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Cases covered include published criminal and related decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between December 5, 2023, and June 4, 2024. State cases were summarized by Alex Phipps, and Fourth Circuit cases were summarized by Phil Dixon. To view all of the case summaries, go the Criminal Case Compendium. To obtain summaries automatically by email, sign up for the Criminal Law Listserv. Summaries are also posted on the North Carolina Criminal Law Blog.

Warrantless Stops and Seizures

Drug dog's alert represented probable cause for search, despite legalization of hemp in North Carolina; convictions for trafficking by possession and trafficking by transportation were both valid

State v. Guerrero, COA23-377, ___ N.C. App. ___; 897 S.E.2d 534 (Feb. 6, 2024). In this Union County case, the defendant appealed his convictions for trafficking in heroin by possession and by transportation, arguing error by (1) denying his motion to suppress based on insufficient probable cause, and (2) sentencing him for both convictions as possession is a lesser-included offense of trafficking. The Court of Appeals found no error.

In November of 2020, a lieutenant with the Union County Sheriff's Office received a call from a confidential informant regarding a man driving a Honda Accord who had recently left a known heroin trafficker's house. Another officer received the report and initiated a traffic stop of the defendant after observing him run a red light. A canine officer responded to the stop and conducted a search around the vehicle; the dog alerted at the passenger side door. A search of the vehicle found a plastic bag with brownish residue. The defendant moved to suppress the results of this search before trial, but the trial court denied the motion, finding the dog's alert and the confidential informant's tip supported probable cause.

Taking up (1), the Court of Appeals outlined the defendant's arguments challenging both the reliability of the dog's alert and the reliability of the confidential informant. Concerning the dog's alert, the defendant argued due to the legalization of hemp, the alert did not necessarily indicate illegal drugs, and thus could not represent probable cause. The court rejected this argument, explaining that caselaw supported a drug dog's alert as probable cause to search the area where the dog alerted, and "[t]he legalization of hemp does not alter this well-established general principle." Slip Op. at 7. The court noted that this argument also did not fit the facts of the case, as no officer noticed the smell of marijuana, and the confidential informant referenced heroin, which was also the substance found in the car. Because the dog's alert alone formed sufficient probable cause, the court did not reach the confidential information argument.

Arriving at (2), the court explained that "[d]efendant was sentenced for trafficking in heroin *by* transportation and possession, not trafficking *and* possession." *Id*. at 11. The court pointed to *State v.*

Perry, 316 N.C. 87 (1986), for the principle that a defendant could be convicted for trafficking in heroin by possession and by transporting "even when the contraband material in each separate offense is the same." *Id*., quoting *Perry* at 103-04. Based on this precedent, the court rejected the defendant's arguments, and also rejected his "challenge" to create "a hypothetical where a defendant transports drugs without possessing drugs." *Id*.

Phil Dixon blogged in part about this case and the following two cases, here.

Additional circumstances beyond the odor of marijuana justified the search of defendant's vehicle and personal belongings

State v. Springs, COA23-9, ___ N.C. App. ___; 897 S.E.2d 30 (Jan. 16, 2024). In this Mecklenburg County case, the State appealed an order granting the defendant's motion to suppress evidence seized during a traffic stop. The Court of Appeals reversed the trial court's order and remanded for additional proceedings.

In May of 2021, the defendant was pulled over by a Charlotte-Mecklenburg Police officer due to suspicion of a fictitious tag. When the officer approached the vehicle, he noticed the defendant was fumbling with his paperwork and seemed very nervous, and the officer noted the smell of marijuana in the car. After the officer determined that the defendant was driving on a revoked license, he asked about the marijuana smell. The defendant denied smoking in the car but said he had just retrieved the car from his friend and speculated that was the source of the smell. The officer asked the defendant to step out of the car and he did so, bringing cigarettes, a cellphone, and a crown royal bag with him. The officer put the belongings on the seat and patted the defendant down for weapons. Finding no weapons, the officer then searched a crown royal bag and found a green leafy substance along with a digital scale, baggies of white powder, and baggies of colorful pills. The defendant was indicted for Possession of Drug Paraphernalia, Trafficking in Drugs, and Possession with Intent to Sell or Deliver a Controlled Substance. He filed a motion to suppress the evidence from the bag, arguing the officer did not have probable cause for the search. The trial court orally granted the motion, referencing *State v. Parker*, 277 N.C. App. 531 (2021), and explaining "I just think in the totality here and given the new world that we live in, that odor plus is the standard and we didn't get the plus here." Slip Op. at 4.

The Court of Appeals first reviewed its basis for appellate jurisdiction based on the State's notice of appeal, explaining that the State's appeal violated Rule of Appellate Procedure 4 by incorrectly identifying the motion to suppress as a "motion to dismiss," failed to reference G.S. 15A-979(c) as support for its appeal of an interlocutory motion to suppress, and failed to include the statement of grounds for appellate review required by Rule of Appellate Procedure 28(b)(4). *Id*. at 6-7. Despite the defects with the State's appeal, the majority determined that the appropriate outcome was to issue a writ of certiorari, but "given the substantial and gross violations of the Rules of Appellate Procedure, we tax the costs of this appeal to the State as a sanction." *Id*. at 10.

After establishing jurisdiction for the appeal, the court turned to the issue of probable cause for the warrantless search of the vehicle and ultimately the crown royal bag. The court declined to consider whether the odor of marijuana alone justified the search, as "[i]n this case, however, as in *Parker*, the Officer had several reasons in addition to the odor of marijuana to support probable cause to search the vehicle and, consequently, the Crown Royal bag." *Id*. at 13. The court pointed to (1) the "acknowledgement, if not an admission" that marijuana was smoked in the car, and that the defendant did not assert that it was hemp, (2) the defendant was driving with a fictitious tag, and (3) the defendant

was driving with an invalid license. *Id*. at 14. Then the court established that the officer also had probable cause to search the Crown Royal bag, quoting *State v. Mitchell*, 224 N.C. App. 171 (2012), to support that probable cause authorizes a search of "every part of the vehicle *and its contents* that may conceal the object of the search." *Id*. at 15. Although the defendant tried to remove the bag as he left the vehicle, the court explained that was "immaterial because the bag was in the car at the time of the stop." *Id*. Because the totality of the circumstances supported the officer's probable cause in searching the vehicle, the trial court's order granting the motion to suppress was error.

Judge Murphy concurred in part and dissented in part by separate opinion and would have found that the State did not adequately invoke the court's jurisdiction. *Id*. at 17.

Odor of marijuana plus a cover scent provided adequate probable cause to search vehicle

State v. Dobson, COA23-568, ___ N.C. App. ___; 900 S.E.2d 231 (April 16, 2024). In this Guilford County case, the defendant appealed after his guilty pleas to possession of a firearm by a felon and carrying a concealed firearm, arguing error in denying his motion to suppress because the smell of marijuana could not support probable cause. The Court of Appeals disagreed, finding no error.

In January of 2021, Greensboro police received a report that a handgun was in plain view inside a parked car. Police officers observed a group of people getting into the car, and eventually pulled the car over for going 55 mph in a 45-mph zone. When the officers approached the vehicle, they smelled what they believed was marijuana, along with a strong cologne scent. Officers asked the driver about the smell of marijuana, and she explained that they were recently at a club where people were smoking outside. After that answer, officers conducted a probable cause search of the vehicle for narcotics. During the search, officers noticed what appeared to be marijuana next to where the defendant was sitting, and conducted a *Terry* frisk, discovering a firearm in his waistband. Before trial, the defendant filed a motion to suppress the results of the search, arguing the smell of marijuana could not support probable cause due to the recent legalization of hemp. The trial court denied the motion, and the defendant subsequently pleaded guilty to the firearms charges through a plea agreement.

On appeal, the Court of Appeals explained that the defendant's challenges fell into two areas. First, he challenged the trial court's findings of fact that officers smelled marijuana, arguing the legalization of hemp made identifying marijuana by smell alone impossible. The court noted that "contrary to Defendant's arguments, the legalization of industrial hemp did not eliminate the significance of detecting 'the odor of marijuana' for the purposes of a motion to suppress." Slip Op. at 7. The court then considered the argument that the trial court misquoted the driver, writing that she said they were "in a club where marijuana was smoked" as opposed to at a club where people were smoking outside, with no mention of marijuana. *Id*. at 8. The court explained that even if the quotation was error, it did not undermine the finding of probable cause. Instead, the officers "detected the odor of marijuana *plus* a cover scent," providing a basis for probable cause to search the vehicle. *Id*. at 9.

Sight and smell of possible marijuana represented reasonable suspicion to extend traffic stop

State v. George, COA22-958, ___ N.C. App. ___; 898 S.E.2d 801 (March 5, 2024). In this Sampson County case, defendant appealed his convictions for trafficking heroin by possession and by transport, possession with intent to sell or deliver heroin and cocaine, and resisting a public officer, arguing (1)

insufficient findings of fact, and (2) error in denying his motion to suppress the results of a traffic stop. The Court of Appeals found no error.

In July of 2017, an officer pulled the defendant over for driving 70 mph in a 55 mph zone. When the officer approached the defendant's car, he noticed the smell of marijuana and what appeared to be marijuana residue on the floorboard. After a long search for registration, the defendant finally produced his documents; when the officer returned to his vehicle, he called for backup. After checking the defendant's registration and returning his documents, the officer asked if any illegal drugs were in the vehicle. The defendant said no. He declined the officer's request to search the vehicle, but during a free-air sniff around the vehicle, a canine altered at the driver's side door. A search found various narcotics. The defendant filed a pre-trial motion to suppress the results of the search, but the trial court denied the motion after a suppression hearing.

Both of the defendant's points of appeal depended upon the underlying argument that the officer unconstitutionally prolonged the traffic stop. Beginning with (1) the findings of fact to support the trial court's conclusion of law that the traffic stop was not unconstitutionally extended, the Court of Appeals explained that "our de novo review examining the constitutionality of the traffic stop's extension shows that the challenged legal conclusion is adequately supported by the findings of fact." Slip Op. at 8.

