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Administration of Justice Memorandum

Judges, Prosecutors, Appellate and Public Defenders, Police Attorneys

Recent Criminal Cases
(October 5, 1993 - December 7, 1993)

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This memorandum discusses cases of October 8 and November 5, 1993 (there were no significant cases on December 3, 1993) from the North Carolina Supreme Court and cases of October 5, October 19, November 2, November 16, and December 7, 1993 from the North Carolina Court of Appeals.

North Carolina Supreme Court

Arrest, Search, and Confessions

(1) Defendant Did Not Assert Right To Counsel Under *Miranda*
(2) Defendant's Sixth Amendment Right To Counsel Attached At First Appearance, Not Arrest

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). (1) On May 31, 1990, the defendant was in custody at a police department as a murder suspect. He had not yet been given *Miranda* warnings or interrogated. About fifteen minutes before being taken to the magistrate's office for service of arrest warrants charging him with murder and other offenses, the defendant asked officer Batchelor if he had to get an attorney (defendant's inquiry was not in response to questions by the officer). Batchelor told the defendant that the question of a lawyer had to be his decision and asked the defendant if he could afford to hire an attorney. Defendant said he could not, and Batchelor then told him that the court would appoint an attorney to represent him if he asked for one. About an hour later, Batchelor and another officer properly gave the defendant *Miranda* warnings and obtained a waiver, and obtained a statement. Officers obtained another statement on June 3, 1990. The defendant had a first appearance in district court on June 4, 1990, which was within 96 hours of his arrest on May 31, 1990—as required under G.S. 15A-601(c). (1) Distinguishing *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992), the court rules that defendant did not assert his Fifth Amendment right to counsel when he asked officer Batchelor if he had to get an attorney. Unlike *Torres*, in this case interrogation was not impending and the defendant had not been told he would be questioned. Batchelor's responses to the defendant's question about an attorney constituted narrow clarification, and the defendant did not ask for an attorney afterwards. Moreover, Batchelor did not attempt to dissuade the defendant from exercising his right to an attorney. Based on the entire context in which the defendant's inquiry was made, defendant did not assert his right to counsel. (2) The court, following *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979), *State v. Nations*, 319 N.C. 318, 354 S.E.2d 510 (1987), and *State v. Tucker*, 331 N.C. 12, 414 S.E.2d 548 (1992), rules that the defendant's Sixth Amendment right to counsel did not attach

when defendant was arrested. It did not attach until the defendant's first appearance in district court. Therefore, defendant did not have a Sixth Amendment right to counsel during interrogations on May 31, 1990 and June 3, 1990.

Defendant Did Not Assert Right To Counsel Under *Miranda*

State v. Barber, 335 N.C. 120, 436 S.E.2d 106 (5 November 1993). A fire occurred at a home in which the fifteen-year-old defendant and her grandparents lived. Both grandparents died as a result of the fire. Assuming that the defendant was in custody when she was given *Miranda* and juvenile warnings in the sheriff's office hours after the fire, the court rules—distinguishing *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992)—that the defendant did not assert her Fifth Amendment right to counsel when she asked an officer (during his recitation of the warnings) if she needed a lawyer. Her inquiry constituted an ambiguous or equivocal invocation of her right to counsel. The officer's response—that he could not advise her whether she needed a lawyer or not, but he was merely advising her about her right to a lawyer—was a proper narrow response to clarify her intent. Immediately thereafter, her specific affirmative waiver of her rights (including whether she wished to answer questions without a lawyer, parents, guardian, or custodian present) demonstrated that she had not invoked her right to counsel when she asked the officer if she needed a lawyer.

Criminal Offenses

Evidence Was Sufficient To Support Two Separate Conspiracy Convictions

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). Evidence showed that defendant and others agreed to commit a murder several weeks before the murders took place. Thus, the offense of conspiracy to commit murder had been completed. However, defendant had not then agreed to commit first-degree burglary. That agreement was not made until the night of the murders. Therefore, the evidence was sufficient to support convictions of both conspiracy to commit murder and conspiracy to commit burglary.

