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Administration of Justice Memorandum

Judges, Prosecutors, Appellate and Public Defenders, Police Attorneys, Subscribers

Recent Criminal Cases
(July 19, 1994 - September 20, 1994)

Robert L. Farb

This memorandum discusses cases of July 29 and September 9, 1994 from the North Carolina Supreme Court, and cases of July 19, August 2, August 16, September 6, and September 20, 1994 from the North Carolina Court of Appeals.

North Carolina Supreme Court

Arrest, Search, and Confession Issues

(1) Officer's Walking Over To Defendant (Who Was Sitting In His Vehicle) Was Not A Seizure, Based On The Facts In This Case
(2) Officer's Shining Flashlight Into Car's Interior Was Not A Search
(3) Defendant Was Not In Custody To Require Officer To Give *Miranda* Warnings; In Any Event, Question Was Permissible Under *New York v. Quarles*
(4) Search Incident To Arrest May Precede Arrest When Arrest Was Made Contemporaneously With The Search
(5) Suppression Of Evidence In Federal Court Prosecution Did Not Require Suppression Of Same Evidence In State Court Prosecution

State v. Brooks, 337 N.C. 132, 446 S.E.2d 579 (29 July 1994), *reversing*, 111 N.C. App. 558, 432 S.E.2d 900 (1993). An SBI agent accompanied other law enforcement officers in executing a search warrant for a nightclub to search for illegal drugs. On arriving at the nightclub, the agent saw a vehicle parked in the parking lot with the defendant sitting in the driver's seat. The agent walked over to the driver's side of the vehicle and shined his flashlight into the car's interior. He saw on the passenger side of the bucket seats an empty unsnapped holster within the defendant's reach. The agent asked the defendant, "Where is your gun?" The defendant replied, "I'm sitting on it." The agent was unable to see the gun although he shined his light all about the vehicle. He requested the defendant to get out of the vehicle; the defendant reached under his right thigh and handed the gun to the agent. The agent did not place the defendant under arrest for carrying a concealed weapon, but eventually obtained permission to search the vehicle and found cocaine in a nylon pouch there. (1) The court rules, relying on *Florida v. Bostick*, 501 U.S. 429 (1991), that the agent's initial encounter with the defendant was not a seizure under the Fourth Amendment and therefore did not require justification, such as reasonable suspicion. There was no evidence tending to show that the agent made a physical application of force or that the defendant submitted to any show of force. Further, there was no indication that a reasonable person in the defendant's position would have believed he or she was not free to leave or otherwise terminate the encounter. (2) The court rules that the officer's shining his flashlight into the car's interior was not a search, citing *Texas v. Brown*, 460 U.S. 730 (1983) and *State v. Whitley*, 33

N.C. App. 753, 236 S.E.2d 720 (1977). (3) The court rules that the defendant was not in custody when the agent asked the defendant, "Where is your gun," and therefore *Miranda* warnings were not required. In any event—even if the defendant was in custody—*Miranda* warnings were not required because the agent was permitted to ask that question for his own safety; see *New York v. Quarles*, 467 U.S. 649 (1984). (4) The court upholds the search of the nylon pouch as a proper search incident to the arrest of the defendant for carrying a concealed weapon: The agent had probable cause to arrest the defendant and the search may be made before the actual arrest and still be justified as a search incident to arrest when, as here, the agent made the search contemporaneously with the arrest; see *Rawlings v. Kentucky*, 448 U.S. 98 (1980). (5) The defendant had previously been prosecuted in federal court on federal drug charges arising from the same search. A federal judge had ruled that the search violated the Fourth Amendment and suppressed the cocaine that had been seized. The court rules that the federal court suppression of the cocaine did not collaterally estop the state from introducing the same evidence in state court. Collateral estoppel does not apply, under either federal or state constitutions, to criminal cases in which separate sovereigns are involved in separate proceedings and there is no privity between the two sovereigns in the first proceeding. The state was not in privity with the federal government concerning federal charges simply because it may have deferred to having federal prosecution begin first.

Officer Had Reasonable Suspicion To Make Investigative Stop Of Vehicle When He Corroborated Anonymous Tip, Based On Facts In This Case

State v. Watkins, 337 N.C. 437, 446 S.E.2d 67 (29 July 1994), *reversing*, 111 N.C. App. 766, 433 S.E.2d 817 (1993). An officer received a transmission on an official radio frequency stating that there was a "10-50" (suspicious vehicle) behind a well drilling company. The officer arrived there and got out of his car. The officer saw a car with its lights off moving out of the company parking lot. It was 3:00 A.M., the area was generally rural, and the location was a business that the officer knew to be normally closed then. The officer got in his car and stopped the car on the highway. The court rules, based on these facts and comparable cases of *State v. Fox*, 58 N.C. App. 692, 294 S.E.2d 410 (1982), *aff'd per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983) and *State v. Tillett*, 50 N.C. App. 520, 274 S.E.2d 361 (1981), that the officer had a reasonable suspicion to stop the car. The court notes, citing *Alabama v. White*, 496 U.S. 325 (1992), that an anonymous tip may provide reasonable suspicion when corroborated by independent law enforcement work.

Evidence Of Defendant's Silence During Custodial Interrogation Was Improperly Admitted

State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (29 July 1994). Five law enforcement officers were questioning the defendant about a murder. They informed him that he was not under arrest and was free to leave at any time. The officers gave him *Miranda* warnings and obtained a waiver. The defendant denied his involvement in the murder. During the interview an officer received a telephone call from the SBI lab that the defendant's fingerprints had been found in an ashtray in the victim's home. Another officer told the defendant that he was under arrest for first-degree murder. The officer then made accusatory remarks to the defendant, including asking him how it felt to have killed a seventy-eight year old helpless man. The trial judge permitted the officer to testify how the defendant reacted to these accusatory remarks: "He had no reaction. He acted like I was talking about the weather." Relying on *State v. Hoyle*, 325 N.C.. 232 (1989) and *Doyle v. Ohio*, 426 U.S. 610 (1976), the court rules that this evidence impermissibly referred to the defendant's exercise of his right to remain silent. The court also rules that the state's cross-examination of the defendant (which again elicited the defendant's silence in response to the officer's accusation) was improper.