The court then proceeded to (2), performing a review of the traffic stop to determine whether the officer had reasonable suspicion to extend the stop. Because the defendant argued that the legalization of hemp in North Carolina meant the smell and sight of marijuana could not support the reasonable suspicion required to extend the stop, the court looked to applicable precedent on the issue. The court noted several federal court decisions related to probable cause, and the holding in *State v. Teague*, 286 N.C. App. 160 (2023), that the passage of the Industrial Hemp Act did not alter the State's burden of proof. Slip Op. at 13. After considering the circumstances, the court concluded "there was at least 'a minimal level of objective justification, something more than an unparticularized suspicion or hunch' of completed criminal activity—possession of marijuana." *Id*. at 13, quoting *State v. Campbell*, 359 N.C. 644, 664 (2005). Because the officer had sufficient justification for extending the stop, the trial court did not err by denying the motion to suppress.

Evidence of contraband found during search was admissible under inevitable discovery doctrine, but plain feel did not support seizure or search of pill bottle

State v. Jackson, COA23-727, ___ N.C. App. ___; 899 S.E.2d 582 (March 19, 2024). In this Avery County case, the defendant appealed his conviction for possession of methamphetamine, arguing error in denying his motion to suppress the results from a search. The Court of Appeals disagreed, finding no error.

The defendant was pulled over for driving while his license was revoked. The officer who pulled the defendant over asked him to step out of the vehicle so that he could pat him down for weapons. During the pat down, the officer found a pill bottle, and the defendant told the officer the pills were Percocet. The bottle was not a prescription pill bottle. The officer handcuffed the defendant and told him he was being detained for having the Percocet pills in a non-prescription bottle. The officer then searched the defendant's person, finding a bag of methamphetamine in defendant's boot. After the defendant was indicted for felony possession of methamphetamine, he moved to suppress the results of the search, arguing no probable cause. The trial court denied the motion, and the defendant was subsequently convicted.

Considering defendant's argument, the Court of Appeals first noted the "plain feel doctrine" allows admission of contraband found during a protective frisk if the incriminating nature of the contraband is immediately apparent to the officer. Slip Op. at 7. The State pointed to *State v. Robinson*, 189 N.C. App. 454 (2008), as supporting the officer's actions in the current case; the court rejected this comparison, noting that the supporting circumstances of location and nervousness of the suspect from *Robinson* were not present here. Slip Op. at 8. The court also rejected the assertion that the unlabeled pill bottle gave the officer probable cause to seize it. However, even if the search and seizure violated defendant's constitutional rights, the court concluded "the methamphetamine found in defendant's boot was still admissible because the contraband's discovery was shown to be inevitable." *Id*. at 9. Testimony from the officer at the suppression hearing supported the assumption that he would have arrested the defendant for driving with a revoked license if he had not found the contraband. This triggered the "inevitable discovery doctrine" and justified admission of the contraband evidence despite the lack of probable cause for the search. *Id*. at 10.

Judge Stading concurred in the result only.

Phil Dixon blogged about this case, here.

Searches

Officers' search of defendant's substance abuse recovery journals while looking for passwords or passcodes did not exceed the scope of search warrant.

State v. Hagaman, COA22-434, ___ N.C. App. ___; 897 S.E.2d 163 (Jan. 16, 2024). In this Watauga County case, the defendant appealed after pleading guilty to indecent liberties with a child, arguing error in denying his motion to suppress the evidence obtained from a search of his notebooks. The Court of Appeals found no error and affirmed the trial court.

In May of 2018, officers from the Boone Police Department were investigating child pornography distribution when they discovered files uploaded to a sharing network from defendant's IP address. The officers obtained a search warrant for the defendant's residence, and during a search of notebooks found at the home for passwords or passcodes related to the child pornography, the officers discovered a reference to a "hands-on sexual offense involving a minor." Slip Op. at 4. Officers obtained additional search warrants and eventually the defendant was indicted for additional counts of sexual exploitation of a minor and sexual offense. He moved to suppress the evidence seized in excess of the scope of the initial search warrant, and to quash the subsequent search warrants. The trial court denied the motions and the defendant pleaded guilty, reserving his right to appeal the order denying his motion to suppress and motion to quash.

Examining the motion to suppress, the Court of Appeals noted that the defendant's challenge was divided into two issues, (1) that many of the findings of fact were not actual findings or were not supported by competent evidence, and (2) that searching the notebooks went beyond the scope of the initial search warrant. While the court rejected the majority of the defendant's challenges to the findings of fact in (1), the court did agree several were not appropriately categorized, but explained that it would review them "under the appropriate standard depending on their actual classification, not the label given by the trial court." *Id*. at 14.

After walking through the defendant's objections to the findings of fact, the court reached (2), whether the officers exceeded the scope of the search warrant by searching through the defendant's substance abuse recovery notebooks. The defendant argued "the agents were allowed to cursorily look in the notebook but immediately upon discovering it was a substance abuse journal, they should have looked no further, not even for passwords or passcodes." *Id*. at 17. The court noted this would lead to the absurd result of requiring officers to trust the label or classification of a defendant's records when performing a search and rejected defendant's argument.

Search warrants for Facebook accounts were supported by probable cause and were not overbroad; even if the lack of temporal limitation on account information for one of the warrants violated the Fourth Amendment, officers were entitled to rely on the warrant under the good faith exception

U.S. v. Zelaya-Veliz, 94 F.4th 321 (Feb. 16, 2024). In this multi-defendant case from the Eastern District of Virginia, the defendants were charged with sex trafficking of a minor child and related offenses. The men were associated with MS-13, an international criminal gang. After around six weeks, the 13-year-old girl escaped and met with local law enforcement. She identified and was able to help locate another minor being trafficked by the men. Eventually, the matter was turned over to the FBI. Relying on information from local law enforcement's investigation, the lead agent discovered that the suspects were likely communicating via Facebook to accomplish the trafficking and prostitution of the minors. Agents ultimately obtained four search warrants for Facebook accounts associated with the suspects, each building on the information obtained from the previous warrant.

The first warrant sought information associated with four accounts connected to one of the suspects and a fifth account of another man, none of whom were parties to this case. The warrants sought all information related to the accounts for the entire time the accounts had been in existence, including all direct messages. While the warrants permitted the government to search all of the information provided by Facebook, they limited the seizures of information to evidence of the four specific potential crimes (all of which related to sex trafficking of a minor). The affidavits in support of these warrants explained the information learned during the course of the investigation, including that both men had communicated with minors on Facebook about prostitution and that one of the men had sexual contact with one of the minors. It also stated that MS-13 members were known to communicate via Facebook and that its members often utilized sex trafficking as a means of generating money.

The second Facebook warrant requested similar information on eight different accounts, five of which belonged to one defendant and three other accounts by other co-conspirators. The one defendant was identified by a minor victim as a person who facilitated her trafficking and prostitution. A credit card in the defendant's name was connected to the cell phone possessed by the child when she was found by law enforcement as well. Like the first warrant, the seizures of information authorized by the warrant were limited to evidence of four specific sex trafficking related crimes but were not limited by any specific time frame.

The third warrant requested an account belonging to a different defendant, multiple accounts of other, unindicted people, and five accounts belonging to three minor victims. Unlike the first two warrants, this warrant only requested information within a ten-month period prior to and over the period when the minors were trafficked. This warrant also sought broader categories of information associated with the accounts, including IP address and location data. Again, the warrant only authorized seizure of information showing involvement of the suspects in four specific sex trafficking offenses.

The last warrant requested account info on 22 Facebook accounts, some of which were associated with other defendants. It too limited seizure of the information produced in response to the warrant to evidence of sex trafficking offenses. It recounted information obtained from earlier warrants showing that these defendants discussed coordinating prostitution of minors, transporting minors for commercial sex, obtaining explicit photos of minors, and admissions to sex trafficking of minors.

Five of the six defendants challenged the denial of their motions to suppress the information obtained from Facebook on appeal, arguing the warrants were overbroad and not based on probable cause. The Fourth Circuit unanimously affirmed.

As to the first warrant, the defendants lacked standing to challenge it. Because this warrant only targeted information from other co-conspirators who were not involved in the current matter, the court declined to consider any challenge to it. (One of the men targeted in this warrant pleaded guilty to sex trafficking conspiracy prior to the trial of the defendants.) Regarding the second, third, and fourth warrants, each was aimed towards obtaining the account information of at least one of the named defendants in the case and the defendants could challenge those. The court noted that most courts that have considered the question have agreed social media users have a reasonable expectation of privacy in private messages sent through a social media application. The Fourth Circuit agreed that such private messages sent through a third-party provider remain constitutionally protected and that the government must typically obtain a search warrant before accessing them. "It cannot be the rule that the government can access someone's personal conversations and communications without meeting the warrant requirements or one of the Supreme Court's delineated exceptions to it. The judiciary would not allow such a trespass upon privacy at its core." *Zelaya-Veilz* Slip op. at 21.

Turning to the merits of the challenges, the court first determined that the warrants were all amply supported by probable cause. The second warrant was supported by information that the target defendant had trafficked the minor recovered by police, that he had multiple accounts in fake names, that his credit card was connected to a phone in possession of a minor victim when police found her, and that his known affiliates were using Facebook to accomplish trafficking and other forms of child abuse. This information, coupled with information about how MS-13 operates and typically uses Facebook based on the agent's training and experience, established probable cause. The third warrant was supported by identification of the target defendant by one of the minor victims and information from the first warrant showing that the target communicated over Facebook to facilitate crimes by gang members. Likewise, the affidavit in support of the fourth warrant demonstrated that account activities of each target defendant showed the targets either coordinating prostitution of minors, discussing the trafficking of a minor, admitting to sexual abuse of a minor, or making sexual advances towards minors. This information was corroborated by the minor victim and easily established probable cause. In the words of the court:

> The warrant affidavits in this case are well-sourced. They incorporated information from a reliable witness, the experience of an agent well-versed in the workings of MS-13, and—with each successive warrant—an increasingly incriminating chain of messages that tethered successive Facebook accounts to a larger conspiracy. *Id*. at 26.

