying felony.

Drug Crimes

State v. Barnes, __ N.C. __, 756 S.E.2d 38 (April 11, 2014). The court per curiam affirmed the decision below, *State v. Barnes,* __ N.C. App. __, 747 S.E.2d 912 (Sept. 17, 2013). (1) Over a dissent, the court of appeals held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence. (2) The court of appeals held that the trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.

Frauds

State v. Jones, __ N.C. __, 758 S.E.2d 345 (Mar. 7, 2014). Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that the evidence was sufficient to establish identity theft. The case arose out of a scheme whereby one of the defendants, who worked at a hotel, obtained the four victim's credit card information when they checked into the premises. The defendant argued the evidence was insufficient on his intent to fraudulently use the victim's cards. However, the court found that based on evidence that the defendant had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed the four victim's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. The defendant argued further that the transactions involving other individuals' credit cards actually negated the required intent because when he made them, he used false names that did not match the credit cards used. He continued, asserting that this

negates the suggestion that he intended to represent himself as the person named on the cards. The court rejected that argument, stating: “We cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder’s name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information.”