Published by the
Institute of Government,
The University
of North Carolina
at Chapel Hill

No. 93/02
September 1993


# Administration of Justice Memorandum

Judges, Prosecutors,
Appellate and
Public Defenders,
Police Attorneys



## RECENT CRIMINAL CASES

**(July 20, 1993 - September 10, 1993)**

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This memorandum discusses cases of July 30 and September 10, 1993 from the North Carolina Supreme Court and cases of July 20, August 3, 17, and September 7, 1993 from the North Carolina Court of Appeals.

### North Carolina Supreme Court

#### Reasonable Doubt Jury Instruction

Reasonable Doubt Jury Instruction Is Unconstitutional

**State v. Bryant**, 334 N.C. 333, 432 S.E.2d 291 (30 July 1993). Court rules, based on *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d. 339 (1991), that the following jury instruction on reasonable doubt was unconstitutional, and, based on *Sullivan v. Louisiana*, 113 S.Ct. 2078, 123 L.Ed.2d. 182 (1993), was reversible error *per se*—not subject to harmless error analysis:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is an honest substantial misgiving generated by the insufficiency of the proof.

Although the defendant did not object to the reasonable doubt instruction at trial, the court rules that the instructional error was fundamental error that qualified as "plain error" to excuse the defendant's failure to object at trial.

**State v. Williams**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Relying on *State v. Bryant*, discussed above, court rules that a virtually identical reasonable doubt instruction was unconstitutional.

**Jury Selection**

(1) Judge Did Not Err In Refusing Defense Request To Rehabilitate Prospective Juror
(2) When Prosecutor Committed *Batson* Error, Judge Properly Used New Jury Panel

**State v. McCollum**, 334 N.C. 208, ___ S.E.2d ___ (30 July 1993). (1) Trial judge properly exercised his discretion in refusing to allow defense counsel to examine or rehabilitate two prospective jurors after prosecutor challenged them for cause because of their unequivocal opposition to the death penalty, when the record showed that further questioning would not have caused either of them to alter their expressed beliefs. (2) Trial judge did not err in ordering that jury selection process begin again with a new panel of forty prospective jurors after judge had ruled that prosecutor had committed *Batson* error in exercising peremptory challenges to three black prospective jurors. Trial judge properly rejected defendant's request that the improperly challenged jurors be seated. Court states that "[w]e believe that the better practice is that followed by the trial court in this case," and federal case law does not require a different procedure.

**Criminal Offenses**

Voluntary Intoxication Defense Inapplicable to Second-Degree Murder And Acting In Concert

**State v. Harvell**, 334 N.C. 356, 432 S.E.2d 125 (30 July 1993). Voluntary intoxication defense does not apply to (1) second-degree murder, because specific intent is not an element of that offense, and (2) the acting in concert theory because the defense applies only to an element of a *crime*.

(1) Taking Contraband Constitutes Larceny (Or Robbery)
(2) Sufficient Evidence Of Constructive Breaking For Burglary

**State v. Oliver**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). (1) Taking contraband (in this case, illegal drugs) constitutes larceny or robbery—in this case, armed robbery. (2) There was sufficient evidence of constructive breaking in burglary case when the victim was induced to open the door by the defendant's knocking on the door under the pretense of business.

Court Upholds Two Separate Conspiracy Convictions

**State v. Gay**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Defendant was convicted of conspiracy to commit murder and conspiracy to commit first-degree burglary. Court upholds both convictions because the conspiracy to commit murder was committed weeks before the murders (and there was no specific plan on how to accomplish the murders), and the conspiracy to commit first-degree burglary was a separate agreement formed on the morning of the murders.

## Evidence

Court Clarifies Scope Of Impeachment By Prior Conviction

**State v. Lynch**, 334 N.C. 402, 432 S.E.2d 349 (30 July 1993). Court rules, clarifying and overruling cases to the contrary [e.g., *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992) and *State v. Harrison*, 90 N.C. App. 629, 369 S.E.2d 624 (1988)], that a prosecutor under Rule 609(a) at the guilt-innocence phase of a trial is prohibited from eliciting details of a prior conviction other than the name of the crime, the time and place of the conviction, and the punishment. Court rules that prosecutor in this case improperly elicited details of prior convictions under Rule 609(a) and was not permitted to do so alternatively under Rule 611(b), Rule 404(a)(1), or Rule 404(b).

Court notes, however, when a defendant opens the door by misstating his or her criminal record or the facts of the crimes or actions, or when the defendant has used his or her criminal record to create a favorable inference for himself or herself, the prosecutor may cross-examine the defendant about the details of those prior crimes or actions. However, the court rules that in this case the defendant did not open the door because his brief summary of his criminal record was accurate and complete.

Partially Inaudible Tape Recording Was Admissible

**State v. Williams**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Trial judge has discretion to determine whether a partially inaudible tape recording is admissible, and the court rules that the judge did not err in admitting it.