The defendants also argued that the warrants were overbroad, in that the second and third warrants sought account information without any time limitation. They also argued that the warrants scooped up too many categories of account information. The court rejected these arguments as well. While the warrants required Facebook to disclose all the requested information connected to the accounts, the

warrants limited the seizure of that information to evidence of the crimes of investigation only. According to the court:

> We have previously found that a warrant's particularity is bolstered where, as here, the scope of the seizure it authorized was limited to evidence of enumerated offenses. The warrants in this case thus appropriately confined the officers' discretion, by restricting them from rummaging through the appellants' social media data in search of unrelated criminal activities. *Id*. at 28.

The timeframe limits on the third and fourth warrants that included a period beyond the time during which the minor victims were trafficked also did not render the warrants overbroad. Law enforcement had information that the defendants were engaged in a far-reaching sex trafficking conspiracy involving multiple victims and that the perpetrators used Facebook to communicate about the crimes before and after their commission. "The extensive nature of the conspiracy being investigated in this case meant that less temporal specificity was required here than in other contexts where evidence can be more readily confined to a particular time period." *Id*. at 32 (cleaned up).

The court agreed with the defendants that the lack of any timeframe limitation in the second warrant was problematic and potentially unreasonable under the Fourth Amendment. "… [A] time-based limitation is both practical and protective of privacy interest in the context of social media warrants." *Id*. at 34 (cleaned up). However, the second warrant was not so obviously illegal that a reasonable officer would have recognized it as such, and the good faith exception acted to save the warrant here. The court cautioned that social media warrants without any temporal limitation could be subject to an overbreadth challenge. In its words: "… [F]uture warrants enhance their claims to particularity by requesting data only from the period of time during which the defendant was suspected of taking part in the criminal conspiracy." *Id*. at 35. In a footnote, the court also noted that its opinion did not address the contours of the plain view exception in the context of social media warrants.

Other challenges were similarly rejected, and the judgment of the district court was unanimously affirmed.

Jeff Welty and Phil Dixon jointly blogged about the case, here.

Suppression Motions

Defendant was not required to give advance notice of his intent to appeal prior to pleading guilty when plea was not part of a plea agreement

State v. Jonas, 433PA21, ___ N.C. ___ (May 23, 2024). In this Cabarrus County case, the Supreme Court upheld the Court of Appeals decision that the defendant was not required to give notice of his intent to appeal the denial of his motion to suppress prior to entering an open guilty plea.

The defendant was charged with possession of a controlled substance and filed a motion to suppress, arguing the officer who stopped and searched him lacked reasonable suspicion. The trial court denied the motion, and the defendant subsequently pleaded guilty. Notably, the defendant confirmed to the trial court that he was not pleading guilty as part of a plea arrangement. After sentencing, defense

counsel gave notice of appeal on the record. The Court of Appeals panel unanimously held that the defendant was not required to give notice of intent to appeal prior to entering his plea.

Taking up the State's discretionary petition, the Supreme Court first noted that under *State v. Reynolds*, 298 N.C. 380 (1979), the defendant would normally be required to give notice of his intent to appeal to the prosecutor and court "to ensure fundamental fairness in the plea negotiation process." Slip Op. at 1. The Court noted that here, the defendant did not receive any benefit from the State, and the issue of fairness was not in play. Concluding it would not advance the interests of justice and fairness to extend the *Reynolds* rule to open guilty pleas, the Court affirmed the Court of Appeals decision.

Chief Justice Newby, joined by Justice Berger, dissented, and would have held that *State v. Tew*, 326 N.C. 732 (1990), controlled and required application of the *Reynolds* rule to open pleas. Slip Op. at 14.

Confrontation Clause

Admission of hearsay cellphone records without authenticating witness testimony violated defendant's Confrontation Clause rights; new trial

State v. Lester, COA23-115, ___ N.C. App. ___; 895 S.E.2d 905 (Dec. 5, 2023); *temp. stay allowed*, ___ N.C. ___; 894 S.E.2d 740. In this Wake County case, the defendant appealed his convictions for statutory rape, statutory sexual offense, and indecent liberties with a child, arguing the admission of hearsay cellphone records violated his rights under the Confrontation Clause of the Sixth Amendment. The Court of Appeals agreed, vacating the judgment and remanding for a new trial.

In 2022, the defendant came to trial for having sex with a thirteen-year-old girl during the summer of 2019. At trial, the State offered cellphone records showing calls between a number associated with defendant and a number associated with the victim as Exhibits #2 and #3. The defendant was subsequently convicted of all charges and appealed. The Court of Appeals issued an opinion on October 17, 2023, which was subsequently withdrawn and replaced by the current opinion.

Considering the defendant's Sixth Amendment argument, the court quoted *State v. Locklear*, 363 N.C. 438 (2009), for the concept that the Confrontation Clause "bars admission of direct testimonial evidence, 'unless the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant.'" Slip Op. at 7-8. When determining whether a defendant's Confrontation Clause rights were violated, courts apply a three-part test: "(1) whether the evidence admitted was testimonial in nature; (2) whether the trial court properly ruled the declarant was unavailable; and, (3) whether defendant had an opportunity to cross-examine the declarant." *Id*. at 8. Here, "[t]he trial court's findings answered the first and second factors . . . in the affirmative and the third factor in the negative," meaning "the evidence should have been excluded." *Id*. at 9.

The court went on to explain why the admission of the two exhibits was improper under the residual exception in Rule of Evidence 803(24), noting that "[t]he primary purpose of the court-ordered production of and preparation of the data records retained and provided by Verizon was to prepare direct testimonial evidence for Defendant's trial." *Id*. at 13. Because the defendant was "not given the prior opportunity or at trial to challenge or cross-examine officials from Verizon, who had purportedly accumulated this evidence . . . their admission as such violated Defendant's rights under the Confrontation Clause." *Id*.

After establishing that admission of the exhibits was error, the court explained that the State could not meet the burden of showing the error was "harmless beyond a reasonable doubt" as required for constitutional errors. *Id*. at 14. As a result, the court vacated the judgment and remanded for a new trial.

Pleadings

Supreme Court holds that constitutional and statutory defects in indictments do not deprive the trial court of jurisdiction, unless the indictment wholly fails to allege a crime

State v. Singleton, 318PA22, ___ N.C. ___ (May 23, 2024). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating the defendant's conviction for second-degree rape due to a fatal defect in the indictment. The Court held that a defect in an indictment does not deprive the courts of jurisdiction unless the indictment wholly fails to allege a crime.

In November of 2017, the victim, a college student home for thanksgiving break, went out in downtown Raleigh with her friends and became intoxicated. At some point during the night, the victim blacked out, and woke up in the defendant's car with him on top of her. The defendant was subsequently convicted of second-degree forcible rape and first-degree kidnapping. On appeal, he argued for the first time that the trial court lacked jurisdiction over the second-degree forcible rape charge because the indictment did not allege that he knew or should have known that the victim was physically helpless at the time of the act. The Court of Appeals agreed and vacated the rape conviction, holding that the indictment failed to allege an essential element of the crime.

Taking up the State's petition for discretionary review, the Supreme Court first gave a broad historical overview of the jurisdictional indictment rule, beginning with common law and walking through North Carolina constitutional and statutory provisions. The Court ultimately concluded that "[o]ur Constitution and General Statutes, not an indictment, confer the general courts of justice with jurisdiction over criminal laws and the defendants accused of violating such laws." Slip Op. at 40. Having established that constitutional or statutory defects do not deprive the trial court of jurisdiction, the Court explained that "[a]s these species of errors in a charging document are not jurisdictional, a defendant seeking relief must demonstrate not only that such an error occurred, but also that such error was prejudicial." *Id*. at 42. The Court pointed to G.S. 15A-1443 for the appropriate prejudicial error tests.

The Court then examined the indictment at issue in this case, concluding that "[a] plain reading of [G.S.] 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim's physical helplessness." *Id*. at 46. Here the Court noted that the language used in the indictment was simply a modern version of the short-form indictment language and concluded that the indictment was not deficient.

Justice Earls, joined by Justice Riggs, concurred in the conclusion that the indictment in this case was not deficient, but dissented from the holding "that constitutional and statutory defects in an indictment are non-jurisdictional" and provided a lengthy dissent supporting this argument. *Id*. at 49.

Failure of indictment to include language on use of force in sexual battery charge did not render the indictment invalid.

State v. Stewart, 23PA22, ___ N.C. ___ (May 23, 2024). In this Mecklenburg County case, the Supreme Court reversed the unpublished Court of Appeals opinion vacating the defendant's conviction for sexual battery. The Court applied the holding in *State v. Singleton* when determining that the failure of the indictment to allege defendant used force during the sexual battery did not make the indictment invalid.

In January of 2016, the victim celebrated her birthday by going to a massage therapist in Charlotte. During the massage, the therapist digitally penetrated the victim's vagina. The defendant was subsequently convicted of sexual battery and appealed. At the Court of Appeals, the defendant argued that the trial court lacked subject matter jurisdiction because the indictment omitted that his act was committed "by force." The Court of Appeals agreed, determining G.S. 14-27.33 required the indictment to allege the act was committed by force and against the will of another.

The Supreme Court accepted the State's petition for discretionary review, and the Court took the opportunity to apply the reasoning from *Singleton* that the defendant must show "that the indictment contained a statutory or constitutional defect and that such error was prejudicial." Slip Op. at 6. Walking through the analysis, the Court noted that in the juvenile case *In re J.U.*, 384 N.C. 618 (2023), the Court held the element of force was inferable from the allegation that the act was nonconsensual. This led the Court to conclude "[t]he element of force is inferable from the language of the indictment such that a person of common understanding might know what was intended" and that the indictment was facially valid. Slip Op. at 9.