Criminal Offenses

Defendant May Be Separately Convicted And Punished For Trafficking By Possessing Cocaine And Possession Of Cocaine Under G.S. 90-95(a)(3) Based On The Same Cocaine

State v. Pipkins, 337 N.C. 431, 446 S.E.2d 360 (29 July 1994), *reversing*, 111 N.C. App. 458, 434 S.E.2d 251 (1993). The defendant was convicted of trafficking in cocaine by possession [G.S. 90-

95(h)(3)(a)] and felonious possession of cocaine [G.S. 90-95(a)(3)] based on the same 53.8 grams of cocaine found in a closet. The court rules that an examination of the language and history of the controlled substances statutes shows that the legislature intended that these offenses may be punished separately at the same trial, even when the offenses are based on the same conduct. Unlike G.S. 90-95(a)(3), which combats the perceived evil of individual possession of controlled substances, the drug trafficking statute is intended to prevent the large-scale distribution of controlled substances to the public. To the extent that this ruling conflicts with the following court of appeals cases, the court overrules them: *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700 (1992) (separate punishments for misdemeanor possession of cocaine and trafficking by possessing the same cocaine were unconstitutional); *State v. Mebane*, 101 N.C. App. 119, 398 S.E.2d 672 (1990) (separate punishments for possession with intent to sell and deliver and trafficking by possessing the same cocaine were unconstitutional); *State v. Williams*, 98 N.C. App. 405, 390 S.E.2d 729 (1990); *State v. Oliver*, 73 N.C. App. 118, 325 S.E.2d 682 (1985).

Jury Instructions On Acting In Concert Were Error When Applied To First-Degree Murder Based On Theory Of Premeditation and Deliberation

State v. Blankenship, 337 N.C. ___, ___ S.E.2d ___ (9 September 1994). The defendant was convicted of two counts of first-degree murder based on theories of felony murder and premeditation and deliberation. He also was convicted of two counts of first-degree kidnapping. The evidence showed that after robbing and killing a man, the defendant and his accomplice, Tony Slidden, kidnapped two boys (the man's sons) and drove them into a wooded area. The defendant asked Slidden what they were going to do with the boys. Slidden told the defendant that we've got to shoot them. Slidden then shot each of the boys in the head, killing both. The trial judge gave the acting-in-concert instruction with both the felony murder and the premeditated and deliberate first-degree murder instructions. The instruction for premeditated and deliberate first-degree murder indicated that the elements of intent to kill, premeditation, and deliberation could be satisfied when the defendant "or someone acting in concert with him" met these elements.

The court rules that although this instruction was not error when used for the felony murder theory, it was error when used in instructing on first-degree theory based on premeditation and deliberation, because the "only common purpose shared between defendant and Tony Slidden was to kidnap the boys and when only Tony Slidden actually murdered the boys with the requisite specific intent to kill after premeditation and deliberation. In other words, the instructions permit defendant to be convicted of premeditated and deliberated murder when he himself did not inflict the fatal wounds, did not share a common purpose to murder with the one who did inflict the fatal wounds and had no specific intent to kill the victims when the fatal wounds were inflicted. The doctrine of acting in concert does not reach so far." The court states that under the acting-in-concert doctrine, when "a single crime is involved, one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime . . . . [When] multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. As a corollary to this latter principle, one may not be criminally responsible under the theory of acting in concert for a crime like premeditated and deliberated murder, which requires a specific intent, unless he is shown to have the requisite specific intent. The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan. Although a common plan for all crimes committed may exist at the outset of the criminal enterprise, its scope is not invariable; and it may evolve according to the course of events. Thus, where a series of crimes is involved, all of which are part of the course of criminal conduct, the common plan to commit any one of the crimes may arise at any time during the conduct of the entire criminal enterprise." [The court then discusses with approval the ruling in *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), which upheld the defendant's convictions based on acting in concert.] The court states that the foregoing principles governing the acting-in-concert doctrine are

necessary to insure that a defendant is not convicted of any crime for which he did not have the requisite *mens rea*; the court discusses with approval the ruling in *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987). The court disavows contrary dicta in *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991) and *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971).

Evidence Was Sufficient To Prove Serious Injury In Felonious Assault Prosecution

State v. Alexander, 337 N.C. 182, 446 S.E.2d 83 (29 July 1994). The court rules that the following evidence was sufficient to support the element of serious injury in a felonious assault prosecution: The force of shotgun blasts into a truck drove shards of glass into the victim's arm and shoulder. He had blood on his arm and was treated for the injury. An officer testified that when he arrived at the hospital, the victim "appeared to be very shaken. He had some blood, I believe it was on his left arm, I could see he was pretty shaken up."

Defendant Was Not Entitled To Second-Degree Murder Instruction Simply Because He Presented Evidence Of Insanity At Time Of Killing

State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (29 July 1994). The defendant was convicted of first-degree murder committed by an unprovoked beating to death of an elderly man with an ax handle. (He also was convicted at the same trial of first-degree murder of the man's wife, committed in a similar manner.) The court rules that the trial judge did not err in refusing to submit second-degree murder to the jury. The defendant had offered expert testimony that he was in a psychotic state when he committed the murder, but the court notes that although that testimony questioned the defendant's ability to distinguish right from wrong (i.e., an insanity defense), it never indicated that he was unable to plan his actions or that he lacked the ability to premeditate or deliberate.

Felonious Assault Of Third Person Was Sufficient Evidence To Support Felony Murder Conviction When Assault Was Committed During Same Chain Of Events Of Murder

State v. Terry, 337 N.C. ___, ___ S.E.2d ___ (9 September 1994). The defendant shot A twice, seriously injuring him. He then shot B three times, killing him. He then shot C once, killing him. The defendant fired all six shots in less than two seconds. For the killing of C, the defendant was convicted of first-degree murder based on felony murder, the felony being the felonious assault of A (based on the phrase "or other felony committed or attempted with the use of a deadly weapon" in G.S. 14-17). The court rejects the defendant's argument that the felony murder theory is inapplicable because "the homicide was not done to escape or to complete the assault and there was no causal relationship between the assault and the homicide." The court rules that there only needs to be an interrelationship between the felony and the murder, which clearly existed in this case—the assault of A and the killing of C were part of an unbroken chain of events all of which occurred within two seconds.

When Evidence Was In Conflict On First-Degree Murder By Lying In Wait, Trial Judge Erred In Not Submitting Second-Degree Murder

State v. Camacho, 337 N.C. 224, 446 S.E.2d 8 (29 July 1994). The defendant was tried for first-degree murder solely on the theory of the murder being committed by lying in wait. Since the defendant's evidence showed that he did not lie in wait for the murder victim, the court rules that the trial judge erred in not submitting second-degree murder. The court also rules, based on the defendant's evidence which showed that the victim initially attacked him, that the trial judge should also have submitted voluntary manslaughter. The court concludes that the defendant had a federal constitutional due process right to have submitted to the jury all lesser-included offenses encompassed by the indictment and supported by the evidence.