## Search and Seizure and Confessions

Physical Evidence Found As Result Of *Miranda* Violation Is Admissible

**State v. May**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Court rules that physical evidence found as a result of a *Miranda* violation (in this case, the defendant's statement led officers to a knife, pair of gloves, and rag in the defendant's backyard) is admissible when defendant was not coerced into giving the statement (i.e., the statement was voluntarily given). Court relies on *Michigan v. Tucker*, 417 U.S. 433 (1974) and *Oregon v. Elstad*, 470 U.S. 298 (1985) in ruling that the officers violated the prophylactic rule of *Miranda* and *Edwards v. Arizona*, but not the defendant's right against compelled self-incrimination. The rule's deterrent value is satisfied by excluding the defendant's statement, but not the physical evidence.

Defendant Impliedly Waived *Miranda* Rights, Although He Was Silent After *Miranda* Warnings

**State v. Williams**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Officer gave *Miranda* rights to defendant and defendant responded, "yes," when officer asked him if he understood the rights. Defendant remained silent when the officer asked defendant, first, whether he wished to waive his right to remain silent and, second, whether he wished to waive his right to have counsel present during questioning. Soon thereafter, someone else asked defendant whether anything in

the room belonged to him. Defendant responded that he owned the boxes. Officer then asked if he would consent to a search of the boxes, to which the defendant responded, "yes." Relying on *North Carolina v. Butler*, 441 U.S. 369 (1979), court rules that defendant properly waived his rights. Court notes that although defendant remained silent when asked if he would waive his rights, he had previously affirmatively stated that he understood his rights. He appeared coherent then and capable of understanding his rights. Also, officers did not pressure him in any way to answer their questions. Thus, one can infer that, in answering the officers' questions after expressly acknowledging that he understood his right not to do so in the absence of counsel, defendant impliedly waived his rights to remain silent and to counsel.

State Employee's Fifth Amendment Rights Were Not Violated When He Was Fired

**Debnam v. Department of Correction**, 334 N.C. 380, 432 S.E.2d 324 (30 July 1993). Court rules that state did not violate public employee's Fifth Amendment right against compelled self-incrimination by firing employee for refusing to answer questions relating to his employment (in this case, an incident involving a ring allegedly stolen from an inmate), when the employee was informed that his failure to answer might result in his dismissal, and the state did not seek the employee's waiver of his immunity from the state's use of any of his answers in a criminal action against him. Court rejects employee's argument that Fifth Amendment prohibited the state from firing him for refusing to answer questions during its internal investigation, because he was not advised that his responses could not be used against him in any criminal prosecution and that the questions would relate specifically and narrowly to his performance of official duties.

**Capital Case Issues**

(1) Peremptory Instructions Required For Nonstatutory And Statutory Mitigating Circumstances
(2) Judge Must Instruct On Not Using Same Evidence In Finding Aggravating Circumstances

**State v. Gay**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). (1) At sentencing, defendant submitted written request for peremptory instructions for all mitigating circumstances. Court rules that trial judge must, if requested, give peremptory instruction for any mitigating circumstances, statutory or nonstatutory, if supported by uncontroverted evidence. Court grants new sentencing hearing because trial judge erred in failing to give peremptory instruction for several nonstatutory mitigating circumstances supported by uncontroverted evidence (individual jurors may still reject nonstatutory mitigating circumstance because supporting evidence was not convincing or they did not consider it to have mitigating value). (2) Court determines that separate evidence supported each of three aggravating circumstances. And it is not improper to submit aggravating circumstances even though evidence supporting each may overlap. However, trial judge must instruct the jury in such a way to ensure that jurors will not use the same evidence in finding more than one aggravating circumstance.

**Miscellaneous**

Defendant Must Clearly And Unequivocally Request To Represent Himself Or Herself

**State v. Williams**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Court rules that a defendant must clearly and unequivocally request to represent himself or herself. Court states that this rule is required to prevent defendants from manipulating trial courts by recording an equivocal request at trial and then arguing on appeal either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel. There is no right to represent oneself if one's statements or actions create "any ambiguity" about the desire to do so. Court discusses the facts in this case and rules that the defendant did not make a clear and unequivocal request to represent himself.

Defendant Had No Right To Enforce Plea Bargain

**State v. Marlow**, 334 N.C. 273, 432 S.E.2d 275 (30 July 1993). Prosecutor made proposed plea agreement with defendant and codefendant in which defendant would plead guilty to second-degree murder and other offenses and codefendant would plead guilty to first-degree murder. Trial judge stated he could not accept plea from codefendant unless state had no evidence of aggravating circumstances (apparently there were aggravating circumstances). Prosecutor then stated that proposed plea agreement with both defendants was contingent on both pleading guilty. Judge then rejected pleas from both defendants. Court rules that judge did not err in rejecting pleas, because a prosecutor may rescind an offer of a proposed plea agreement before *actual entry of the guilty plea* and acceptance and approval of proposed sentence by judge. In this case, defendant tendered a guilty plea that was not accepted and approved by the trial judge. Furthermore, defendant was not prejudiced at trial by rejection of the proposed plea agreement.