Justice Earls, joined by Justice Riggs, concurred in the result by separate opinion and explained that the Court's precedent in *In re J.U.* and *Singleton* bound her to concur in the result. *Id*. at 10.

Pretrial Release

District court retained jurisdiction to alter pretrial release bond after defendant announced his intention to appeal to superior court; district court erred by not making written findings when imposing secured bond but this error did not justify dismissal of charges

State v. Robinson, COA23-564, ___ N.C. App. ___ (June 4, 2024). In this Guilford County case, the State appealed an order granting dismissal of the assault, interfering with emergency communications, and communicating threats charges against the defendant after the district court imposed a $250 secured bond when he announced his intention to appeal to superior court. The Court of Appeals reversed the superior court order dismissing the charges, remanding for further findings to support the imposition of a secured cash bond.

In June of 2019, the defendant was charged with felony assault by strangulation, interfering with emergency communications, and communicating threats, and received a $2,500 unsecured bond for pretrial release. The State reduced the assault by strangulation charge to simple assault, and a district court bench trial was held in August 2022. The defendant was found guilty on all charges and given a 150-day suspended sentence. The defendant then gave notice of appeal, at which point the district court modified the defendant's pretrial release to require a $250 secured bond. This led to the defendant being taken into custody for a few hours while his family posted the bond. In October 2022, the defendant moved at the superior court to dismiss the charges, and the superior court granted the motion, finding the district court did not properly modify the defendant's bond pursuant to statute and

the denial of his right to a reasonable bond impermissibly infringed on his Fourth Amendment and Sixth Amendment rights.

Taking up the State's appeal, the Court of Appeals first looked at the district court's jurisdiction to modify the pretrial release bond, as the defendant argued that the district court was immediately divested of jurisdiction when he announced his appeal. Looking to the language of G.S. 15A-1431, the court concluded "[g]iven that the plain language contained in Section 1431 mandates action from a magistrate or district court following a defendant giving notice of appeal, we conclude that the district court is not immediately divested of jurisdiction following 'the noting of an appeal.'" Slip Op. at 11. This meant that the district court retained jurisdiction to modify the defendant's pretrial release. The court then looked to G.S. 15A-534 for the requirements to impose a secured cash bond, finding that the district court did not properly record its reasons in writing, meaning the superior court's order was correct in finding the district court erred.

Having established that the district court erred by imposing a secured bond without written findings, the court moved to the question of whether the defendant's rights were flagrantly violated and whether his case suffered irreparable prejudice to support dismissal of the charges against him under G.S. 15A-954. The court concluded that the defendant had not been irreparably prejudiced, looking to the superior court's own findings, pointing to Finding No. 12 that "the court does not find, that the $250 cash bond and subsequent time in custody affected defendant's ability to prepare his case in superior court, or otherwise to consult with counsel to be ready for trial." *Id*. at 14 (cleaned up). Because the superior court's own findings showed no prejudice and the findings were not challenged on appeal, the court determined it was error to grant the defendant's motion to dismiss.

Capacity

Defendant's traumatic brain injury and subsequent memory loss did not render him incompetent to stand trial

State v. Bethea, COA22-932, ___ N.C. App. ___; 896 S.E.2d 277 (Dec. 19, 2023). In this Scotland County case, the defendant appealed his convictions for attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a firearm on an officer, and carrying a concealed gun, arguing abuse of discretion in finding him competent to stand trial. The Court of Appeals disagreed, finding no error.

In May of 2018, the defendant walked up to a crime scene and passed under the police tape into the secured area. Two officers on the scene moved to arrest the defendant, and in the ensuing confrontation, defendant drew his firearm and shot at one of the officers. The defendant attempted to flee but was struck by shots from one of the officers. At the hospital, the defendant was diagnosed with a traumatic brain injury. Before trial, defense counsel filed a motion for capacity hearing due to the defendant's alleged memory loss from the brain injury. The trial court held a competency hearing, where a doctor provided by the defense testified that the defendant could not remember the days leading up to the confrontation with police or the events of the day in question, but that he had a "rational understanding" of the legal proceedings against him. Slip Op. at 3. The trial court ruled that the defendant was competent to stand trial, and he was subsequently convicted.

The Court of Appeals noted that "our Supreme Court has explained that even when a defendant's ability to participate in his defense is limited by amnesia, it does not per se render him incapable of standing trial." *Id*. at 6. Although the defendant argued his memory loss made him unable to participate in his defense, the court disagreed, explaining "he was able to understand the nature and object of the proceedings against him and able to comprehend his own situation in reference to the proceedings." *Id*. The court found no abuse of discretion by the trial court when weighing the testimony and concluding that the defendant was competent to stand trial.

Right to Counsel

Denial of defense counsel's motion to withdraw did not represent Sixth Amendment structural error.

State v. Melton, COA23-411, ___ N.C. App. ___ (May 21, 2024). In this Forsyth County case, the defendant appealed his convictions for possession of methamphetamine and habitual felon status, arguing structural error in denying his court-appointed counsel's motion to withdraw. The Court of Appeals majority found no error.

In July of 2022, the defendant was represented by court-appointed counsel, and requested a trial on his charges. A trial date was set for September 12, 2022. On September 9, an attorney who was not the court-appointed counsel contacted the State to negotiate a plea deal or continuance for the defendant's case. The State did not agree to the continuance, but offered a plea deal, which the defendant rejected. Court-appointed counsel learned of this negotiation on September 11, and subsequently filed a motion to withdraw. The trial court heard and denied the motion to withdraw on September 12. The next day, the case came for trial, and defense counsel informed the trial court (who was a different superior court judge) that the defendant wished to be heard on the motion again; after hearing from both parties, the trial court repronounced the motion to withdraw. The defendant was subsequently convicted and filed notice of appeal.

The Court of Appeals first noted the framing of the defendant's argument, that depriving him of his Sixth Amendment right to counsel was structural error and explored the proper standard for reviewing an indigent defendant's request to substitute appointed counsel with counsel of his choice. Looking to applicable precedent, the court noted that a trial court should only deny a motion like the defendant's when "granting the motion would 'result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances[.]'" Slip Op. at 7, quoting *State v. Goodwin*, 267 N.C. App. 437, 440 (2019). Although the majority opinion noted possible issues with Court of Appeals precedent around the *Goodwin* standard, it proceeded to apply this reasoning to the present case, holding that "the trial court conducted an inquiry which revolved around issues concerning the further disruption and delay of trial." *Id*. at 12. As a result, the court found no structural error with the trial court's initial denial of the motion.

The court then moved to the defendant's request for reconsideration of the motion on September 13. Normally a superior court judge is not authorized to overrule another, but when the order is (1) interlocutory, (2) discretionary, and (3) subject to a substantial change of circumstances, an exception to this rule applies. The court held that while the order was both (1) and (2), "the record does not reflect a substantial change in circumstances" and the trial court did not err in repronouncing the denial of the motion. *Id*. at 14.

Judge Stroud concurred by separate opinion, and concurred with the majority opinion except as to the citation of certain unpublished cases that were not argued by the parties.

Judge Thompson dissented and would have held that the trial court committed a structural error by denying defense counsel's motion to withdraw.

Defendant forfeited his right to counsel after six appointed attorneys and two years of delay to the proceedings

State v. Smith, COA23-575, ___ N.C. App. ___; 898 S.E.2d 909 (March 5, 2024). In this Stanly County case, the defendant appealed the trial court's ruling that he forfeited his right to counsel. The Court of Appeals found no error.

The defendant pleaded guilty to first degree kidnapping, second degree rape, and second degree burglary in December of 2017. However, due to a sentencing error, he was brought back before the trial court in July 2020, where he requested to set aside his guilty plea. At the same time, the defendant's first attorney requested to withdraw. This began a series of six appointed attorneys that represented the defendant from July 2020 to July 2022. During this time, the defendant was also disruptive to the proceedings, and at one point was held in contempt by the trial court. Eventually, due to the disruptions and dispute with his sixth appointed attorney, the trial court ruled that the defendant had forfeited his right to court-appointed counsel. On appeal, he argued that the trial court erred in determining he had forfeited his right to counsel.

The Court of Appeals explained that the trial court was correct in finding that defendant forfeited his right to counsel, pointing to defendant's "insistence that his attorneys pursue defenses that were barred by ethical rules and his refusal to cooperate when they would not comply with his requests[,]" along with defendant's conduct that "was combative and interruptive during the majority of his appearances in court." Slip Op. at 10. These behaviors caused significant delay in the proceedings, and justified forfeiture of counsel.

Right to Jury Trial

Substitution of alternate juror after jury began deliberation violated defendant's right to properly constituted jury of twelve, requiring new trial

State v. Chambers, COA22-1063, ___ N.C. App. ___; 898 S.E.2d 86 (Feb. 20, 2024); *temp. stay allowed*, ___ N.C. ___; 897 S.E.2d 668 (March 7, 2024). In this Wake County case, the defendant appealed his convictions for first-degree murder and assault with a deadly weapon, arguing his right to a properly constituted jury was violated when the trial court substituted an alternate juror after the jury began deliberations. The Court of Appeals agreed, vacating his convictions and remanding for a new trial.

The defendant was tried in August of 2018 for a shooting at a Raleigh motel. After jury deliberations began, a juror informed the trial court that he had a doctor's appointment and could not return the next day. The trial court replaced the juror with an alternate juror and ordered the jury to restart deliberations. The defendant was not present in the courtroom when the substitution was made. The defendant subsequently appealed.