Judge Erred In Failing To Submit Lesser Offense Of Armed Robbery, Based On Facts In Case

State v. Smith, 335 N.C. 162, 435 S.E.2d 770 (5 November 1993). The defendant was convicted of armed robbery. Supreme Court affirms, per curiam, opinion of Court of Appeals, 110 N.C. App. 119, 429 S.E.2d 425 (1993) that the trial judge erred in failing to submit the lesser offense of assault with a deadly weapon when judge instructed the jury on the voluntary intoxication defense to armed robbery (specifically, the issue whether the defendant's voluntary intoxication negated the armed robbery element that requires proof of the defendant's specific intent to permanently deprive owner of the use of his property).

Capital Case Issues

(1) Removal Of Prospective Jurors For Cause And Denial Of Rehabilitation Were Proper
(2) Proper To Not Submit No Significant History Of Prior Criminal Activity

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (5 November 1993). (1) The court examines the trial judge's removal for cause of three prospective jurors and determines that they were properly removed under *Wainwright v. Witt*, 469 U.S. 412 (1985) because their views against the death penalty would have substantially impaired their duties as juror. The court also examines the trial judge's denial of defendant's opportunity to rehabilitate two other prospective jurors and finds no error, distinguishing *State v. Brogden*, 334 N.C. 39, 430 S.E.2d 905 (1993). (2) The trial judge properly refused to submit mitigating circumstance that defendant had no significant history of prior criminal history [G.S. 15A-2000(f)(1)] when neither the state nor the defendant presented any evidence about the defendant's criminal history—whether he had any or no criminal history. Court follows *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989) and *Delo v. Lashley*, 507 U.S. ___, 113 S.Ct. 1222, 122 L.Ed.2d. 620 (1993).

Defendant Was Not Entitled To Instruction On Mitigating Circumstance Of No Prior Significant Criminal History

State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (8 October 1993). Court rules that trial judge did not err in refusing to instruct on the statutory mitigating circumstance [G.S. 15A-2000(f)(1)] that defendant had no significant prior criminal history. Defendant, age 20, had prior convictions for provisional license violation; failure to stop at scene of accident; possession of alcoholic beverage by person under 21; drunk and disruptive in public; 14 counts of felonious breaking and entering; 13 counts of felonious larceny; and conspiracy to break and enter. Defendant's psychiatrist testified that defendant told him he was convicted at age 17 for stealing a woman's pocketbook to get drugs and he had also broken into about 60 houses to support his drug problem. Court concludes that no rational juror could have found that defendant had no significant history of prior criminal activity.

Miscellaneous

Authority To Impose Sentence Even After Specific Date For Sentencing Has Passed

State v. Absher, 335 N.C. 155, 436 S.E.2d 365 (5 November 1993), *reversing*, 108 N.C. App. 356, 424 S.E.2d 464 (1992). The defendant was convicted of impaired driving in superior court on May 18, 1989 and the trial judge continued prayer for judgment (for sentencing) for thirty days. A sentence was not imposed within thirty days; it was imposed on October 27, 1989. The court rules that as long as prayer for judgment is not continued for an unreasonable period and the defendant is not prejudiced (neither of which occurred in this case), the trial judge does not lose jurisdiction to impose a sentence. Court notes, with approval, a similar ruling in *State v. Degree*, 110 N.C. App. 638, 430 S.E.2d 491 (1993) and disapproves language in *State v. Gooding*, 194 N.C. 271, 139 S.E. 436 (1927) that is inconsistent with the ruling in this case.

No Retroactive Application Of Abrogation of "Year And A Day" Rule For Murder

State v. Robinson, 335 N.C. 146, 436 S.E.2d 125 (5 November 1993), *reversing*, 110 N.C. App. 284, 492 S.E.2d 357 (1993). The defendant assaulted his wife on October 18, 1988, and she remained comatose until her death on May 30, 1991. Before her death, the Supreme Court on May 22, 1991 in *State v. Vance*, 328 N.C. 613, 403 S.E.2d 495 (1991) had abolished, prospectively only, the common law "year and a day" rule for murder. The court rules that the prosecution for murder is effectively barred, because retroactivity focuses on what defenses were available to the defendant when the murderous assault occurred, not when the victim died. Therefore, retroactive application of the abrogation of the "year and a day" rule would deprive the defendant of federal due process and the *Vance* ruling.