Defense Counsel Declining Lesser-Included Instructions May Not Raise Issue On Appeal

**State v. Gay**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Trial judge asked defense counsel at jury instruction conference if there were any lesser-included offenses to submit for the first-degree burglary charge. Defense counsel responded, "[n]ot based on the evidence, I don't think so your honor." Court rules that defendant therefore may not raise on appeal the failure to instruct on lesser-included offenses.

Defense Counsel Did Not Concede Defendant's Guilt In Closing Argument

**State v. Harvell**, 334 N.C. 356, 432 S.E.2d 125 (30 July 1993). Defense counsel during closing argument asserted that defendant was not guilty of first- or second-degree murder but stated that the evidence was most closely related to voluntary manslaughter. Court rules, relying on *State v. Greene*, 332 N.C. 565, 422 S.E.2d 730 (1992), that defense counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence established the commission of any crime, it was voluntary manslaughter.

Prosecutor's Comment On Defendant's Failure To Testify Required New Trial

**State v. Reid**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Prosecutor's statement in jury argument, "The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him," was error and required the trial judge to give a curative instruction to the jury when the statement was made. In this case, the judge overruled the defendant's objection to the prosecutor's statement. The court states that a judge's later instructions to the jury about the defendant's right not to testify does not cure the error. Court notes that a prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute the state's evidence, but prosecutor may not comment that a defendant has failed to testify.

Court Finds No *Brady v. Maryland* Violations In Two Separate Cases

**State v. Howard**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Court rules that trial judge properly denied defendant's motion for appropriate relief that alleged that the state failed to disclose that a witness—who did not testify for the state—had failed to positively identify the defendant as the assailant. Evidence showed that the witness's testimony was not material under the due process standard—based on the facts in this case (strong and cumulative testimony of three eyewitnesses and circumstantial evidence), there was no reasonable probability that disclosure of the witness's information to the defense would have affected the outcome of defendant's trial

**State v. Potts**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Court rules that testimony of a witness, who was not disclosed by the state, about a note stating that others (not the defendant) committed the murder would have been inadmissible as hearsay and did not point directly to the guilt of another. Nor would this evidence have led to other admissible evidence. Therefore, trial judge properly denied defendant's motion for appropriate relief.

Proceeds From Civil RICO Forfeiture Must Go To County School Fund

**State ex rel. Thornburg v. House and Lot**, 334 N.C. 290, ___ S.E.2d ___ (30 July 1993). Court rules that since civil RICO act [see G.S. 75D-1 through -14] provides that proceeds from the sale of RICO forfeited property accrues to the state, Sec. 7, Art. IX of the North Carolina Constitution requires that proceeds from the forfeiture must go to the county school fund.

Police Communications In District Attorney's Possession For Use In Prosecution Were Not Public Records

**Piedmont Publishing Company v. City of Winston-Salem**, ___ N.C. ___, ___ S.E.2d ___ (10 September 1993). Newspaper sued city for release of recordings of communications between two officers (one of whom was killed and the other injured) and police communications center. Recordings had been transcribed and given to district attorney, who maintained them for prosecution of suspects who allegedly had committed criminal acts against the officers. Court rules that since the recordings were not discoverable by criminal defendants in the pending

prosecution, they were not public records under Chapter 132 of the General Statutes. **Note, however, that effective October 1, 1993, Chapter 461 of the 1993 Session Laws makes some law enforcement agency records, including law enforcement communications, public records.**

## North Carolina Court of Appeals

### Evidence

(1) Evidence Of Prior Sexual Activity Properly Excluded Under Rule 412
(2) No Right To Cross-Examine Expert With Exhibits Not Used In Forming Expert's Opinion And When Exhibits Were Not Learned Treatises

**State v. Black**, ___ N.C. App. ___, 432 S.E.2d 710 (3 August 1993). (1) At *in camera* hearing to determine admissibility of evidence of prior sexual behavior of alleged sexual assault victim with two particular men, victim denied having sexual relations with them. Defense counsel asserted that one of them would testify to the contrary, but that person never testified nor was any other evidence offered to contradict the victim. Trial judge properly refused to allow the cross-examination since defendant never offered proof of the prior sexual behavior and its relevancy. (2) Defendant sought to cross-examine state's medical expert with medical records that expert had not reviewed in formulating her opinion concerning sexual abuse. Court rules that defendant improperly sought to question expert concerning contents of data that the expert had never before contemplated nor used in any way to formulate her opinion, and it also was not contained in any recognized learned treatises. Court notes that defendant properly had been permitted to cross-examine expert about facts and data on which her opinion had been based and to use counter-hypotheticals to point out the overlooked sources of information.