Court Disavows Dicta In Prior Case Implying That All Underlying Felony Convictions Must Be Arrested When There Is A Felony-Murder Conviction

State v. Barlowe, 337 N.C. 371, 446 S.E.2d 352 (29 July 1994). The court states when a defendant is convicted of first-degree murder based on the felony

murder theory only, and the defendant also is convicted of more than one of the underlying felonies that supported the felony murder theory, the sentencing judge is required to arrest judgment for only one of the convictions of the underlying felonies. The court disavows contrary dicta in *State v. Pakulski*, 326 N.C. 434, 390 S.E.2d 129 (1990).

Insufficient Evidence Was Presented To Support Voluntary Intoxication Instruction In First-Degree Murder Prosecution

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant was tried for first-degree murder. The court rules that the following evidence was insufficient to support an instruction on voluntary intoxication affecting the defendant's capacity to think and plan (to permit the jury to convict the defendant of the lesser offense of second-degree murder): the defendant had been drinking for some time during the day of the murder, and he did not want to drive because he had been drinking. The court notes there was no evidence that the defendant looked drunk, how much he had drunk, or that he was having difficulty speaking or walking.

Sufficient Evidence Of Kidnapping Committed During Armed Robbery

State v. Johnson, 337 N.C. 212, 446 S.E.2d 92 (29 July 1994). The defendant was convicted of two charges of kidnapping (the victims were a husband and wife) during the course of a robbery. He was also convicted of armed robbery and other offenses. The defendant threatened to kill the husband with a lug wrench (the husband was in a bedroom then). At the same time, accomplice A jumped on the wife's chest, restraining her and covering her mouth and nose (the wife was in the living room). The defendant then removed the husband from his bedroom to the living room sofa, called accomplice B in, handed her the lug wrench, and instructed her to guard the husband. The husband's hands were taped together. The defendant next bound the wife's hands and feet. After the wife fell silent (she died there), the husband attempted to get up and help her, but someone struck him on the head with the lug wrench. Thereafter, his hands and feet were tied. The defendant and his accomplices then stole various items in the bedroom and elsewhere. The court states that the key issue in determining whether kidnapping convictions may be upheld along with armed robbery convictions is whether the victim is exposed to greater danger than that inherent in armed robbery itself or is subjected to the kind of danger and abuse the kidnapping statute was designed to prevent. The court upholds the conviction for kidnapping the husband; it concludes that all the restraint necessary and inherent to the armed robbery was exercised by the defendant's threatening the husband with the lug wrench. It was not necessary to remove him from the bedroom to the living room to commit the robbery; court distinguishes *State v. Irwin*, 304 N.C. 503, 243 S.E.2d 338 (1981) (no kidnapping when defendant removed victim to place where he stole drugs). The husband was exposed to further danger by his removal from the bedroom and further restraint in the living room, where he was struck in the head when he attempted to help his wife. The court upholds the conviction for kidnapping the wife; it notes that in light of her physical condition (she slept in a hospital bed in the living room due to serious ailments), the multiple restraints used on her exposed her to greater danger, even death, than that inherent in the armed robbery.

Dog Owner Properly Convicted Of Involuntary Manslaughter In Death of Jogger By His Two Dogs

State v. Powell, 336 N.C. 762, 446 S.E.2d 26 (29 July 1994). The defendant was convicted of involuntary manslaughter in the death of a jogger by his two Rottweiler dogs, "Bruno" and "Woody." The dogs were away from the defendant's property and had been loose earlier that day. There also was evidence of the dogs' aggressive behavior and their running loose in the neighborhood before the date of the offense. The conviction was based on the defendant's culpable negligence by violating a Winston-Salem ordinance in leaving his dogs unattended when not restrained and restricted to the defendant's property by a fence adequate to keep the resident dogs on the defendant's lot. The court: (1) rules that the ordinance was a safety ordinance designed to protect both people and property; (2) rules that the defendant willfully, wantonly, or intentionally violated the ordinance; (3) rejects defendant's argument that the state must prove the defendant knew of his dogs' vicious propensities to establish the jogger's death was foreseeable; the state presented sufficient evidence that the defendant's intentional, willful, or wanton

violation of the safety ordinance was the proximate cause of the jogger's death.

Evidence

Trial Judge Has No Authority To Order Victim To Submit To Psychological Examination, Even When The Victim's Mental Status Is An Element Of The Charged Offenses

State v. Horn, 337 N.C. 449, 446 S.E.2d 52 (29 July 1994). The defendant was indicted for sexual assaults against a nineteen-year-old mentally handicapped female. The state provided the defendant with psychological evaluations that showed the victim's mental deficiencies. Before trial, a judge granted the defendant's motion for appointment of an independent psychologist and directed the psychologist to examine the victim and testify about her mental capacity. The state sought and was granted review of the judge's order by the supreme court. The court rules, citing several of its prior rulings [e.g., *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978)], that the trial judge had no authority to order the victim to submit to a psychological examination (the defendant argued that the examination was necessary to his defense since the victim's mental deficiency was an element in this case of the charges of second-degree rape and second-degree sexual offense). The court states that such an examination would violate the public policy designed to protect victims from further intrusion into their private lives and would discourage victims of crimes from reporting such offenses.

The court notes that the trial judge has several available alternatives to ordering the victim to submit to an examination. The defendant may employ (or if indigent, be appointed) a mental health expert to interpret and to dispute the findings of psychological evaluations already performed on the victim. Or the judge may deny the admission of the state's proffered psychological evidence showing the victim's mentally deficient status. Further, the judge may consider dismissing the case against the defendant if the defendant's right to adequately present a defense is imperiled.