Turning to the defendant's arguments, the Court of Appeals concluded that the trial court's substitution of an alternate juror was error. The court referenced *State v. Bunning*, 346 N.C. 253 (1997), and explained that the N.C. Supreme Court has interpreted the unanimous verdict requirement of the North Carolina Constitution in Article I, § 24 "to preclude juror substitution during a trial after the commencement of jury deliberations." Slip Op. at 3. Because the substitution meant that thirteen jurors participated in the deliberations for defendant's convictions, "[d]efendant's constitutional right to a properly constituted jury of twelve was violated when the trial court substituted an original juror with an alternate juror after the commencement of jury deliberations." *Id*. at 4. The court reached this conclusion despite the text of G.S. 15A-1215(a), noting that "where a statute conflicts with our state constitution, we must follow our state constitution." *Id*. at 5.

Shea Denning blogged about the case, here.

Lay and Expert Opinion

Trial court failed to exercise gatekeeping function under Rule 702, but error did not rise to plain error

State v. Figueroa, COA23-313, ___ N.C. App. ___; 896 S.E.2d 188 (Dec. 19, 2023). In this Guilford County case, the defendant appealed her conviction for trafficking methamphetamine, arguing (1) plain error in admitting testimony from an expert without a sufficient foundation for reliability under Rule of Evidence 702, and (2) error in failing to intervene *ex mero motu* when the prosecutor made improper remarks during closing argument about her past convictions. The Court of Appeals found no plain error in (1), and no error in (2).

In November of 2018, law enforcement officers set up an undercover investigation of a suspected drug dealer. At a meeting set up by an undercover officer to purchase methamphetamine, the defendant was the driver of the vehicle with the drug dealer. After officers found methamphetamine in the vehicle, the defendant was charged and ultimately convicted of trafficking methamphetamine by possession.

Looking to (1), the Court of Appeals found error in admitting the State's expert testimony under Rule 702, as "the court failed to exercise its gatekeeping function" when admitting the expert's testimony. Slip Op. at 7. Although the expert offered testimony about the type of analysis she performed to identify the methamphetamine, "she did not explain the methodology of that analysis." *Id*. However, the court noted that this error did not rise to the level of plain error as the expert "identified the tests she performed and the result of those tests," and she did not engage in "baseless speculation." *Id*.

Character Evidence

Testimony by lead detective vouching for victim's credibility was improperly admitted, justifying new trial.

State v. Aguilar, COA23-556, ___ N.C. App. ___; 898 S.E.2d 914 (March 5, 2024). In this Mecklenburg County case, the defendant appealed his convictions for sexual battery, assault on a female, and false imprisonment, arguing error in allowing the State's witness to vouch for the alleged victim's credibility. The Court of Appeals agreed, ordering a new trial.

In October of 2019, the defendant allegedly assaulted the victim at a Mexican restaurant where they both worked. At trial, the State called the lead detective to testify regarding her investigation of the case. During direct examination, the State asked the detective if she questioned the validity of the victim's story; defense counsel objected, but the trial court overruled the objection and allowed the questioning to proceed. The State asked the detective several more questions regarding the credibility of the victim's statements, and defense counsel renewed their objection, which was again overruled. The defendant was subsequently convicted, and appealed.

Taking up the defendant's argument, the Court of Appeals noted that "a detective or other law enforcement officer may testify as to why they made certain choices in the course of an investigation, including their basis for believing a particular witness[,]" but here "the challenged testimony was clearly unrelated to [the detective's] investigatory decision-making." Slip Op. at 8-9. The court pointed to *State v. Taylor*, 238 N.C. App. 159 (2014), and *State v. Richardson*, 346 N.C. 520 (1997), as examples of testimony related to investigatory decisions, and contrasted these with the current case. The State argued that Rule of Evidence 608(a) permitted bolstering the victim's testimony, but the court rejected this argument, explaining that the defendant's cross-examination of the victim did not implicate Rule 608(a). The court concluded that the defendant was prejudiced by the admission of the detective's testimony, and remanded for a new trial.

Crimes

Drugs

State admitted sufficient evidence to support conviction under death by distribution statute; testimony regarding previous drug sales was admissible under Rule 404(b)

State v. McCrorey, COA23-592, ___ N.C. App. ___; 896 S.E.2d 309 (Dec. 19, 2023). In this Cabarrus County case, the defendant appealed his death by distribution conviction, arguing error in (1) denial of his motion to dismiss, and (2) improperly admitting Rule of Evidence 404(b) evidence. The Court of Appeals found no error.

In March of 2020, the defendant sold drugs, purportedly heroin and cocaine, to two women. After taking the drugs, one of the women died, and toxicology determined she had both cocaine and fentanyl in her bloodstream. The level of metabolites for both cocaine and fentanyl were determined to be in the fatal range. When the defendant came to trial on charges of death by distribution, the trial court allowed the surviving woman to testify about the defendant's prior sales of drugs to her as Rule 404(b) evidence to show the defendant's "intent, identity, and common scheme or plan." Slip Op. at 5.

(1) Considering the defendant's motion to dismiss, the Court of Appeals addressed the defendant's arguments in relation to the elements of G.S. 14-18.4(b), the death by distribution statute. The court explained that circumstantial evidence supported the conclusion that the defendant sold fentanyl instead of heroin to the victim. The court also noted "[w]hile the evidence does not foreclose the possibility that fentanyl may not have been the sole cause of [the victim's] death, there is ample evidence to support a conclusion that it was, in fact, fentanyl that killed [the victim]." *Id*. at 9. Rejecting the defendant's argument that he could not foresee that the victim would consume all the drugs at once, the court found sufficient evidence to submit the question of proximate cause to the jury.

(2) Turning to the issue of the Rule 404(b) evidence, the court noted that the trial court engaged in a lengthy analysis of whether to admit the testimony related to previous drug sales. Here, the testimony "demonstrate[d] not only the common plan or scheme of Defendant's drug sales, but also his intent when transacting with [the woman]," and also served to confirm his identity. *Id*. at 13. Because the court could not establish a danger of unfair prejudice outweighing the probative value of the testimony, it found no error.

Firearms Offenses

Conviction for possession of firearm on educational property was unconstitutional where gun was found in vehicle parked in hospital parking lot

State v. Radomski, COA23-340, ___ N.C. App. ___; ___ S.E.2d ___ (May 21, 2024). In this Orange County case, the defendant appealed his conviction for possession of a firearm on education property, arguing the application of G.S. 14-269.2 to his case was unconstitutional and that the trial court erred by denying his motion to dismiss for insufficient evidence. The Court of Appeals majority agreed on both grounds, reversing the trial court and vacating defendant's conviction.

In June of 2021, the defendant drove his vehicle to UNC Hospital for treatment. He was homeless at the time, and kept all his possessions, including his firearms, inside his vehicle. A UNC Hospital police officer received a report that the defendant's vehicle was suspicious, and while investigating, the officer discovered that the vehicle had no license plate or insurance coverage. The officer questioned the defendant about the contents of the vehicle, and the defendant admitted he had firearms inside, but that he was unaware he was on educational property. The officer cuffed the defendant and searched the vehicle, finding several firearms along with ammunition. The defendant was subsequently arrested and charged with one count of possession of a firearm on educational property.

The Court of Appeals first explained that the defendant failed to raise the constitutional argument at trial, but that it would invoke Rule of Appellate Procedure 2 to consider his arguments. The court then moved to the substance of the argument, that applying G.S. 14-269.2(b) to the defendant under the facts of his case violated his Second Amendment rights under the "historical tradition of firearm regulation" analysis required by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022). Slip Op. at 9. The court noted that the purpose of the open-air parking lot where the defendant's vehicle was located was "not educational in nature" as it was intended to serve the hospital and could not be considered an obvious sensitive place for purposes of *Bruen*. *Id*. at 10. The court also rejected that the hospital's "affiliation" with UNC made it qualify as a sensitive place under *Bruen*. *Id*. at 12. Under these facts, the court held that applying G.S. 14-269.2(b) to the defendant would be unconstitutional, regardless of the various signs and administrative links between the hospital and the educational campus.

The court then moved to considering whether evidence supported that defendant was on educational property and whether he knew he was on educational property. Considering the first issue, the court held "Defendant's car was located on the UNC Chapel Hill Campus." *Id*. at 15. However, the majority opinion held that the State did not present sufficient evidence of the defendant's knowledge that he was on educational property. To support this holding, the court looked to the arresting officer's testimony, concluding "[t]he State failed to present any evidence, direct or circumstantial, as to which

path Defendant took, what signs he saw, or any other indication of personal knowledge that he was on educational property." *Id*. at 21.

Chief Judge Dillon concurred by separate opinion as to the Second Amendment holding but did not agree with the majority's holding regarding insufficient evidence of the defendant's knowledge that he was on educational property.

"In operation" for purposes of discharging a firearm into an occupied vehicle has a commonly understood meaning, and special jury instruction defining the term was not required

State v. Shumate, COA23-256, ___ N.C. App. ___; 896 S.E.2d 200 (Dec. 19, 2023). In this McDowell County case, the defendant appealed his conviction for discharging a firearm into an occupied vehicle in operation and possessing a firearm as a felon, arguing error in (1) not instructing the jury on the lesser included offense of discharging a firearm into an occupied vehicle; (2) not defining "in operation" during the jury instructions; and (3) denying the defendant's motion to dismiss. The Court of Appeals disagreed, finding no error.

In June of 2022, the defendant's ex-girlfriend and two accomplices drove a vehicle onto his property to take a puppy from his home. Testimony from the parties differed, but a firearm was discharged into the rear passenger side window of the vehicle as the ex-girlfriend and her accomplices attempted to drive away with the puppy. The engine of the vehicle was running, but it was stopped when the shot was fired through the window. The defendant did not object to the jury instructions during the trial.