(1) Doctor Was Properly Qualified As Expert
(2) Expert Testimony That Child Had Been Sexually Abused Was Improper, Based On Facts In This Case

**State v. Parker**, ___ N.C. App. ___, 432 S.E.2d 705 (3 August 1993). (1) Based on doctor's training and experience, he was properly qualified as an expert in pediatrics and in detection of child abuse and trauma. (2) Relying on *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), court rules that doctor was improperly permitted to testify that child had been sexually abused, based on the facts in this case. The expert based his opinion only on the fact that her hymeneal ring was not intact and his interview with the child in which she related a history of sexual abuse. With this limited basis for the expert's opinion, he was not in a better position than the jury to determine whether the child was sexually abused.

Defendant Failed To Satisfy Burden Of Proof In Establishing *Boykin* Error

**State v. Hester**, 111 N.C. App. ___, 432 S.E.2d 171 (20 July 1993). Defendant moved to suppress the use of three district court convictions in sentencing under the Fair Sentencing Act, based on *Boykin v. Alabama*, 395 U.S. 238 (1969) error. At the suppression hearing, the

defendant offered into evidence the district court files of his prior convictions, which demonstrated that he had pled guilty while being represented by an attorney. Defendant did not present any additional evidence, and the state did not present evidence. Relying on *State v. Smith*, 96 N.C. App. 235, 385 S.E.2d 349 (1989), the court rules that defendant failed to meet his burden of proof. Court notes that "[n]othing in the record affirmatively indicates the requisite waivers of rights were not obtained before defendant pled guilty in the earlier cases . . . Defendant presented no testimony on this issue, and his assertion to the court below that the resultant convictions were invalid, without more, is insufficient. While waiver may not be 'presumed' from a silent record . . . neither may lack of waiver be inferred, particularly in favor of a party with the burden of proving it."

**Criminal Offenses**

Sufficient Evidence Of Kidnapping To Facilitate Commission Of Felony

**State v. Pendergrass**, ___ N.C. App. ___, 432 S.E.2d 403 (3 August 1993). Defendant was convicted of kidnapping infant for the purpose of facilitating the commission of a felony (sexual assault against mother). Defendant's accomplice pointed a gun at mother's head while defendant ordered mother to place her infant in a crib. When baby began to cry, accomplice pointed the gun at the infant and the mother while defendant refused the mother's pleas to hold the child. Defendant then forced the mother into another room where she was bound, gagged, and sexually assaulted. Court rules that there was sufficient evidence that (1) infant was unlawfully confined, restrained, and removed, and (2) removal of child facilitated the commission of the sexual assault felony against the mother. Court also rules that with kidnapping by facilitating the commission of a felony, the underlying felony need not be committed against the victim (in this case, the infant) of the kidnapping. It was sufficient that the felony was committed against the mother.

Jury May Determine Defendant's Age By Observing Defendant In Court

**State v. Bynum**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). Defendant, forty-one years old, was charged with indecent liberties with a minor. State did not offer any evidence of defendant's age, and the defendant did not testify. Court rules that jury could reasonably infer—by observing him in the courtroom and considering testimony that the defendant drank alcoholic beverages for many years and had married the victim's mother in 1987—that the defendant was at least sixteen and five years older than the victim, particularly since he was twenty-four years older than the age element of the crime.

Jury Instruction Inconsistent With Conspiracy Indictment

**State v. Minter**, 111 N.C. App. ___, 432 S.E.2d 146 (20 July 1993). Indictment alleged defendant conspired with Branch to commit drug offense (apparently, it did not allege that defendant conspired with Branch and unnamed others). Court rules that jury instruction that defendant "agreed with at least one other person" was error because it did not limit the agreement to the only person alleged in the indictment, Branch.

Failure To Submit Common Law Robbery Was Error When Evidence Of Missing Firing Pin

**State v. Everette**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). In armed robbery trial, judge erred in failing to submit common law robbery to jury. State's witness testified that when accomplice got back into car after robbery had occurred, he looked at the gun and the firing pin was missing and two barrels fell out of it.

State Failed To Allege Prior Conviction Properly To Elevate Misdemeanor To Felony

**State v. Sullivan**, ___ N.C. App. ___, 432 S.E.2d 376 (3 August 1993). State failed to allege a prior conviction properly under G.S. 15A-928 to elevate a violation of G.S. 14-56.1 (breaking into coin-operated machine) from a misdemeanor to a felony. A separate indictment alleging habitual felon does not substitute for the pleading requirements of G.S. 15A-928.