North Carolina Court of Appeals

Arrest, Search, and Confessions

(1) Stop Of Vehicle For License Check Was Proper
(2) Officer Had Authority To Frisk Driver
(3) Patting Bulge In Pocket Was Proper Frisk
(4) Case Remanded To Trial Court For "Plain Touch" Issue

State v. Sanders, 112 N.C. App. ___, 435 S.E.2d 842 (2 November 1993). Two State Highway Patrol officers set up a driver's license check at a ramp off a highway. They did not post signs warning the public that a license check was being conducted. The officers checked every car that approached the check point unless they were busy writing citations. The defendant entered the ramp and as he approached the check point, he stopped his car 150 feet from one of the troopers. The defendant then drove up to the check point, stopped the car, and rolled down his window. In response to the trooper's request for driver's license and registration, defendant said that he did not have the registration or any identification,

and he was not the owner of the car. The passenger in the car also failed to produced any identification. The trooper asked the defendant to get out of the car. As he stepped out of the car, the trooper saw a bulge about the size of two fists in the right pocket of the defendant's jacket. The trooper then told the defendant to face the car and place his hands on the car so he could pat him down for weapons. As the defendant was doing so, the trooper saw plastic protruding from the right pocket. While frisking the defendant, the trooper touched the bulge and noted that it felt like "hard flour dough." The trooper removed the plastic bag from the defendant's pocket. It contained three smaller bags with cocaine inside. (1) Distinguishing *Delaware v. Prouse*, 440 U.S. 648 (1979), the court rules that the stop of defendant's vehicle for the license check was constitutional. The court notes that the troopers followed guidelines of their agency in selecting the location and time for the license check and detained every car that passed through (except for those that came through while they were issuing citations). (2) Following *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982), the court rules that the trooper—based on the facts described above, his testimony that people driving stolen cars often provide officers with false names and insist they have no identification, and his seeing the bulge in the defendant' pocket—had reason to believe that the defendant was armed and dangerous and therefore could frisk him. (3) The court also rules, based on *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), that the trooper acting properly in conducting the frisk by feeling the packet in the bulge in the jacket to determine if it was a weapon. (4) The court remands the case to the trial court to determine, in light of *Dickerson* (decided after this case was heard in the trial court), whether it was immediately apparent to the trooper—when he determined that the bulge was not a weapon, but felt like "hard flour dough"—that what he felt was illegal drugs. ["Immediately apparent" means that there is probable cause to believe the object was illegal to possess; see discussion in Farb, *Arrest, Search, and Investigation in North Carolina*, p. 112 at n. 31 (2d. ed. 1992) and *State v. Wilson*, discussed below.]

Officer Had Probable Cause To Search Defendant's Pocket For Crack Cocaine

State v. Whitted, ___ N.C. App. ___, ___ S.E.2d ___ (16 November 1993). A car parked in front of a residence fled at a high rate of speed after the driver saw a marked patrol car. The area from which the car fled was known for frequent drug sales, especially crack cocaine. People commonly pulled over to the curbside, after being flagged down, and purchased drugs. This area had been under surveillance for thirty days, and several arrests had been made based on drug sales at the residence from which the car had fled. After officers stopped the car, they went on each side of the car to investigate. The defendant was sitting in the front passenger seat, and an officer saw that the defendant kept his hand by his front pants pocket and "kept pushing something down." The defendant did not move his hand when the officer asked him to do so, and the officer then frisked the defendant for weapons. During the frisk, the officer felt a "pebble" (i.e., a hard substance) in the defendant's pocket that he believed, based on his experience and knowledge of the circumstances, was crack cocaine. He removed the object and discovered that it was crack cocaine. The court rules, based on all the circumstances in this case including the suspicious behavior and flight from the officers, that the officer had probable cause to search the defendant after the officer felt the pebble in the defendant's pocket. [Although the court does not discuss *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), its ruling is consistent with the *Dickerson* ruling.]