Reviewing (1) for plain error, the Court of Appeals noted that "in operation" is undefined in G.S. 14-34.1, but looking to the plain meaning of the words and consideration from a previous unpublished case, the court arrived at the following: "A vehicle is 'in operation' if it is 'in the state of being functional,' i.e., if it can be driven under its own power. For a vehicle to be driven, there must be a person in the driver's seat, and its engine must be running." Slip Op. at 6. Because all the evidence indicated someone was in the driver's seat of the vehicle and the engine was running, the trial court did not err by not instructing on the lesser included offense. Likewise, this dispensed with (2), as the trial court did not need to provide instruction on the meaning of "in operation" due to the phrase carrying its common meaning. Resolving (3), the court noted that testimony in the record would allow a reasonable juror to conclude the defendant fired a shot into the vehicle, representing substantial evidence to survive a motion to dismiss.

Hit and Run

Definition of "crash" for G.S. 20-166 includes intentionally hitting victim with vehicle

State v. Buck, COA23-606, ___ N.C. App. ___; ___ S.E.2d ___ (May 7, 2024). In this New Hanover County case, the defendant appealed his convictions for assault with a deadly weapon with the intent to kill inflicting serious injury (AWDWIKISI), felony hit-and-run with serious injury, and robbery with a dangerous weapon, making several arguments centered around the definition of "crash" under G.S. 20-166, the mutually exclusive nature of the AWDWIKISI and hit-and-run charges, and a clerical error in the judgment. The Court of Appeals found no merit with the defendant's arguments regarding his convictions but did find that the trial court made a clerical error in the hit-and-run judgment and remanded for correction of that error.

In January of 2021, the defendant met the victim to sell him marijuana; instead of paying the defendant for the marijuana, the victim grabbed the drugs and ran. The defendant hit the victim with his car, got out of the vehicle and went through the victim's pockets, then drove away without calling for assistance.

The defendant argued that "crash" as used in the section defining a hit-and-run (G.S. 20-166) could not refer to an intentional action because it was the same as an "accident." To support this argument, he pointed to the definition section G.S. 20-4.01(4c), defining "crash" and including the following language: "[t]he terms collision, accident, and crash and their cognates are synonymous." Rejecting the defendant's interpretation, the Court of Appeals explained "[t]he General Assembly chose not to discriminate between intended events and unintended events; therefore, so long as there is injury caused by a motor vehicle— intent is irrelevant." Slip Op. at 6-7. After the court established that the defendant could be charged with hit-and-run for an intentional action, it dispensed with the defendant's argument regarding his AWDWIKISI charge, explaining "[c]onvictions of AWDWIKISI and felony hit and run with serious injury are not mutually exclusive because assault is intentional, and a 'crash' can also be intentional." *Id*. at 10. Based on this reasoning, the court rejected the various challenges to the convictions.

Moving to the clerical error, the court acknowledged that the judgment finding the defendant guilty of hit-and-run referenced G.S. 20-166 subsection "(E)" instead of the appropriate "(a)" for his conviction. The court remanded to allow correction of the clerical error.

Homicide

Robbery committed after killing represented continuous transaction for felony murder charge; defendant could not claim self-defense as a defense to armed robbery or felony murder charges

State v. Jackson, COA23-636, ___ N.C. App. ___; 899 S.E.2d 399 (March 19, 2024). In this Guilford County case, the defendant appealed his convictions for first-degree murder based on felony murder, armed robbery, and possession of a stolen vehicle, arguing error in (1) denying his motion to dismiss the armed robbery charge and (2) not instructing the jury that self-defense could justify felony murder based on armed robbery. The Court of Appeals found no error.

In August of 2018, the defendant was staying at the apartment of a female friend when a series of phone calls from another man woke him up. The defendant went to the parking lot to confront the other man (the eventual victim), and the defendant testified that the man threatened to kill him. At that point, the defendant shot the victim four times. A few minutes afterwards, he stole the victim's car. The victim's car was found abandoned in a field a day later. The defendant was indicted for first-degree murder based on felony murder, with the underlying felony being armed robbery. He moved to dismiss the murder and robbery charges, arguing there was insufficient evidence the shooting and taking of the vehicle occurred in a continuous transaction. The trial court denied the motion.

Taking up (1), the Court of Appeals noted that temporal order of the felony and the killing does not matter for a felony murder charge, as long as they are a continuous transaction. Here, the time period between the shooting and the defendant taking the victim's car was short, only "a few minutes" after the shots. Slip Op. at 6. The court also noted that "our Supreme Court has repeatedly rejected arguments a defendant must have intended to commit armed robbery at the time he killed the victim in order for the exchange to be a continuous transaction." *Id*. at 7-8. Here, evidence supported the finding

of a continuous transaction, and whether the defendant initially intended to steal the car was immaterial.

Moving to (2), the court pointed to precedent that self-defense is not a defense for felony murder, but it can be a defense to the underlying felony. However, the court explained that "[b]ased on our precedents, self-defense is inapplicable to armed robbery[,]" and because armed robbery was the underlying felony in this case, the defendant was not entitled to a jury instruction on self-defense. *Id*. at 11.

Because the evidence supporting the underlying felony was not "in conflict," defendant was not entitled to an instruction on second-degree murder under the first part of the *Gwynn* test

State v. Wilson, 358 N.C. 538 (Dec. 15, 2023). In this Mecklenburg County case, the Supreme Court modified and affirmed the Court of Appeals majority opinion that held the defendant was not entitled to an instruction on second-degree murder as a lesser included offense while on trial for first-degree murder based on the felony-murder rule.

On Father's Day in 2017, the defendant and an associate arranged to sell a cellphone to a man through the LetGo app. However, during the meeting to sell the phone, the deal went wrong, and the defendant's associate shot the buyer. The defendant came to trial for attempted robbery with a dangerous weapon, first-degree murder under the felony murder theory, and conspiracy to commit robbery with his associate. The trial court denied the defendant's request for an instruction on second-degree murder as a lesser-included offense. The defendant was subsequently convicted of first-degree murder and attempted robbery, but not the conspiracy charge. The Court of Appeals majority found no error, applying "the second part of the test" from *State v. Gwynn*, 362 N.C. 334 (2008), to conclude "defendant was not entitled to a second-degree murder instruction because 'there [was] no evidence in the record from which a rational juror could find [d]efendant guilty of second-degree murder and not guilty of felony murder.'" Slip Op. at 6.

Taking up the appeal, the Supreme Court explained that the defendant was only entitled to an instruction on lesser-included offenses if "(1) the evidence supporting the underlying felony is 'in conflict,' and (2) the evidence would support a lesser-included offense of first-degree murder." *Id*. at 9. The Court examined the elements of attempted robbery and found supporting evidence, while rejecting the three issues raised by the defendant that attempted to show the evidence was "in conflict." *Id*. at 15. Applying the first part of the test from *Gwynn*, the Court determined that there was no conflict in the evidence supporting the underlying attempted robbery felony. Modifying the Court of Appeals majority's analysis, the Court explained that "[b]ecause there was not a conflict in the evidence, we need not proceed to the next step of the *Gwynn* analysis to consider whether the evidence would support a lesser-included offense of first-degree murder." Id. at 17.

Justice Earls, joined by Justice Riggs, dissented and would have found the evidence was "in conflict," justifying an instruction on second-degree murder under the *Gwynn* analysis. *Id*. at 18.

Impaired Driving

Analyst did not follow applicable DHHS regulations for observation period before administering Intoximeter test, but additional evidence supported defendant's conviction

State v. Forney, COA23-338, ___ N.C. App. ___; 897 S.E.2d 171 (Jan. 16, 2024). In this Buncombe County case, the defendant appealed his convictions for driving while impaired, arguing error in denying his motion to exclude an Intoximeter chemical analysis as well as his subsequent objections to the admission of the analysis at trial. The Court of Appeals majority found error as the officer performing the analysis did not conduct an observation period after ordering the defendant to remove gum from his mouth but did not find prejudice by the error, upholding the conviction.

In March of 2021, an Asheville police officer observed the defendant roll through a stop sign. The officer pulled over the defendant, and observed the smell of alcohol, glassy eyes, and slurred speech. The office conducted field sobriety tests, determining that defendant was likely intoxicated. After the defendant was arrested and taken to the Buncombe County Jail, a certified chemical analyst conducted a 15-minute observation period, followed by an Intoximeter breath analysis. After this first breath test, the analyst noted that the defendant had gum in his mouth and had him spit it out, then conducted a second breath test two minutes after the first. Both tests resulted in 0.11 BAC readings. Both parties offered expert testimony about the possible effects of the gum, but no studies were admitted using the type of Intoximeter in question, and no evidence established the type of gum the defendant had in his mouth at the time of the test.

The Court of Appeals first explained that G.S. 20-139.1(b)(1) makes breath tests admissible if they are "performed in accordance with the rules of the Department of Health and Human Services." Slip Op. at 8. The applicable rules are found in 10A NCAC 41B.0101, which requires an observation period to ensure the person being tested does not ingest alcohol, vomit, or eat or drink other substances. The State argued that chewing gum did not represent "eating" for purposes of the rules, a position the court's opinion rejected:

> In sum, we believe the intent of both the legislature and DHHS in the provisions pertinent here is clear: to ensure that the chemical analysis of a subject's breath is accurate in measuring BAC and not tainted by the presence of substances in the mouth during testing. And in our view, to adopt the State's position that the observation period requirement is not violated when a subject "chews" something during the period would lead to absurd results and have bizarre consequences because it would mean, for example, that a subject could engage in the following activities not listed in 10A NCAC 41B.0106(6) moments before the taking of breath samples: *chewing* gum—presumably including nicotine gum—or tobacco or food that is spit out before swallowing, *dipping* snuff, *sucking* on a medicated throat lozenge or a hard candy, *using* an inhaler, and *swallowing* a pill. *Id*. at 13.

Despite finding that the test was improperly admitted, the court did not see prejudice for the defendant, noting the overwhelming evidence of guilt from the defendant's performance on the field sobriety tests, his glassy eyes and slurred speech, and the smell of alcohol observed by the officer.