Insufficient Evidence Of Violation Of Securities Statute, G.S. 78A-36

**State v. Clemmons**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). **(Note: this opinion replaced the opinion of 6 July 1993, which had been withdrawn.)** Defendant was convicted of obtaining property by false pretenses (G.S. 14-100) and transacting business in securities without being licensed or registered with Secretary of State (G.S. 78A-36). State's evidence showed that he obtained money from people by telling them he was a broker (he was not a broker) and would invest money for them in stock options in corporations; there was no evidence that any stock options were purchased or sold by defendant. Court upholds false pretenses convictions, but reverses securities convictions because statute does not make it a crime to *offer* to transact business without being registered. Court states that evidence was sufficient to charge a violation of G.S. 78C-8 (fraud by investment advisor).

**Search and Seizure and Confessions**

Officer's Approach And Shining Light On Defendant In Vehicle Was Seizure That Was Not Supported By Reasonable Suspicion

**State v. Brooks**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). SBI agent went with local law enforcement officers to execute search warrant of nightclub for illegal drugs. Agent wore marked raid jacket with badge on the front and "POLICE" written on the back, and he also wore baseball cap with the letters "SBI" across top of cap. Agent saw vehicle in parking lot with defendant sitting in driver's seat and another male standing in front of the car. As agent walked over to driver's side of vehicle, male standing outside of car walked away before agent arrived there. Agent shined his flashlight on defendant in car and saw an empty unsnapped holster on front passenger bucket seat that was within reach of defendant. Agent asked defendant, "Where is your gun?" Defendant replied, "I'm sitting on it." Agent then asked defendant to get slowly out of the vehicle. Defendant then reached under his right thigh and handed his gun to the agent. Defendant told agent to be careful because the gun was loaded. Defendant asked agent if he needed identification, agent said "yes," and defendant handed his driver's license and registration to agent. Agent asked defendant if he had any dope in the vehicle; defendant said "no" but asked

agent if he wanted to look and told agent he could look if he wanted to. Court rules: (1) agent's conduct in approaching vehicle and his shining a flashlight in the vehicle was a seizure under the Fourth Amendment (the court states that the agent's observation of the empty holster resulted from the agent's initial invalid intrusion, clearly indicating court's view that the agent's approach to the vehicle and shining of the flashlight constituted a seizure); (2) agent did not have "reasonable suspicion that this defendant was engaged in illegal activity at the time [the agent] approached the vehicle."

[Consider, however, whether the court's determination that the agent's approach to the vehicle and his shining of the flashlight constituted a seizure under the Fourth Amendment is consistent with such United States Supreme Court decisions as *California v. Hodari D.*, 499 U.S. ___, 111 S.Ct. 1547, 113 L.Ed.2d. 690 (1991) and *Florida v. Bostick*, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d. 389 (1991).]

Officer Did Not Have Reasonable Suspicion To Stop Vehicle

**State v. Watkins**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993) **(Note: there was a dissenting opinion in this case, so it will be reviewed by the Supreme Court.)** At 3:00 a.m. city police officer overheard sheriff's department radio transmission from dispatcher to a deputy sheriff that there was a "10-50" (suspicious vehicle) behind a well drilling company. No information was given about who made this report or the basis of the information. City officer advised deputy sheriff that he was near that location and could assist him. City officer went to company and saw two or three vehicles there and several buildings, one of which had a light on inside. Officer had driven past the company on many occasions before, had seen cars parked on the premises, and had never investigated any of the cars; it would be normal to see a few cars on the premises during day and night. While he was outside his vehicle, he saw a car pull out of the company parking lot with its lights off. The car's lights went on as it turned onto the public road. Officer then got in his car and followed the car, turning on his blue light as he pulled out of the parking lot and turned onto the public road. Officer believed that at 3:00 a.m. any vehicle at a closed place of business normally is a suspicious vehicle. Officer saw car was continually weaving within its lane, but he turned on his blue lights to continue the "10-50" investigation and not for the observed driving. The car eventually stopped. Court rules that officer's observation of defendant's driving away from closed business at night with his car headlights off and the anonymous unverified telephone information about a suspicious vehicle was insufficient to establish reasonable suspicion to stop the vehicle.

The dissenting opinion concluded there was reasonable suspicion to stop the vehicle, based on the collective knowledge of the deputy sheriff and the city officer about the likelihood of people on company property at that hour, the anonymous tip, defendant's driving out of the parking lot with his lights off, and the defendant's vehicle weaving on the road.