Officer's Search Of Defendant's Pocket During Frisk Was Unconstitutional

State v. Beveridge, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993) **(Note: there was a dissenting opinion in this case, so it will likely be reviewed by the Supreme Court.)** While Officer Johnson was arresting a driver for impaired driving, Officer Gregory (while securing the car) asked the defendant, a passenger, to get out. Officer Gregory

noticed a strong odor of alcohol about the defendant, who also was acting "giddy." The officer believed, based on the facts in this case, that the defendant was under the influence of alcohol and a controlled substance. He told the defendant he was going to pat him down for weapons. During the pat down, the officer noticed that there was a cylindrical-shaped rolled-up plastic bag in his front pocket. The officer asked him what it was, and the defendant started laughing and pulled out some money. However, the officer could still see the long cylindrical bulge he had in his pocket. He asked the defendant what it was. The defendant then stuck his hand in his pocket and tried to palm what he had. The officer asked him what he was trying to hide, and the defendant rolled open his hand and showed the officer a white plastic bag with a white powdery substance in it. The officer believed that the substance was cocaine and then arrested him for possession of cocaine. The court rules that Officer Gregory was justified in conducting a limited pat down of the defendant to determine whether the defendant was armed, but once he concluded that there was no weapon, he could not continue to search "or question" the defendant to determine whether the bag contained illegal drugs. (That part of the court's ruling in quotation marks in the preceding sentence does not appear consistent with prevailing federal constitutional law.) The court rules that the search exceeded the scope of the frisk under *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), because it was not immediately apparent that the item in the defendant's pocket was an illegal substance.

The dissenting opinion states that the facts in this case are distinguishable from the facts in *Dickerson*. Unlike *Dickerson*, the officer in this case did not continue to manipulate the defendant's pocket once he determined that the object in the defendant's pocket was not a weapon. Instead, the defendant in this case delivered the object to the officer, based on the officer's request and without any compulsion or coercion. Thus, there was no additional search after the officer conducted the pat down.

(1) Officers Had Reasonable Suspicion To Stop And Frisk Defendant
(2) Frisk Was Proper Because It Was Immediately Apparent Lump In Pocket Was Crack Cocaine

State v. Wilson, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993). A police department received an anonymous phone call that several people were selling drugs in the breezeway of Building 1304 in the Hunter Oaks Apartments. The caller did not provide any names or descriptions of the alleged drug dealers. Two officers familiar with the area knew that if a police car entered the parking lot at one end of the breezeway that the suspects would run out of the other end. They devised a plan where a police car would enter the parking lot and officers would position themselves so they could stop anyone who ran out of the back of the breezeway. An officer stopped the defendant as he ran out of the back of the breezeway and conducted a frisk. During the frisk the officer felt a lump in the left breast pocket of the defendant's jacket and immediately believed that it was crack cocaine. The officer then asked the defendant if his coat had an inside pocket. The defendant did not respond verbally, but instead opened his jacket so the inside pocket was visible. The officer saw and removed a small plastic bag that contained crack cocaine. (1) Distinguishing *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), the court rules that the officer had authority to stop and frisk the defendant, based on the anonymous phone call, the flight of the defendant and others when the police car pulled into the parking lot, and the officer's experience that weapons were frequently involved in drug transactions. (2) Distinguishing *Minnesota v. Dickerson*, 113 S.Ct. 2130, 124 L.Ed.2d. 334 (1993), the court notes that the officer in this case—unlike the officer in *Dickerson*—did not need to manipulate the item in the defendant's pocket to determine that it was cocaine; he immediately believed it was crack cocaine. The court rules that the requirement in *Dickerson* that it must be "immediately apparent" to the officer that the item is

illegal means that the officer must have *probable cause* to believe that the item is illegal. [See discussion in Farb, *Arrest, Search, and Investigation in North Carolina*, p. 112 at n. 31 (2d. ed. 1992).] The court also rules that the officer's tactile senses, based on his experience and the facts in this case, gave him probable cause to believe that the item was crack cocaine. Thus, the officer did not exceed the scope of a frisk under the *Dickerson* ruling.