Judge Arrowood concurred in the result only.

Judge Wood concurred in the result only by separate opinion, and also would have held that the admission of the breath test results was not error. *Id*. at 19.

Shea Denning blogged about this case, here.

"Interlocutory no-man's land" justified granting certiorari after district court's suppression order; officer had probable cause for DWI arrest

State v. Woolard, 385 N.C. 560 (Dec. 15, 2023). In this Beaufort County case, the Supreme Court granted certiorari to review the State's appeal of a district court order suppressing evidence gathered during a DWI traffic stop. The Supreme Court found that the arresting officer had probable cause to arrest the defendant and reversed the suppression order, remanding for further proceedings.

In April of 2020, a State Highway Patrol officer stopped the defendant after observing him weaving across the centerline. The officer noticed the defendant smelled of alcohol and had glassy eyes, and he admitted to having a couple of beers earlier in the day. After administering a preliminary breath test (PBT) and horizontal gaze nystagmus (HGN) test, the officer arrested the defendant for DWI. When the matter came to district court, he moved to suppress the results of the stop. The trial court found that the officer did not have probable cause to suspect the defendant of DWI before his arrest, and also that the officer failed to ensure that the defendant had nothing in his mouth before the PBT, excluding the results. After the trial court's preliminary ruling, the State challenged the determination in superior court under G.S. 20-38.7(a), but that court affirmed the trial court's determination and directed it to enter a final order. The Court of Appeals denied the State's petition for a writ of certiorari.

Taking up the State's petition, the Supreme Court first established its jurisdiction and the lack of other appeal routes, explaining that the final suppression order from district court was interlocutory, and the statute governing appeals from district court, G.S. 15A-1432, provided no other route for the State to appeal because there was no dismissal or motion for new trial. Since there was no vehicle for appeal and the State "would otherwise be marooned in an 'interlocutory no-man's land,'" Rule of Appellate Procedure 2 allowed the State to petition the Court for certiorari. Slip Op. at 8. This also meant that the Court was considering the district court's final order, as there was no Court of Appeals opinion on the matter.

Moving to the suppression order, the Court explained the applicable standard for probable cause in DWI arrests and noted the extensive facts in the record supporting the officer's suspicion of the defendant, including "erratic weaving; the smell of alcohol on his breath and in his truck; his red, glassy eyes; his admission to drinking; and his performance on the HGN test." *Id*. at 23. Based on the totality of the evidence, the Court concluded that "a reasonable officer would find a 'substantial basis' to arrest in this case," and defendant's arrest did not offend the Fourth Amendment. *Id*. at 22.

Shea Denning blogged about this case, here.

Obstruction of Justice

Obstruction of justice is a cognizable common law offense in North Carolina, but indictments lacked necessary elements of the offense and were fatally defective

State v. Coffey, COA22-883, ___ N.C. App. ___; 898 S.E.2d 359 (Feb. 20, 2024); *temp. stay allowed*, ___ N.C. ___; 897 S.E.2d 672 (March 8, 2024). In this Wake County case, the defendant appealed his convictions for obstruction of justice, arguing (1) obstruction of justice is not a cognizable common law offense in North Carolina; and (2) the indictments were insufficient to allege common law obstruction of

justice. The Court of Appeals disagreed with (1), but in (2) found the indictments were fatally defective, vacating the convictions.

The defendant was a deputy sheriff in Granville County, where he held instructor certifications that allowed him to teach in-service courses and firearms training for law enforcement officers. In October of 2021, he was charged with obstruction of justice for falsely recording that the sheriff and chief deputy had completed mandatory in-service training and firearms qualifications. After a trial, the defendant was found guilty of twelve counts.

Beginning with (1), the Court of Appeals explained that G.S. 4-1 adopted the existing common law, and "obstruction of justice was historically an offense at common law, and our courts have consistently recognized it as a common law offense." Slip Op. at 5.

Reaching (2), the court noted "[o]ur courts have defined common law obstruction of justice as 'any act which prevents, obstructs, impedes or hinders public or legal justice.'" *Id*. at 8, quoting *In re Kivett*, 309 N.C. 635, 670 (1983). The court then set about determining what constituted an act under this definition, noting examples such as "false statements made in the course of a criminal investigation" and "obstructing a judicial proceeding." *Id*. However, the court pointed out that "the act—even one done intentionally, knowingly, or fraudulently—must nevertheless be one that is done for the purpose of hindering or impeding a judicial or official proceeding or investigation or potential investigation" *Id*. at 12. That element was missing from the current case, as "there [were] no facts asserted in the indictment to support the assertion Defendant's actions were done to subvert a potential subsequent investigation or legal proceeding." *Id*. at 13. This meant the indictments lacked a necessary element of common law obstruction of justice and were fatally defective.

Chief Judge Dillon, joined by Judge Stading, concurred by separate opinion and suggested that the defendant may have committed another offense from common law such as "misconduct in public office." *Id*. at 15.

Theft Crimes

Defendant's use of a price label sticker from another product did not represent larceny by product code under G.S. 14-72.11(3)

State v. Hill, COA22-620, ___ N.C. App. ___; 896 S.E.2d 216 (Dec. 19, 2023). In this Onslow County case, the defendant appealed his convictions for larceny from a merchant by product code and misdemeanor larceny, arguing error in (1) denying his motion to dismiss, and (2) ordering him to pay an incorrect amount of restitution. The Court of Appeals found no error with the misdemeanor larceny conviction but vacated the larceny by product code conviction and remanded for resentencing and a new order of restitution.

In February of 2020, a Walmart manager saw the defendant putting a sticker with a product code for a Tupperware container over the product code on a sewing machine box. The manager followed the defendant, noticing that he went to the electronics department and several other areas of the store and placed things in his backpack, then headed to the self-checkout. At the self-checkout, the defendant scanned the sticker, which resulted in a $7.98 charge for a $227 sewing machine. The defendant also had placed electronics into his backpack that he did not scan or pay for and fled the store when the

manager attempted to confront him. At trial, proof of the product code sticker, along with receipts for the merchandise stolen, were admitted into the record.

The Court of Appeals first considered the larceny by product code charge, looking to G.S. 14-72.11(3), specifically the meaning of "created" in the sentence "[b]y affixing a product code created for the purpose of fraudulently obtaining goods or merchandise from a merchant at a reduced price." Slip Op. at 6. Explaining that this was a matter of first impression, the court looked to the plain meaning of "create," as well as its use in context of the section, to weigh whether this language contemplated repurposing an existing product code as the defendant had done here. The court pointed out that G.S. 14-72.1(d) seemed to more appropriately reflect the repurposing done by the defendant in this case, as it considered transferring a price tag for obtaining goods at a lower price. *Id*. at 15. This led the court to agree that the charge was not applicable, concluding:

> Because the larceny [statutes] are explicit about the conduct which constitutes each level of offense, we conclude the word "created" in Section 14-72.11(3) applies to the specific scenario where (1) an actor (the defendant or another person) created a false product code "for the purpose of fraudulently obtaining goods or merchandise at a reduced price" and (2) the defendant affixed it to the merchandise. Section 14-72.11(3) does not apply where a defendant transfers a legitimate product code printed on the price tag from one product to another, which is already punishable as a misdemeanor under Section 14-72.1. *Id*. at 18.

However, because the indictment still alleged the essential elements of larceny, the defendant's argument for a fatal variance failed when applied to the misdemeanor larceny charge. Additionally, the court noted that the sewing machine was left behind when the defendant fled the store, justifying a reduction in the value of restitution. The court remanded to the trial court for resentencing and recalculation of restitution.

Judge Tyson concurred by separate opinion to address the appropriate charge of shoplifting by substitution of tags under G.S. 14-72.1(d).

Judge Stading concurred in the result only.

Defenses

Under *State v. McLymore*, defendant was not disqualified from instruction on stand-your-ground by felony of possessing sawed-off shotgun during murder

State v. Vaughn, COA23-337, ___ N.C. App. ___ (May 7, 2024); *temp. stay allowed*, ___ N.C. ___; 900 S.E.2d 329 (May 16, 2024). In this Lincoln County case, the defendant appealed his convictions for first-degree murder and possessing a weapon of mass death and destruction, arguing error in denying his requested jury instructions on stand-your-ground and defense of habitation for murder and justification for the possession of a weapon of mass death charge. The Court of Appeals found error in denying the stand-your-ground instruction, but no error in denying the other two. The court vacated the first-degree murder charge and remanded for a new trial and resentencing.

In August of 2017, the defendant became involved in a dispute with the owner of his residence and her son. After an extended argument, the defendant retrieved a sawed-off shotgun from the residence. At that point, after further arguing, the landlord's son charged the defendant and the defendant shot him in the chest, killing him.

Considering the defendant's arguments, the Court of Appeals explained that the recent decision in *State v. McLymore*, 380 N.C. 185 (2022), altered the analysis of whether a defendant could claim stand-your-ground as a defense under G.S. 14-51.3. Previously, under *State v. Crump*, 259 N.C. App. 144 (2018), a defendant was disqualified from using force in self defense if they were committing a felony, and the State did not have to prove a connection between the felony and the use of force in self-defense. The Supreme Court held in *McLymore* that "the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." Slip Op at 9, quoting *McLymore* at 197-98.

In this case, *Crump* controlled when the trial was held, as *McLymore* had not been released. After considering the evidence at trial, the court concluded:

> [T]here is a reasonable possibility that, had the trial court instructed the jury on the stand-your-ground provision and causal nexus requirement, the jury would have determined that Defendant's use of deadly force was justified because he reasonably believed that such force was necessary to prevent imminent death to himself and that there was no causal nexus between Defendant's felonious possession of a weapon of mass death and destruction and his use of force.