(1) Evidence Admissible Under Rule 404(b) Despite No Probable Cause Finding For Crime

(2) Court Sets Out Calculation Of Ten-Year Period Of Rule 609 And Also Rules That Aggravated Robbery Conviction Was Admissible To Impeach Under Rule 609 Although Over Ten Years Old

(3) PJC Was Not Conviction Under Rule 609

State v. Lynch, 337 N.C. 415, 445 S.E.2d 581 (29 July 1994). The defendant was convicted of first-degree murder in the stabbing death of his estranged wife on 21 June 1986. (1) The state offered evidence of the defendant's breaking and entering into his estranged wife's house on 19 May 1986 to show, under Rule 404(b), the defendant's malice, intent, and ill will toward his wife. The defendant, relying on *State v. Scott*, 331 N.C. 39, 413 S.E.2d 787 (1992) [court rules that, with one exception, evidence of prior offense offered under Rule 404(b) that resulted in acquittal is always irrelevant under Rule 403], argued that this breaking and entering was inadmissible because a district court judge found no probable cause. The court rules that *Scott* is distinguishable since a finding of no probable cause does not prevent the state from prosecuting the defendant. (2) The defendant was convicted of aggravated robbery in Colorado on 14 June 1974, and he was released from prison and parole on 19 July 1982. The murder trial began on 17 August 1992. Under the terms of Rule 609, the ten years began to run on 19 July 1982. The court appears to rule that the beginning of the trial is the ending date for calculating Rule 609's ten-year period when a conviction is automatically admissible (if it is within ten years of the later of specified events), since it accepts the fact that the conviction was *over* ten years old under the rule. The court then rules that the trial judge did not err in allowing the state to impeach the defendant with this conviction, because the probative value of attacking the defendant's credibility (the court appears to recognize that robbery is a crime of dishonesty because it involves taking someone's property) outweighed the danger of prejudice to the defendant. (3) The defendant asked a state's witness if he had been convicted of assault. The witness replied that he had not been convicted—he had been found not guilty. The defendant then attempted to introduce the court record. It showed that the witness had pled not guilty, and no verdict was recorded but the notation was "PJ cont and costs remitted." It also said "[h]ave no contact with each other." The defendant argued that the court

could not have ordered a prayer for judgment continued unless it had found the defendant guilty. The court, citing G.S. 15A-101(4a) (definition of entry of judgment, which provides that prayer for judgment continued on payment of costs, "without more," does not constitute entry of judgment), states that this entry was not a conviction and therefore the defendant could not impeach the state's witness with it. The court stated that the phrase "[h]ave no contact with each other" was ambiguous and was not something "more" under the definition to constitute entry of judgment. If the phrase meant that the defendant and prosecuting witness should not contact each other, the court could not bind the prosecuting witness not to contact the defendant.

(1) Defendant's Cross-Examination Opened The Door To Question Of Doctor On Redirect Examination
(2) State's Witness Was Improperly Permitted To Testify About Child Victim's Prior Acts Indicating Truthfulness

State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (29 July 1994), *affirming on other grounds*, 108 N.C. App. 476, 424 S.E.2d 141 (29 July 1994). The defendant was convicted of various sex offenses against a nine-year-old female. (1) A medical doctor, a state's witness, testified on direct examination that before she conducted a physical examination of the child, she discussed with a counselor on the child sexual abuse team a videotape interview that the counselor had with the child. The doctor also testified that her examination revealed a strong indication of sexual abuse. The defendant on cross-examination—in an effort to undermine the doctor's credibility, particularly her reliance on the history given by the child in the videotaped interview—attempted to leave the impression that the child had been coached by her relatives or social workers involved in the case. On redirect examination, the doctor was permitted to testify that she had not learned anything that would suggest that someone had told the victim what to say or that the victim had been coached. The court rules that the redirect examination was proper, because the defendant's cross-examination on this issue had opened the door to the doctor's testimony (that otherwise would have been inadmissible). (2) The court rules that the child's school teacher, a state's witness, was improperly permitted under Rule 608 to testify to specific prior acts of conduct of the child that indicated her truthfulness about the charges against the defendant. For example, the teacher testified that the child might mention that she had been shopping and later she would be wearing new clothes, so the witness knew that it was true; the witness never had any reason to doubt what the child told her was not true. [Note: The witness could have offered *opinion* or *reputation* evidence about the child's truthfulness, since the child testified at trial.]

Witness's Description Of Defendant During Assault Was Admissible As Shorthand Statement Of Fact Under Rule 701

State v. Eason, 336 N.C. 730, 445 S.E.2d 917 (29 July 1994). The defendant was convicted of first-degree murder and two counts of felonious assault. An assault victim, while testifying how the defendant attacked him, said in response to a prosecutor's question about how many times do you remember being cut that evening: "I just sort of went blank. . . .I just kept seeing him in front of me, and he had this grin on his face. He was enjoying what he was doing." The court notes that Rule 701 permits a lay witness to offer an opinion, which include shorthand statements of fact. The court rules that the comment "he was enjoying what he was doing" was an instantaneous conclusion of the witness based on his perception of the defendant's appearance, facial expressions, mannerisms, etc.—it was an admissible shorthand statement of fact.

(1) Officer's Opinion About Defendant's Capacity To Waive *Miranda* Rights Was Inadmissible
(2) Mental Health Expert May Offer Opinion On Defendant's Mental Status Without Personally Interviewing Defendant

State v. Daniels, 337 N.C. 243, 446 S.E.2d 298 (29 July 1994). (1) During a suppression hearing challenging the defendant's mental capacity to waive *Miranda* rights, the defense called a law enforcement officer who observed the defendant immediately after the defendant's interrogation by other officers. The defense asked the officer whether the defendant "could have waived" his *Miranda* rights and whether the defendant understood the *Miranda* waiver form. The court rules that the trial judge properly sustained the state's objections to these questions, since they

called for a legal conclusion whether the defendant had the capacity to waive his rights. The court notes that the defense did not ask whether the defendant had the capacity to understand keys words used, such as "right," "attorney," "waiver," etc. (implying that such questions would be permissible). (2) The state called a psychiatric expert during a capital sentencing hearing who diagnosed the defendant as having an antisocial personality disorder. The expert did not personally interview the defendant. Instead, her opinion was based on her review of the evaluations of other doctors who had interviewed the defendant; a personal discussion with a doctor who had cared for the defendant; and interviews of the defendant's friends, employers, and family. The court rules that an expert's opinion based on this information could assist the jury in understanding the evidence and is not inherently unreliable. Therefore the opinion was properly admitted under Rule 702 even though it was not based on a personal interview of the defendant.