Defendant's Statements After Asserting Right To Counsel Under *Miranda* Were Admissible

State v. Jones, 112 N.C. App. 337, 435 S.E.2d 574 (19 October 1993). The defendant was arrested for breaking and entering and larceny about 1:05 P.M. and taken to the police department. He waived his *Miranda* rights and talked to officers for a while and then asserted his right to counsel. The officers stopped the interrogation and left the defendant in the interrogation room until about 7:00 P.M., when they obtained a search warrant for his apartment. The officers took the defendant with them to execute the search warrant. The defendant and an officer had a general conversation there, including the defendant responding to the defendant's request for a cigarette (trial judge found that conversation was not calculated to induce defendant to make incriminating statements, and defendant made none). The defendant's live-in girlfriend became upset during the officers' questioning of her about which items in the apartment were hers. The defendant decided then to initiate a conversation with the officers so they would not bother her about these items. The defendant then showed the officers which items were stolen. When the officers took him back to the police station, the defendant was advised of his *Miranda* rights, waived those rights, and confessed. The court rules, following *Rhode Island v. Innis*, 446 U.S. 291 (1980), that officers should not have known that their actions (taking the defendant for execution of the search warrant, the reaction of his girlfriend to the officers' questioning, the defendant's reaction, etc.) would elicit an incriminating response.

Trial judge had ruled that officers violated G.S. 15A-501(2) (taking the defendant to magistrate without unnecessary delay) and G.S. 15A-501(5) (advising the defendant without unnecessary delay of right to communicate with counsel and friends), but these violations had not proximately caused the defendant's incriminating statements. The court affirms the trial judge's ruling, following *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978) (statutory exclusionary rule requires, at a minimum, a "but for" causal relationship between statutory violation and confession), and noting that the defendant did not argue a causal connection before the trial judge.

Mentally-Retarded Defendant Knowingly And Intelligently Waived *Miranda* Rights

State v. Brown, 112 N.C. App. ___, 436 S.E.2d 163 (2 November 1993). **(Note: there was a dissenting opinion in this case, so it will likely be reviewed by the Supreme Court.)** The court rules, following *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 665 (1983), that a mentally retarded fifteen-year-old defendant knowingly and intelligently waived his *Miranda* and juvenile rights.

Evidence

(1) DNA Statistical Evidence Was Admissible
(2) No Confrontation Violation Although No Testimony From Person Who Did DNA Testing

State v. Futrell, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993). (1) Court rules that methodology used by FBI in determining statistical compilation of the frequency of a matching DNA "print" was sufficiently reliable so results were admissible. Mere conflicting expert testimony about FBI statistical procedures neither suggests unfair prejudice nor shows those procedures were so totally unreliable to require the exclusion from evidence of the resulting compilations. (2) The state's witness who testified about DNA profile test results had supervised and monitored the lab technician who conducted the tests, and the technician took notes and photographs at each stage of the process for the witness's review. The court rejects the defendant's argument that his Sixth Amendment right to confront witnesses against

him was violated because the lab technician did not testify at trial; court relies on *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984).

State's Use Of Defendant's Testimony At Rule 412 *In Camera* Hearing Was Proper

State v. Najewicz, 112 N.C. App. 280, 436 S.E.2d 132 (19 October 1993). The defendant testified at an *in camera* hearing under Rule 412 (rape and sex offense evidence shield rule) that the victim had led him to believe that she was a virgin, until moments before they had intercourse when she revealed she had been raped by a former boyfriend. Later, on direct examination in the presence of the jury, the defendant testified about the contents of a letter written more than two weeks before the offense being tried—the letter revealed that the victim had informed the defendant of the earlier rape long before the night of the offense. On cross-examination, the state used the *in camera* transcript to question the defendant about his belief that the victim was a virgin on the date of the offense since she had previously told him she had been raped. The court rules that state had properly been (1) provided with a transcript of the *in camera* hearing, and (2) permitted to cross-examine the defendant about his prior inconsistent statements at the *in camera* hearing and to use the transcript during the cross-examination.