(1) Officer's Interaction With Defendant At Train Station Was Not A Seizure
(2) Officers Had Reasonable Suspicion To Stop Vehicle
(3) Officers Did Not Have Probable Cause To Search Defendant After Vehicle Stop

**State v. Pittman**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). Two officers were on patrol at train station at 1:30 a.m. They saw the female defendant and a man speaking, and

they parted company when they saw the officers. Officer Gunn approached defendant and Officer Ferrell approached the man. Defendant showed Gunn a train ticket and stated she was traveling alone and did not know the man with whom she had been seen. Gunn noticed that defendant was constantly looking over at the man, who was twenty feet away. Defendant consented to a search of her bag; nothing was found. Meanwhile, Ferrell spoke with the man, who said he was traveling alone and did not know the defendant. The man consented to a search of his bag; nothing was found. Later a vehicle pulled up to the train station, and the man put his bag in the trunk. The man then motioned to the defendant to approach the car, he placed her bag in the trunk, and the two of them got in the car and left. The officers compared information they had learned from their encounters with the man and the defendant and had the car stopped by a uniform officer. A female officer was called to the scene to search the defendant (she had refused to consent to a search); instead the defendant was taken to the police station and searched. (1) Court rules that officer Gunn did not seize the defendant when he approached her at the train station. He merely approached her, asked a few questions, and she voluntarily gave him her train ticket and consented to a search of her bag. Court relies on *Florida v. Bostick*, 501 U.S. ___, 111 S.Ct. 2382, 115 L.Ed.2d. 389 (1991). (2) Court rules that officers had reasonable suspicion to stop the vehicle in which the defendant was a passenger, based on the facts discussed above. (3) Court rules that officers did not have probable cause to search the defendant after the vehicle stop, based on the facts discussed above.

Warrantless Entry Of Home Was Improper

**State v. Wallace**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). Officers received information that marijuana was being grown in the basement of a residence. However, the officers were unable to corroborate the informant's information. Therefore, they went to the residence to confirm or deny the information. After knocking on the door, Jolly came out and closed the door behind him. Officers told him why they were there and asked him if there were others in the residence. Jolly told officers that one or his roommates was asleep inside. Officers then asked for consent to search the residence. Before Jolly could answer, Wallace came out of the residence. Officers then asked for consent to search, which Wallace and Jolly denied. Court's opinion then states that *"Jolly then stated that 'there might be some drug paraphernalia and marijuana seeds in the house,' and that he would not consent to a search until he had time to get rid of the contraband."* After the officers were denied consent to search, they heard footsteps in the residence and a door shut on the inside. The officers asked Wallace and Jolly about who was in the residence and they said they did not know because they had just arrived. Officers then went inside to execute a protective sweep before leaving the residence to obtain a search warrant. Officers saw what appeared to be marijuana plants while inside. Defendants were detained in the residence while other officers obtained a search warrant, which included information about their observation of marijuana in the house.

Court rules: (1) Uncorroborated information initially given officers was insufficient to establish probable cause to search the residence. (2) Officers did not violate defendants' rights by going to residence to investigate the information they had received. (3) Probable cause to search the residence existed when Jolly made the statement noted in italics above . (4) Officers did not have exigent circumstances to enter the residence without a search warrant. Court states that the "record is devoid of any evidence that the officers entered the residence with a reasonably

objective belief that evidence was about to be removed or destroyed." Court notes that the only purpose of officers' entry into the residence was to conduct a protective sweep until a search warrant could be obtained, and the officers did not believe they were in danger at any time. (5) State could not justify the search of the residence under the independent source exception to the exclusionary rule, *Murray v. United States*, 487 U.S. 533 (1988) and *Segura v. United States*, 468 U.S. 796 (1984). In this case, the search warrant was prompted by what the officers saw in their unlawful entry and the information obtained during the illegal entry was presented to the magistrate and affected the decision to issue the search warrant.

Random Drug Testing Of Public Airport Authority Employee Was Constitutional

**Boesche v. Raleigh-Durham Airport Authority**, 111 N.C. App. ___, 432 S.E.2d 137 (20 July 1993). Public airport authority employee was discharged for refusing to submit to a random urine drug test. Employee performed preventive maintenance and repairs on airport terminal air conditioning, ventilating, and heating systems, and he had a security clearance to drive a motor vehicle 10 m.p.h. in a designated area on the apron of the flight area to get access to systems located on the outside of buildings. (The Federal Aviation Administration requires that all employees who drive a motor vehicle on the airside of the airport must be drug tested). Court finds that employee, if drug impaired while operating a motor vehicle, could increase the risk of harm to others and therefore rules that the random drug testing policy was constitutional, based on *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989).

Defendant's Assertion Of His Sixth Amendment Right To Counsel Did Not Bar Custodial Interrogation About Unrelated Offense Under Federal And State Constitutions

**State v. Harris**, 111 N.C. App. ___, 431 S.E.2d 792 (20 July 1993). Defendant was arrested for armed robbery of Fast Fare store, committed to jail, and given his first appearance in district court where he declined appointed counsel (he stated he would hire his own attorney). He remained in jail for that charge. The next day he changed his mind and requested and was appointed counsel. Later that day, a detective who was investigating an unrelated armed robbery of a Circle K store interrogated the defendant after properly giving him *Miranda* warnings and obtaining a waiver of rights. Relying on *McNeil v. Wisconsin*, 501 U.S. ___, 111 S.Ct. 2204, 115 L.Ed.2d. 158 (1991), the court rules that defendant did not invoke his Fifth Amendment right to counsel for interrogation for the Circle K robbery (and he did not have a Sixth Amendment right to counsel since he had not even been charged yet for that offense) when he invoked his Sixth Amendment right to counsel for the Fast Fare robbery. Court also rejects defendant's arguments under Article I, Section 23 of the North Carolina Constitution.