Murder Witness's Out-Of-Court Statement To Officer Was Admissible Under Residual Hearsay Exception, Rule 804(b)(5)

State v. Peterson, 337 N.C. 384, 446 S.E.2d 43 (29 July 1994). The state was allowed to introduce a witness's out-of-court statement to a law enforcement officer, in which the witness described a homicide. [The witness was unavailable under Rule 804(a) because, even though she knew that she would be held in contempt if she did not testify, she still refused to testify.] The trial judge found that her statement was taken under circumstances that assured her personal knowledge of the homicide; the substance of the statement contained statements against her penal interest (she referred to her use of illegal drugs and participation in prostitution); she had no motivation other than to speak the truth; and over a two-year period she never recanted her statement. The court also notes that the statement was made to a law enforcement officer and recorded. The court rules that the statement was properly admitted under Rule 804(b)(5) and the confrontation clause, based on the standards of *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986) and *Idaho v. Wright*, 497 U.S. 805 (1990). The statement possessed sufficient guarantees of trustworthiness to be constitutionally admissible.

(1) Defendant's *Brady* Motion Seeking Impeaching Information About State's Witnesses Was Properly Denied, Based On The Facts In This Case
(2) Defendant's Proffered Evidence Of Murder Victim's Prior Criminal Conduct Was Inadmissible Under Rule 404(b)

State v. Smith, 337 N.C. ___, ___ S.E.2d ___ (9 September 1994). The defendant was convicted of first-degree murder of a resident of a trailer park which the defendant owned and operated. His defense was self-defense. (1) Before trial, the defendant requested the state to produce information of (i) any internal investigation of any law enforcement officer whom the state intended to call as a witness and (ii) records revealing any defect or deficiency of any witness to observe, remember, or recount events. The state responded that the request exceeded the scope of *Brady v. Maryland*, 373 U.S. 83 (1963), that it had complied with statutory discovery, and the state did not possess any of the records the defendant sought. The trial judge ruled that before it would require the state to produce any internal affairs information, a voir dire of a witness could be conducted, on request, to determine if any potentially impeaching evidence existed, was relevant, and was admissible. At trial, after the direct examination of a civilian state's witness, the defendant renewed his motion for disclosure of impeaching information about whether the witness suffered from any mental defect or history of substance abuse that might affect her ability to recollect or to recount the events occurring on the night of the homicide. In denying the motion, the judge noted that counsel could question the witness concerning these matters, within reason, but refused to order the state to inquire into the background of its witnesses. On appeal, the defendant contended that his specific request for discovery triggered the state's duty to determine if such impeachment evidence existed and, if so, to disclose the information to the defendant. The court rejects the defendant's argument. It notes that nothing in the record reveals that the state suppressed material evidence. The state informed both the trial judge and defendant that it had produced all discoverable materials in its possession, and the defendant failed to show otherwise. The court also rules that the information requested exceeded the scope of *Brady* and statutory discovery. The state is not required to conduct an independent investigation

to determine possible deficiencies suggested in the state's evidence; the defendant's motion was a fishing expedition for impeachment evidence. (2) The defendant at trial sought under Rule 404(b) to introduce evidence of the victim's 1983 conviction for assault with a deadly weapon (not committed against the defendant), the victim's prison disciplinary infractions, and the victim's three prior New Jersey convictions for burglary in 1988 and 1989. (The trial judge found that there was no commonality between the victim's prior criminal conduct and the victim's actions toward the defendant in this case.) The defendant contended that the evidence was relevant to (i) whether the victim was the aggressor and (ii) the defendant's state of mind when the victim threatened to attack him in the same manner he had attacked another on a prior occasion. The court rules, relying on *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), that the evidence was inadmissible. The defendant was not aware of the victim's criminal past; thus it was not relevant to the defendant's belief about the apparent necessity to defend himself. The defendant was also attempting to show that the victim must have been the aggressor in the altercation with the defendant because the victim had a propensity for violence—his history of criminal convictions and disciplinary infractions. However, the court states Rule 404(b) expressly prohibits the admission of evidence for this purpose.

Capital Case Issues

(1) Evidence Was Sufficient For Aggravating Circumstance Of Especially Heinous, Atrocious, Or Cruel
(2) Proper Not To Submit Mitigating Circumstance Of No Significant Prior Criminal History

State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (29 July 1994). (1) The defendant was convicted of first-degree murder committed by an unprovoked beating to death of an elderly man with an ax handle. (He also was convicted at the same trial of first-degree murder of the man's wife that was committed in a similar manner.) The defendant argued that because the evidence showed that the murder victim was unaware of his presence and was rendered unconscious by the first blow, he did not suffer any of the physical or psychological torture that would cause his murder to be considered sufficient evidence of the aggravating circumstance of especially heinous, atrocious, or cruel. The court rejects this argument, noting that this circumstance does not entirely depend on the experience endured by the victim during the killing. The court states that when a murderer attacks an elderly victim by surprise and repeatedly hits him in the head with an ax handle without the slightest provocation, it is inferable that the murder was conscienceless and pitiless. Evidence that the defendant committed a similar set of murders six weeks later, after a boastful discussion of his murderous capabilities, is further evidence of a lack of pity for his victims. The facts of this murder suggest a depravity of mind not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeds that ordinarily present in first-degree murder. (2) The court rules that the trial judge properly submitted the mitigating circumstance of no significant history of prior criminal activity: Evidence of the defendant's prior criminal history consisted principally of his use of illegal drugs and that his aunt "took out warrants on him" for communicating threats and trespassing.

(1) Challenge Of Juror And Denial Of Defense Request To Rehabilitate Juror Was Not Error
(2) Denial Of Information To Jury About Parole Eligibility Was Proper Under *Simmons v. South Carolina*
(3) Proper Not To Submit Mitigating Circumstance Of No Significant Prior Criminal History
(4) Pattern Jury Instruction Was Proper On Individual Juror Consideration Of Mitigating Circumstances In Weighing Aggravating And Mitigating Circumstances

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant was being tried capitally for first-degree murder. (1) The prosecutor and trial judge questioned the prospective juror extensively about her ability to follow the law on capital punishment. Although the juror stated that she could impose the death penalty under some circumstances, she also affirmatively responded three times that she would be substantially impaired in following the law because of her scruples and Christian beliefs. The judge excused the juror for cause and also in his discretion denied the defendant an opportunity to rehabilitate her. The court upholds both rulings. While the juror's answers were not entirely equivocal, they were