Self-Defense Instruction Was Error

State v. Richardson, 112 N.C. App. 252, 435 S.E.2d 84 (5 October 1993). **(Note: the Supreme Court has granted the state's motion to stay the opinion in this case and has granted the state's petition to review this case.)** In second-degree murder prosecution, court rules that trial judge erred by failing to modify the jury instruction on self-defense by stating that it appeared to the defendant and he reasonably believed it to be necessary to "*shoot* the victim," rather than "*kill* the victim," to save himself from death or great bodily harm. Court believes that instruction erroneously reads into self-defense an element (intent to kill) that is not a part of second-degree murder. Court specifically does not decide what constitutes an appropriate self-defense instruction when trial court instructs jury on both first- and second-degree murder.

Criminal Offenses

(1) Error Not To Give Proffered Jury Instruction On Effect Of Reconciliation On Malice Element
(2) Error Not To Submit Involuntary Manslaughter

State v. Tidwell, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993). The defendant was convicted of second-degree murder for killing her husband. (1) The court rules, based on *State v. Horn*, 116 N.C. 1037, 21 S.E. 694 (1895), that the trial judge erred in not submitting the defendant's proffered jury instruction that malice—which could be inferred from prior threats by the defendant—may be rebutted by evidence of a later reconciliation between the defendant and her husband. (2) The court rules that the trial judge erred in not submitting involuntary manslaughter when there was evidence that the killing was unintentional and occurred when the defendant attempted to prevent the victim from committing suicide.

Evidence Supported Only One Conspiracy Conviction

State v. Griffin, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993). Evidence supported only one conspiracy conviction to provide a prison inmate with a controlled substance, although there were four separate deliveries to the prison over a one-month period. Relying on *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984), the court rules that the state's evidence failed to show four separate agreements between the defendant and the named coconspirators. Instead, there was a single conspiracy that consisted of a series of separate offenses of providing prison inmates with controlled substances.

Unoccupied Condominium Unit, Available For Rental, Is Dwelling For Burglary Offense

State v. Hobgood, 112 N.C. App. 262, 434 S.E.2d 881 (5 October 1993). Condominium unit, available for rental but unoccupied at the time of a break-in,

was a dwelling to constitute the offense of second-degree burglary.

Miscellaneous

Error To Find Two Statutory Aggravating Factors Based On Same Evidence

State v. Futrell, ___ N.C. App. ___, ___ S.E.2d ___ (7 December 1993). Court rules, relying on *State v. Kyle*, 333 N.C. 687, 430 S.E.2d 412 (1993), that trial judge erred—when sentencing for second-degree rape—in finding as two statutory aggravating factors that (1) defendant was armed with a deadly weapon, and (2) defendant used a deadly weapon. The trial judge erroneously used the same evidence to prove these two aggravating factors.

Defendant's Name In Judgment For Prior Conviction In Habitual Felon Hearing Was Sufficiently Similar To Name In Indictment To Constitute Prima Facie Evidence Under G.S. 14-7.1

State v. Hodge, 112 N.C. App. ___, 436 S.E.2d 125 (2 November 1993). The court rules, following *State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990), that the name "Michael Hodge" in a court judgment for a prior conviction was sufficiently similar to "William Michael Hodge" in an habitual felon indictment to constitute prima facie evidence under G.S. 14-7.4 that the named defendant was the same as the defendant being tried in the habitual felon hearing.

Note: The summary of the following case appeared in Administration of Justice Memorandum No. 93/02, "Recent Criminal Cases (July 20, 1993 - September 10, 1993)." Since that summary was prepared, the Supreme Court has granted the state's petition to review that case.

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

State v. Brooks, 111 N.C. App. 558, 432 S.E.2d 900 (17 August 1993). **(Note: the Supreme Court has granted the state's petition to review this case.)** 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. 621, 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).]

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