**Drug Cases**

Sufficient Evidence Of Distance From Place of Drug Sale To School Under G.S. 90-95(e)(8)

**State v. Alston**, ___ N.C. App. ___, 432 S.E.2d 385 (3 August 1993). Defendant was convicted of felonious sale of cocaine to an undercover officer within 300 feet of school property under G.S. 90-95(e)(8). Court rules that evidence was sufficient to prove that sale of cocaine was within

300 feet of school property, based on school board employee's oral testimony that he was familiar with school property, his identification of the location of the middle school, and the officer's testimony that sale occurred 100 feet from school boundary. Introduction of maps and plats was unnecessary.

Defendant's Reputation As Drug Dealer Inadmissible When Character Not In Evidence

**State v. Morgan**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). Trial judge erred in admitting evidence of the defendant's reputation in the community as a drug dealer before defendant had put on any evidence, since defendant had not offered any evidence of a pertinent character trait.

**Miscellaneous**

Jury Anti-Deadlock Instruction Was Improper

**State v. Buckom**, 111 N.C. App. ___, 431 S.E.2d 776 (20 July 1993) **(Note: there was a dissenting opinion on this issue, so the Supreme Court will review this case.)** Court rules that trial judge erred by instructing the jury, as part of an anti-deadlock instruction, that the "main purpose" of trying to reconcile differences in further deliberations was to avoid an expensive retrial.

Prosecutor Violated Plea Bargain Agreement By Statement At Sentencing Hearing

**State v. Rodriguez**, 111 N.C. App. ___, 431 S.E.2d 788 (20 July 1993). Court rules that prosecutor violated terms of a plea agreement, which provided that the prosecutor agreed to "take no position on sentencing," when the prosecutor suggested to the trial judge certain non-statutory aggravating factors at the sentencing hearing—even though the trial judge did not find the factors that the prosecutor had suggested (judge found a different non-statutory aggravating factor) and defense counsel did not object to the prosecutor's actions. Court orders a new sentencing hearing before a different trial judge.

Joinder Of Defendants Was Proper Even Though They Had Conflicting Defenses

**State v. Pendergrass**, ___ N.C. App. ___, 432 S.E.2d 403 (3 August 1993). Defendant was tried with codefendant for robbery and various kidnappings and sexual assaults that occurred in retail store. Codefendant held gun to victims and later defendant took victims to another room in the store where he sexually assaulted them. At joint trial, codefendant testified to assisting defendant in the robbery but denied knowledge or participation in the sexual assaults. She said that the defendant had planned the crime, obtained the cuffs and gun used in the crimes, and gagged and tied the victims and removed them to another room. She said after their arrest that defendant told her that he did not rape any of the women but that he had masturbated on "the girl." Defendant did not testify. Court notes that prior case law provides that severance is not necessarily required simply because two defendants may offer antagonistic or conflicting defenses. A defendant is not prejudiced if the state presents plenary evidence of defendant's guilt, independent of the

codefendant's testimony, and defendant had the opportunity to cross-examine the codefendant. Court reviews all the evidence and determines that trial judge not err in denying defendant's motion to sever his trial from codefendant. Codefendant's evidence merely corroborated the state's evidence. Additionally, codefendant was not present in room where sexual assaults occurred and did not testify about those events.

Defendant's Counsel Had Conflict Of Interest In Representing Defendant When He Had Previously Represented State's Witness

**State v. James**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). Lawyer represented defendant in murder case and also represented simultaneously a key prosecution witness for unrelated federal and state charges. Lawyer disclosed this information before he cross-examined this key prosecution witness. Trial judge did not conduct inquiry into lawyer's alleged conflict of interest (court rules that judge's failure to conduct inquiry was, by itself, reversible error.) Court rules that lawyer's dual representation of defendant and key prosecution witness established conflict of interest that prevented lawyer from effectively representing defendant in murder case; it affected the lawyer's ability to impeach effectively the credibility of the key prosecution witness, particularly since the lawyer negotiated a proposed plea bargain in the federal case that would give him a sentence reduction for substantial assistance. Court notes that the Sixth Amendment right to conflict-free representation may be waived by a defendant, but there was no such waiver in this case.

DWI Properly First Tried In Superior Court When Indictment Issued After Presentment

**State v. Gunter**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). Defendant was charged with DWI in a citation. While the charge was pending in district court, the grand jury issued a presentment for DWI, the prosecutor submitted an indictment for DWI, and the grand jury then indicted defendant for DWI. Court rules that superior court had original jurisdiction to try DWI, based on G.S. 7A-271(a)(2).