sufficiently equivocal to justify excusal for cause in the trial judge's discretion. And defense questioning of the juror would have made the situation more confusing. (2) The court reaffirms prior rulings and rules that the trial judge correctly denied defendant's proposed jury instruction explaining parole eligibility for life imprisonment imposed for first-degree murder and correctly instructed the jury when it inquired about parole eligibility ("life imprisonment means . . . imprisonment for life in the state's prison"). The court notes and distinguishes *Simmons v. South Carolina*, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (error not to instruct that defendant was ineligible for parole) since defendant in this case would have been eligible for parole if he had been given life imprisonment. See also *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (29 July 1994) (similar ruling); *State v. Payne*, 337 N.C. ___, ___ S.E.2d ___ (9 September 1994) (similar ruling). (3) The court rules that the trial judge did not err in refusing to submit the mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)]. The defendant had been convicted of assault with a deadly weapon inflicting serious injury in 1978, 1982, and 1984. The court concludes that the defendant's record of three violent felonies, similar to the crime being tried, in the twelve years before this particular crime showed that the defendant had a significant record. No rational juror could have found this mitigating circumstance. (4) The court rejects the defendant's argument that the jury instructions were erroneous because, during the weighing of aggravating and mitigating circumstances, a juror was prohibited by the instruction from considering a mitigating circumstance found by another juror. The court characterizes (and rejects) the defendant's argument as once one juror finds a mitigating circumstance to exist and to have value, all twelve must consider that circumstance when reaching their decision, even if a juror did not believe that the mitigating circumstance existed.

Error Not To Submit Mitigating Circumstance Of No Significant Prior Criminal History

State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (29 July 1994). Evidence presented by the state in its case-in-chief and during cross-examination of the defendant showed that he had used drugs illegally and had been convicted of larceny, receiving stolen goods, and forgery. The court rules, relying on *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992) and *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), that the trial judge erred in not submitting the mitigating circumstance of no significant prior criminal history [G.S. 15A-2000(f)(1)].

Court Clarifies Composition Of Proportionality Pool When Death-Sentenced Defendants Receive Post-Conviction Relief

State v. Bacon, 337 N.C. 66, 446 S.E.2d 542 (29 July 1994). The court clarifies cases that are included in the proportionality pool [court's duty under G.S. 15A-2000(d)(2) to determine if death sentence is disproportionate to penalty imposed in similar cases] when a death-sentenced defendant receives post-conviction relief. If post-conviction relief (federal or state) determines that the state may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is convicted or found guilty of a lesser-included offense, the case is removed from the pool, since the pool only includes first-degree murder convictions. When a post-conviction proceeding results in a new capital trial or sentencing proceeding that then results in a life sentence for a death-eligible defendant, the case is treated as a "life" case for proportionality review (a "life" case also includes when a defendant is sentenced to life imprisonment at a resentencing hearing ordered in a post-conviction proceeding). A case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing hearing ordered in a post-conviction proceeding, and the death sentence is affirmed by the court, is treated as a "death-affirmed" case.

Miscellaneous

North Carolina Supreme Court Reverses Its Prior Ruling, In Light Of Remand From United States Supreme Court, And Finds Jury Instruction On Reasonable Doubt To Be Constitutional

State v. Bryant, 337 N.C. 298, 446 S.E.2d 71 (29 July 1994). On remand from the United States Supreme Court, the court reverses its prior ruling in this case at 334 N.C. 333, 432 S.E.2d 291, and finds that the trial judge's instruction on reasonable doubt (for text of instruction, see the prior ruling) to be

constitutional, in light of *Victor v. Nebraska*, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). The instruction did not contain the constitutional errors found in *Cage v. Louisiana*, 498 U.S. 39 (1991), although it used the terms "moral certainty" and "honest substantial misgiving."

[Note: Judges should avoid using the term "moral certainty" because the United States Supreme Court indicated in *Victor* that it may find in a future case that the use of that term with other inappropriate language may result in an unconstitutional instruction.]

Prosecutor's Jury Argument Improperly Commented On Defendant's Failure To Testify

State v. Baymon, 336 N.C. 748, 446 S.E.2d 1 (29 July 1994), *affirming on other grounds*, 108 N.C. App. 476, 424 S.E.2d 141 (29 July 1994). The defendant was on trial for several sex offenses against a nine-year-old female. The defendant did not testify. During jury argument, the prosecutor stated in effect: we don't know how many times the child was sexually assaulted; the defendant knows, but he's not going to tell you. The court rules that the prosecutor's comment was obviously intended to disparage the defendant for failing to testify and therefore was improper.

Defendant's Introduction Of Photograph During Cross-Examination Of State's Witness Gave State The Opening And Closing Jury Argument Under Rule 10

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (29 July 1994). The defendant attempted to offer a photograph of the crime scene to help illustrate a state witness's testimony during cross-examination. The trial judge sustained the state's objection to the use of the photograph before the jury unless it was introduced into evidence. The defendant then moved to introduce the photograph into evidence; the judge asked the defendant if he understood that he was now offering evidence, and he responded yes. The photograph was admitted into evidence and used while the witness answered defense questions and to impeach the witness. Under these circumstances, the court rules that the defendant offered evidence under Rule 10 of the General Rules of Practice for the Superior and District Courts and lost the right to open and close jury argument.

Sentencing Issues

Trial Judge Erred In Finding "Course Of Violent Conduct" As Non-Statutory Aggravating Factor Under Fair Sentencing Act

State v. Terry, 337 N.C. ___, ___ S.E.2d ___ (9 September 1994). The defendant was convicted of first-degree murder, second-degree murder, and felonious assault. In the sentencing for the second-degree murder conviction, the court found as a non-statutory aggravating factor that the murder was part of a course of violent conduct that included violent crimes against others. Relying on *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985) (sentencing for conviction of offense subject to Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with that offense), the court rules that this finding was error, since this factor was based on joined offenses (first-degree murder and felonious assault) for which the defendant was convicted contemporaneously with the second-degree murder conviction.

North Carolina Court Of Appeals

Criminal Offenses

(1) Defendant Was Improperly Convicted Of Three Offenses Of Discharging Firearm Into Occupied Property In Shooting Three Times Into Same Property At Same Victim, Because Indictment Did Not Allege Specific Events Of Each Shot
(2) To Elevate Misdemeanor To Felony Under G.S. 14-3(b), Indictment Must Allege Legal Basis To Support Felony Status

State v. Rambert, ___ N.C. App. ___, 446 S.E.2d 599 (16 August 1994). (1) The defendant shot his gun three separate times (shots into front windshield, center of passenger door, and rear bumper) into a vehicle occupied by the victim. The three indictments (discharging firearm into occupied property) for each shot were identically worded. The court rules that,

based on these indictments, the defendant could only be convicted of one offense of discharging firearm into occupied property. However, the court states that the defendant could be convicted of three separate offenses (for each separate shot) if the indictments had alleged the specific event constituting each offense (for example, specifying the place where the shot struck the vehicle). (2) The court, relying on *State v. Preston*, 73 N.C. App. 174, 325 S.E.2d 686 (1985), rules that to elevate a misdemeanor to a felony under G.S. 14-3(b), an indictment must allege the legal basis (that is, "infamous," "done in secrecy and malice," or "with deceit and intent to defraud") to support felony status for that misdemeanor.