Slip Op. at 13. Although the same logic regarding disqualification applied to the requested instruction on defense of habitation, the court found that failing to give this instruction was not error, as the victim was not "*in the process of unlawfully and forcefully entering or had unlawfully and forcibly entered* [defendant's] home, including the curtilage of the home." *Id*. at 15. Instead, the victim and defendant had spent time together sitting in the living room just a few hours before the shooting and went for a ride together in a car just before the shooting, ending with the parties coming back to park in front of defendant's trailer. The victim's mother was the landlord, who was also present at the scene.

The court also dispensed with the defense of justification instruction, noting that the defendant did not provide evidence in the record to support the elements of that claim.

Judge Zachary concurred by separate opinion to comment on the use of defense of habitation.

Closing Argument

Trial court's error in permitting reference to defendant's decision not to testify was cured by robust curative instruction to jury.

State v. Grant, COA23-656, ___ N.C. App. ___; 900 S.E.2d 408 (April 16, 2024). In this Mecklenburg County case, the defendant appealed his conviction for assault on a female, arguing prejudicial error in overruling his objection to the State's comment during closing argument regarding his decision not to testify. The Court of Appeals found no prejudicial error.

In May of 2021, the defendant went on trial for various charges related to assaulting a female. During closing argument, the prosecutor twice mentioned that the jury should not hold the defendant's decision not to testify against him. After the first reference, the defendant objected, but the trial court overruled the objection and let the prosecutor continue. The jury was then dismissed for lunch.

After lunch, but before the jury returned, the defendant moved for a mistrial, citing *State v. Reid*, 334 N.C. 551 (1993), and pointing out that the court did not give a curative instruction after the improper statement in closing argument. The trial court denied the mistrial motion but agreed that it should have sustained the objection. When the jury returned, the trial court gave a curative instruction and "explained that the State's comment was improper, instructed the jury not to consider Defendant's decision not to testify, and polled the jury to ensure that each juror understood." Slip Op. at 6. In light of the robust curative instruction, the Court of Appeals concluded that the trial court cured the error of overruling defendant's objection.

Shea Denning blogged about the case here.

Sentencing and Probation

Prior record level calculation improperly included previous convictions

State v. Bivins, COA23-550, 204 N.C. App. 350 (March 19, 2024). In this Cleveland County case, the defendant petitioned for a writ of certiorari, arguing error in sentencing him at an inflated prior record level. The State conceded error. The Court of Appeals vacated the judgment and remanded for resentencing with the appropriate prior record level.

In March of 2021, a jury convicted the defendant of two charges related to controlled substances. After the verdict but before sentencing, the defendant entered a plea agreement to two additional charges and to having attained habitual felon status. During the sentencing hearing, the State submitted a worksheet showing sixteen points based on his seven prior misdemeanors and three prior felonies, along with the defendant's status as a probationer at the time of the offenses. The court sentenced the defendant as a level V offender.

Taking up the defendant's argument, the Court of Appeals explained that the trial court improperly calculated the defendant's prior record level, which should have been level IV. The State conceded that the defendant was improperly assigned additional points based on previous convictions that should have been excluded. The court walked through the appropriate calculation, noting that the highest total that could be assigned to defendant was thirteen points, justifying level IV. As a result, the court remanded for resentencing.

Sex Offender Registration

Out-of-state sex offender registration did not count towards 10-year registration requirement for early termination petition

State v. Fritsche, 385 N.C. 446 (Dec. 15, 2023). In this Wake County case, the Supreme Court affirmed the Court of Appeals decision that the defendant's petition for early termination of his sex offender registration was properly denied.

In November of 2000, the defendant pleaded guilty to sexual exploitation of a child in Colorado. After completing his sentence in 2008, he registered as a sex offender in Colorado. The defendant moved to North Carolina in October 2020, and petitioned under G.S. 14-208.12B for a determination as to whether he must register as a sex offender. The trial court determined that the defendant must register, and he did in April 2021. Subsequently, the defendant filed a petition under G.S. 14-208.12A, arguing that his registration should be terminated as it had been over ten years from the date he initially registered in Colorado. The trial court denied this petition, relying on *In re Borden*, 216 N.C. App. 579 (2011), for the proposition that the statute only allows removal of sex offender registration after he has been registered for ten years in North Carolina. The Court of Appeals affirmed the trial court's denial of the petition, holding that the plain meaning of the statute required ten years of registration in North Carolina.

The Supreme Court granted discretionary review to take up the defendant's argument that the Court of Appeals improperly interpreted G.S. 14-208.12A. Specifically, the Court considered whether the word "county" as used in the statute meant any county or only North Carolina counties, concluding that "[b]ecause the definitions under Article 27A refer specifically to counties in North Carolina, 'initial county registration' in section 14-208.12A must mean the first registration compiled by a sheriff of a county in the state of North Carolina." Slip Op. at 6. The Court noted this conclusion was supported by "the General Assembly's silence since the Court of Appeals decided *In re Borden* in 2011." *Id*. at 7.

Justice Barringer, joined by Justice Dietz, concurred by separate opinion and would not have adopted the General Assembly's acquiescence from its silence after *In re Borden*. *Id*. at 9.

Justice Earls dissented and would have allowed the defendant's petition for termination of his registration. *Id*. at 11.

Post-Conviction

Supreme Court reversed holding in *State v. Allen* that review of MAR must be in the light most favorable to defendant; defendant could not demonstrate ineffective assistance of trial or appellate counsel

State v. Walker, 202PA22, ___ N.C. ___; 898 S.E.2d 661 (March 22, 2024). In this Wake County case, the Supreme Court affirmed an unpublished Court of Appeals opinion denying the defendant's motion for appropriate relief (MAR) based upon ineffective assistance of his trial and appellate counsel. The Court's opinion reversed the holding in *State v. Allen*, 378 N.C. 286 (2021), that the factual allegations in a MAR must be reviewed in the light most favorable to the defendant.

The defendant was convicted of first-degree murder in 1999 and sentenced to life without parole. He appealed, but the Court of Appeals found no error. In April of 2020, the defendant filed the MAR giving rise to the current case, arguing ineffective assistance of counsel from both trial counsel and appellate counsel. The Court of Appeals affirmed the trial court's denial of the MAR but did not state that the standard of review was in the light most favorable to the defendant as required by *Allen*.

After noting that *Allen* had created confusion for the Court of Appeals, the Supreme Court first clarified that the *Allen* standard would no longer apply:

> Reviewing the asserted grounds for relief in the light most favorable to defendant is a departure from this Court's longstanding standard of review. The mere fact that some ground for relief is asserted does not entitle defendant to a hearing or to present evidence. An MAR court need not conduct an evidentiary hearing if a defendant's MAR offers insufficient evidence to support his claim or only asserts general allegations and speculation. Slip Op. at 3 (cleaned up).

The Court then turned to the applicable review in the current case, explaining that under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show (1) deficient performance by his counsel and (2) prejudice from counsel's errors.

The defendant argued that his trial counsel refused to allow him to testify, despite his desire to do so. The Court noted that the record did not support this argument, and "[a]t no point during trial did defendant indicate he wished to testify." Slip Op. at 6. Moving to the appellate counsel issue, the Court explained that the trial court limited the testimony of the defense psychologist, prohibiting her from using legal terminology. The Court pointed out that the expert was permitted to testify about the defendant's mental health issues, and the limitations on her testimony were permissible. Because the defendant could not demonstrate ineffective assistance of counsel in either circumstance, the Court affirmed the denial of the MAR.

Justice Berger concurred by separate opinion and discussed the reversal of *Allen*. *Id*. at 9.

Justice Earls, joined by Justice Riggs, concurred in part and dissented in part and would have found that the defendant's MAR lacked factual support for an evidentiary hearing, but would not have reversed *Allen*. *Id*. at 12.

Defendant's lack of understanding related to collateral consequences from federal immigration law did not justify withdrawal of his guilty plea

State v. Saldana, COA23-51, ___ N.C. App. ___; 896 S.E.2d 193 (Dec. 19, 2023). In this Wayne County case, the defendant appealed the order denying his motion to withdraw his guilty plea to felony possession of cocaine. The Court of Appeals affirmed the trial court's order.

In January of 2005, the defendant was indicted for felony possession of cocaine. Subsequently, the defendant "entered a plea of guilty to felony possession of cocaine in order to receive a conditional discharge pursuant to [G.S.] 90-96." Slip Op. at 2. In February of 2006, the trial court determined that the defendant had satisfied the conditions imposed for a conditional discharge and dismissed the charges under G.S. 90-96. At the time relevant to these proceedings, the defendant was an undocumented immigrant married to an American citizen and father to one child through the marriage. In 2021, the defendant was detained by immigration officials and sent to a detention center in Georgia, where he was held without bond as a result of his guilty plea to a felony in 2005. In January of 2022, the defendant filed a motion to withdraw his guilty plea to the possession charge, arguing he was "confused" and did not know the guilty plea would continue to constitute a conviction for federal

immigration purposes. *Id*. at 3. After holding a hearing, the trial court denied the motion, treating it as a motion for appropriate relief (MAR).

The Court of Appeals first established that the trial court was correct in interpreting the motion as a MAR, explaining the dismissal of charges in 2006 was "final judgment" in the matter, and that the subsequent motion was "a post-sentence MAR requiring Defendant to show manifest injustice in order to withdraw his guilty plea." *Id*. at 9. The court then noted the six factors recognized in North Carolina case law justifying withdrawal of a plea, and that defendant argued "misunderstanding the consequences of the guilty plea, hasty entry, confusion, and coercion." *Id*. at 10. Here, while the court expressed sympathy for the defendant's situation, it explained that he had not shown manifest injustice, as the federal immigration consequences were collateral, not direct consequences of entering his plea that he failed to understand. Summarizing the situation, the court stated "[w]hile Defendant may now regret the consequences of his guilty plea in light of its implications under federal law, his remorse does not reflect a misunderstanding of the guilty plea at the time he entered into it." *Id*. at 15.