Defendant Entitled To Credit Toward Active Sentence For Time Served On Special Probation

**State v. Farris**, 111 N.C. App. ___, 431 S.E.2d 803 (20 July 1993). **(Note: the Supreme Court has granted the state's petition to review this decision.)** Defendant served 90 days imprisonment on special probation. The probation was later revoked and defendant was ordered to serve the suspended sentence. Court rules that the defendant was entitled under G.S. 15-196.1 to 90 days' credit toward the activated sentence. The judge's reduction of the activated sentence by 90 days does not satisfy the requirement that the defendant be given the credit.

Trial Judge Erred In Ordering Defendant To Sign Confession Of Judgment

**State v. Clemmons**, ___ N.C. App. ___, ___ S.E.2d ___ (17 August 1993). **(Note: this opinion replaced the opinion of 6 July 1993, which had been withdrawn.)** Trial judge erred in requiring defendant to sign confessions of judgment in favor of five victims as a condition of

probation, in addition to ordering defendant to pay restitution to them, since imposition of restitution is not a legal obligation equivalent to a civil judgment.

Assault Victim Entitled To Compensation Although She Refused To Prosecute

**Ellis v. Crime Victims Compensation Commission**, 111 N.C. App. ___, 432 S.E.2d 160 (20 July 1993). Victim was assaulted by boyfriend and called police department. Officer responded to call. Victim told officer what had happened, refused medical treatment, and also told the officer that she did not wish to prosecute. She merely wanted her boyfriend to leave (which he apparently did). Court rules that G.S. 15B-11(a) does not list a victim's failure to prosecute as a ground to deny an award, and G.S. 15B-11(c) ("victim has not fully cooperated with appropriate law enforcement agencies") does not permit a denial of an award when victim has failed to prosecute. Court also notes that G.S. 15B-14(a) provides that an award may be approved whether or not a prosecution occurs. Therefore, the victim was entitled to an award in this case—she fully cooperated with law enforcement; there was no evidence that the investigating officer asked her to prosecute.

Burden Of Proof On Insanity Acquittees At Commitment Rehearings Is Constitutional

**In re Hayes**, ___ N.C. App. ___, 432 S.E.2d 862 (3 August 1993). Court rules that it is constitutional to place burden of proof on insanity acquittee at commitment rehearing to prove by a preponderance of evidence (to obtain his or her release) that the acquittee is no longer dangerous or mentally ill. Court also rules that retroactive application of new statute placing burden of proof on acquittee did not violate federal or state *ex post facto* constitutional provisions.

Improper Statutory Aggravating Factor For Accessory After The Fact Of Murder

**State v. Whitley**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). Defendant pled guilty to accessory after the fact of murder. Trial judge erred in finding as a statutory aggravating factor that the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws, because that factor was based on evidence necessary to prove an element of the offense—that the accomplice personally aided the principal in an attempt to avoid personal liability.

Refusal To Appoint Substitute Counsel At Probation Hearing Was Not Error

**State v. Tucker**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). At beginning of defendant's probation revocation hearing, defendant's counsel moved, at defendant's request, to withdraw as counsel. The trial judge granted the motion to withdraw but denied defendant's motion to appoint substitute counsel. Court rules that trial judge did not violate defendant's constitutional rights, because—based on the facts in this case—defendant's counsel was reasonably competent to represent this defendant and the nature of the conflict did not render counsel incompetent or ineffective to represent this defendant.

Four-Year Revocation Of Defendant's Driver's License Was Proper

**Wagoner v. Hiatt**, ___ N.C. App. ___, 432 S.E.2d 417 (3 August 1993). Court rules that Division of Motor Vehicles properly revoked driver's license for four years under G.S. 20-19(d) and (j) even though her two impaired driving convictions occurred in reverse order than the offense dates (i.e., arrest for first DWI, arrest for second DWI, conviction for second DWI, and then conviction for first DWI).

Prosecutors Entitled To Absolute Immunity For Actions Taken In Official Capacities

**White v. Williams**, ___ N.C. App. ___, ___ S.E.2d ___ (7 September 1993). Plaintiff sued seven state employees, including two prosecutors, in their individual capacities for actions involved in plaintiff's license being revoked for failing to appear in superior court for trial de novo of traffic offense. Clerk sent notice to DMV when defendant failed to appear in superior court, which resulted in plaintiff's license being revoked. (Plaintiff alleged that he did not receive proper notice of his scheduled trial in superior court and therefore his license should not have been revoked.) The district attorney refused to reopen defendant's case, which had been dismissed with leave by an assistant district attorney. The district attorney also refused to write to DMV on plaintiff's behalf to request that DMV's revocation order be withdrawn. Court rules that prosecutors were entitled to absolute immunity for their actions in this case, which were taken in their official capacities; court relies on *Jacobs v. Sherard*, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

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