Habitual Impaired Driving Under G.S. 20-138.5 Is A Felony Offense For Which The Superior Court Has Original Jurisdiction

State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (19 July 1994). The court rules that habitual impaired driving under G.S. 20-138.5 is a felony offense for which the superior court has original jurisdiction. The court rejects the defendant's argument that the statute is merely a punishment enhancement provision for a misdemeanor DWI offense.

Arrest, Search, and Confession Issues

Officer's Walking Over To Defendant (Who Was Standing By His Vehicle) Was Not A Seizure, Based On The Facts In This Case

State v. Johnston, ___ N.C. App. ___, 446 S.E.2d 135 (2 August 1994). An officer was conducting a license check at an intersection. He saw the defendant turn off into an apartment complex parking lot about 200 yards before the intersection, and the defendant remained seated there about five minutes. The officer drove over to the defendant's car. As the officer got out of his car, the defendant got out of his car. The officer noticed that the defendant was unsteady on his feet. The officer walked over to the defendant and asked him why he turned off the road before the license check. The defendant responded that he lived there. The officer noticed a strong odor of alcohol about the defendant's breath; he asked him for his driver's license. The defendant was unable to produce a license. The officer then asked him to step back to his vehicle; he eventually arrested him for impaired driving. The court rules that the officer did not seize the defendant when he approached him and asked him for his driver's license, citing *Florida v. Bostick*, 501 U.S. 429 (1991) that a seizure does not occur simply when an officer approaches a person and asks a few questions. Once the defendant admitted that he did not have a license, the officer had probable cause to arrest him. While the officer could have arrested him, he chose to ask the defendant to step back to his vehicle so he could investigate further. He then arrested the defendant after he failed field sobriety tests. The court concludes that the officer's actions were consistent with the Fourth Amendment.

Warrantless Search Of Residential Crime Scene Was Constitutional

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (6 September 1994). Officers responded to an emergency call directing them to the defendant's residence. They found the defendant pacing in the front yard and another male person lying wounded in the doorway of the residence. The defendant told the officers that a man had shot his wife and was fleeing through the woods. The officers radioed for emergency personnel and then entered the residence to check for other victims or suspects. They found the defendant's wife lying dead on a couch in the den, with a gunshot wound above her left ear. They conducted a sweep of the residence. They found a pistol near the kitchen and ammunition casings and a white, rock-like substance on a stereo in the den. Having conducted a thirty-second sweep, they then left the house and secured it against intruders. No one was allowed to enter the residence until investigators arrived fifteen minutes after the first officers had arrived. The investigators entered the house without consent or a search warrant and continued to search the premises. Distinguishing *Thompson v. Louisiana*, 469 U.S. 17 (1984), the court rules that the search by investigators was constitutional. Here, the investigators arrived shortly (fifteen minutes) after the initial thirty-second sweep by the first responding officers. Responding to the ongoing emergency, the investigators conducted a more complete search of the premises that could have revealed additional victims or hiding suspects. In *Thompson*, the investigators arrived thirty-five minutes after the first officers on

the scene had already searched the home, secured the scene, and sent the defendant to the hospital for medical treatment. The court states that if it ruled that the search in this case was unconstitutional, it would mean that "once any law enforcement officer makes an initial sweep through a home no matter how hurried or brief it may be, no other officers may search the home until a search warrant is obtained. Such a rule ignores the fact that the first responding officers making a quick initial search of a home may overlook a victim or suspect located in less obvious places."

[Note: Although the warrantless search by the investigators in this case may have been consistent with the Fourth Amendment, cautious law enforcement officers should strongly consider obtaining a search warrant or consent to search before conducting a similar search.]

Evidence

(1) Prior Sexual Behavior Evidence Between Alleged Rape Victim And Defendant That Was Otherwise Admissible Under Rule 412(b)(1) Was Properly Excluded Under Rule 403
(2) Trial Judge Failed To Make Proper Findings Before Excluding Bystanders Under G.S. 15-166

State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622 (19 July 1994). The defendant was convicted of first-degree rape and second-degree kidnapping. (1) The defendant's defense was consent and he sought to introduce, under Rule 412(b)(1), his prior sexual activity between the alleged victim and himself. The trial judge allowed the admission of some prior sexual activity and excluded other prior sexual activity because it was irrelevant or highly prejudicial. The court affirms the trial judge's ruling, noting that the judge admitted prior sexual activity relevant to the defendant's consent defense and the excluded evidence was irrelevant to that defense. (2) The court rules that in deciding whether to exclude bystanders from the trial under G.S. 15-166, the trial judge under *Waller v. Georgia*, 467 U.S. 39 (1984) must determine if the party seeking to exclude bystanders has advanced an overriding interest that is likely to be prejudiced by an open courtroom. The closure order must be no broader than necessary to protect that interest, and the judge must consider reasonable alternatives to closure and make adequate findings to support the closure. The court ruled in this case that the trial judge failed to make proper findings.

Expert Was Improperly Permitted To Offer Opinion That Children Were Sexually Abused By Defendant

State v. Figured, ___ N.C. App. ___, 446 S.E.2d 838 (16 August 1994). The defendant was on trial for sexually abusing three children. The court rules that a state's expert was improperly permitted to offer his opinion that two of the children were sexually abused by the defendant. The court notes that an expert may properly offer an opinion that a child was sexually abused [citing *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993) and other cases]. However, the opinion that the child was sexually abused *by the defendant* did not relate to a diagnosis of the children during treatment and thus constituted improper opinion testimony about the credibility of the children's testimony in violation of Rules 405(a), 608(a), and 702. Note, however, that the court upholds other testimony by health professionals under Rule 803(4) (hearsay statement during medical diagnosis and treatment), in which the children during their psychological treatment identified the defendant as the perpetrator; see, for example, *State v. Bullock*, 320 N.C. 780, 360 S.E.2d 689 (1987).

DWI Issues

Arresting Or Charging Officer May Not Give Notification Of Rights Under G.S. 20-16.2 When Officer Designates Chemical Analysis Of Breath, Even If Officer Designates An Automated Instrument And Is Authorized To Administer That Instrument

Nicholson v. Killens, 115 N.C. App. 552, 445 S.E.2d 608 (19 July 1994). **(Note: the Court of Appeals has granted the state's petition to stay this ruling and heard oral argument on September 7, 1994 on the state's petition to rehear this case. A new opinion is expected in this case.)** An officer arrested Nicholson for impaired driving, transported him to a room for a chemical analysis of his breath, advised him of his rights under G.S. 20-16.2(a), and requested that he submit to a chemical analysis of his breath with an Intoxilyzer 5000 instrument (an automated instrument). The officer was properly

authorized to administer that instrument. Nicholson willfully refused to submit to the test. The court rules that Nicholson was not notified of his rights as required by G.S. 20-16.2(a) because the arresting or charging officer may not give the notification of rights unless the officer designates a chemical analysis of blood. The court rejects the state's argument that G.S. 20-139.1(b1) permitted the officer to give the notification of rights in this case.

Sentencing Issues

Guilty Plea Agreement That Maximum Sentence Would Not Exceed Forty Years Was Plea Arrangement About Sentence, Which Did Not Require Findings Of Aggravating Or Mitigating Factors And Barred Appeal Of Sentence Under Fair Sentencing Act

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (6 September 1994). The defendant pled guilty to armed robbery and conspiracy to commit armed robbery, and the plea arrangement provided that the charges would be consolidated for sentencing with "exposure . . . limited to 40 years." The court rules, relying on *State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983), that this was a plea arrangement about a sentence [see G.S. 15A-1340.4(b)], which does not require the sentencing judge to make findings of aggravating or mitigating factors and does not allow the defendant the right to appeal the sentence. See also *State v. Washington*, ___ N.C. App. ___, ___ S.E.2d ___ (6 September 1994) (similar ruling).

Miscellaneous

Trial Judge's Midtrial Dismissal Of Criminal Charge Because Superior Court Lacked Jurisdiction Of The Offense Did Not Prohibit State's Appeal Of Dismissal And Retrial Of The Offense

State v. Priddy, 115 N.C. App. 547, 445 S.E.2d 610 (19 July 1994). At the close of the evidence for habitual impaired driving (G.S. 20-138.5) in superior court, the trial judge ruled that superior court did not have jurisdiction over the offense and dismissed the charge (the judge erroneously believed that the statute was a punishment enhancement provision for misdemeanor DWI). The state appealed to the North Carolina Court of Appeals. The court notes that under G.S. 15A-1445(a) that the state may appeal a dismissal of a charge only if further prosecution would not be prohibited by the double jeopardy clause. The court rules, based on *United States v. Scott*, 437 U.S. 82 (1978), that the double jeopardy clause would not prohibit reprosecution because the trial judge's dismissal was not based on grounds of factual guilt or innocence. Therefore, the state had the right to appeal and also had the right to reprosecute the defendant (the court also ruled that the trial judge's dismissal was error since habitual impaired driving is a felony).

Trial Judge Erred In Turning His Back To The Jury During The Defendant's Testimony On Direct Examination

State v. Jenkins, 115 N.C. App. 520, 445 S.E.2d 622 (19 July 1994). The court rules, based on the facts in this case, that the trial judge improperly expressed an opinion in the presence of the jury when he turned his back to the jury for forty-five minutes during the defendant's testimony on direct examination.

Trial Judge Erred In Refusing To Allow Defendant To Make Offer Of Proof About Proposed Testimony Of Witness, Based On Facts In This Case; Court Remands Case To Superior Court For Evidentiary Hearing

State v. Brown, ___ N.C. App. ___, ___ S.E.2d ___ (20 September 1994). The defendant was convicted of second-degree murder of her husband. The state's evidence showed that on 2 May 1992 the defendant shot her husband at a range of less than six inches. The defendant testified at trial that she fired her gun because she believed that her husband was about to shoot her. She also described her abusive marriage: among other things, her husband regularly threatened to kill her if they separated. The defendant attempted to call as a witness a former girlfriend of the defendant's husband. According to defendant's counsel, the girlfriend would testify how the defendant's husband treated her while the two were living together for three years (1983-1986). The trial judge sustained the state's objection that this proposed testimony was irrelevant as improper character evidence, and it was not probative since six years had elapsed since they

had lived together. The trial judge refused to allow the defendant to make an offer of proof of the girlfriend's proposed testimony. (The defendant contended that the evidence would have been relevant to the defendant's knowledge of her husband's violence and to her apprehension or fear of him.) The court rules that the trial judge erred by refusing to allow the defendant to make an offer of proof. Instead of reversing the conviction and ordering a new trial, the court, relying on *State v. Thomas*, 327 N.C. 630, 397 S.E.2d 79 (1990), remands the case to superior court for an evidentiary hearing to record the proposed testimony and to certify the transcript of that testimony to the Court of Appeals. The court then will consider whether the defendant was prejudiced by the trial judge's refusal to allow the girlfriend to testify.

Note: The summary of the following case appeared in Administration of Justice Memorandum No. 94/08, "Recent Criminal Cases (April 19, 1994 - July 5, 1994)." Since that summary was prepared, the North Carolina Supreme Court has granted the state's petition to stay both rulings below and has granted the state's petition to review the ruling in (1) below. It also will be reviewing the ruling in (2) because there was a dissenting opinion on that issue.

(1) Error Not To Give Attempted Second-Degree Rape Charge As Lesser Offense Of Second-Degree Rape
(2) Trial Judge Erred When Addressing Jury Foreman Only (Other Jurors Were Absent) When Responding to Jury Request To Review Evidence

State v. Nelson, 114 N.C. App. 341, 442 S.E.2d 333 (19 April 1994). The defendant was charged with second-degree rape. (1) The alleged victim testified that the defendant had vaginal intercourse with her against her will. The defendant testified that the alleged victim consensually performed oral sex on him and she then began rubbing his (no longer erect) penis against her vagina and tried to insert it into her vagina—but she never got it inside her vagina. The court rules, relying on dicta in *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985) (if a defendant unequivocally denies the *element* of penetration, then the trial judge must submit a lesser offense), that the trial judge erred in not submitting the lesser offense of attempted second-degree rape. In this case, the defendant unequivocally denied the *element* of penetration. (2) The court rules, relying on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985) and G.S. 15A-1233(a), that the trial judge erred—in responding to the jury's written request to review evidence—when the judge addressed the jury foreman without all the jurors being present in the courtroom. The trial judge had brought only the jury foreman back into the courtroom to clarify which exhibits the jury was referring to in its note to the judge.

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