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District Court Judges 2024 Summer Conference
Criminal Case Update
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Cases covered include published criminal and related decisions from the North Carolina appellate courts decided between September 16, 2023 and May 17, 2024. Summaries are prepared by Alex Phipps, Senior Legal Research Associate at the School of Government. 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.

Arrest, Search, and Investigation

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

State v. George, COA22-958, ___ N.C. App. ___ (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 defendant over for driving 70 mph in a 55 mph zone. When the officer approached 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, defendant finally produced his documents; when the officer returned to his vehicle, he called for backup. After checking defendant's registration and returning his documents, the officer asked defendant if any illegal drugs were in the vehicle, and defendant said no. Defendant 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. 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 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 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 defendant's motion to suppress.

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. ___ (Feb. 6, 2024). In this Union County case, 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 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. 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 defendant's arguments challenging both the reliability of the dog's alert and the reliability of the confidential informant. Concerning the dog's alert, 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 defendant's arguments, and also rejected his "challenge" to create "a hypothetical where a defendant transports drugs without possessing drugs." *Id*.

Evidence of contraband found during search was admissible under inevitable discovery doctrine.

State v. Jackson, COA23-727, ___ N.C. App. ___ (March 19, 2024). In this Avery County case, 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.

Defendant was pulled over for driving while his license was revoked. The officer who pulled 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 defendant and told him he was being detained for having the Percocet pills in a non-prescription bottle. The officer then searched defendant's person, finding a bag of methamphetamine in defendant's boot. After 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 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 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.

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

State v. Dobson, COA23-568, ___ N.C. App. ___ (April 16, 2024). In this Guilford County case, 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 defendant was sitting, and conducted a *Terry* frisk of defendant, discovering a firearm in his waistband. Before trial, 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 defendant subsequently pleaded guilty to the firearms charges through a plea agreement.

Taking up defendant's arguments, the Court of Appeals explained that defendant's challenges fell into two areas. First, defendant 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 defendant's 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.

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Sufficient evidence supported conclusion that defendant consented to search of his vehicle; evidence of other incriminating circumstances supported constructive possession of cocaine.

State v. Michael, COA22-846, ___ N.C. App. ___ (Dec. 19, 2023). In this Davidson County case, defendant appealed his conviction for possession of a controlled substance, arguing error in (1) denying his motion to suppress the evidence obtained from a search of his vehicle, and (2) denying his motion to dismiss for insufficient evidence that he knowingly possessed cocaine. The Court of Appeals found no error.

In July of 2019, defendant was driving with two passengers when he was pulled over for failing to yield. After the officers had returned ID cards to defendant and his passengers, one officer asked for permission to search the vehicle. Defendant told the officer that he was on probation and had to allow the search. The officers discovered cocaine and drug paraphernalia during a search of the vehicle. Before trial, defendant filed a motion to suppress, which was denied. Defendant failed to object during trial when the State admitted evidence obtained through the search.

Taking up (1), the Court of Appeals noted the standard of review was plain error as defendant did not object to the admission of evidence during the trial. Here, the search of the vehicle occurred after the traffic stop had concluded. Because defendant was on probation, he is presumed to "have given consent to a search where an officer has reasonable suspicion of a crime." Slip Op. at 5. The trial court did not provide justification in writing, but in open court stated that she concluded the officer "had reasonable suspicion to conduct the search." *Id*. at 6. The court noted that, although the trial court did not consider defendant freely giving consent in the absence of reasonable suspicion, "there was sufficient evidence from which the trial court could have found as fact *at trial* that Defendant voluntarily consented to the search had Defendant objected when the evidence was offered by the State." Id. at 7. As a result, defendant could not show plain error from the failure to suppress.

Dispensing with (2), the court noted that the State presented "evidence of other incriminating circumstances, including the placement of the cocaine in the driver's door, as well as the Defendant's nervous behavior," to support the inference that defendant constructively possessed the cocaine. *Id*. at 8.

Judge Arrowood concurred by separate opinion, writing to address the analysis of the trial court related to the officer's reasonable suspicion to extend the stop and conduct a search.

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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.

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. ___ (Jan. 16, 2024). In this Watauga County case, 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 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 defendant was indicted for additional counts of sexual exploitation of a minor and sexual offense. Defendant 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 defendant's motions and he pleaded guilty, reserving his right to appeal the order denying his motion to suppress and motion to quash.

Examining defendant's motion to suppress, the Court of Appeals noted that 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 defendant's notebooks went beyond the scope of the initial search warrant. While the court rejected the majority of 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 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 defendant's substance abuse recovery notebooks. 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.

Criminal Procedure

Trial court erred by entering civil judgment for attorney's fees against defendant without allowing defendant to be heard on the issue.

State v. Simpson, COA23-676, ___ N.C. App. ___ (May 7, 2024). In this Rowan County case, defendant appealed a civil judgment for attorney's fees imposed on him after a trial and conviction for assault on a detention employee inflicting physical injury. The Court of Appeals found error and vacated the civil judgment, remanding for proceedings to allow defendant to be heard on the issue of attorney's fees.

After the trial against defendant for the assault against a detention employee, appointed defense counsel raised the issue of fees with the court, noting his fee and requesting the court take notice that defendant had been on good behavior. The court did not inquire as to whether defendant wanted to be heard regarding the issue of attorney's fees.

Taking up defendant's appeal, the Court of Appeals explained that the trial court should have ensured that defendant was given an opportunity to be heard on the issue of attorney's fees, and pointed to *State v. Friend*, 257 N.C. App. 516 (2018), as controlling. Because nothing in the record indicated defendant was given notice of the attorney's fees issue until the civil judgment was imposed, the court vacated the judgment and remanded.

Judge Griffin dissented by separate opinion and would have left the civil judgment in place.

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. ___ (Dec. 19, 2023). In this Scotland County case, 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, 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 defendant, and in the ensuing confrontation, defendant drew his firearm and shot at one of the officers. Defendant attempted to flee but was struck by shots from one of the officers. At the hospital, defendant was diagnosed with a traumatic brain injury. Before trial, defendant's counsel filed a motion for capacity hearing due to his alleged memory loss from the brain injury. The trial court held a competency hearing, where a doctor provided by the defense testified that defendant could not remember the days leading up to the confrontation with police or the events of the day in question, but that defendant had a "rational understanding" of the legal proceedings against him. Slip Op. at 3. The trial court ruled defendant was competent to stand trial, and he was subsequently convicted.

Taking up defendant's appeal, 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 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 defendant was competent to stand trial.

(1) Failure to hold pretrial release hearing was not flagrant violation of defendant's constitutional rights; (2) there was a distinct separation between defendant's assaults; (3) defendant's acts of confining and removing the victim justified his kidnapping conviction.

State v. Tucker, COA22-865, ___ N.C. App. ___ (Nov. 21, 2023). In this Durham County case, defendant appealed his convictions for first-degree kidnapping, three counts of assault, and interfering with emergency communications, arguing (1) he was prejudiced by not receiving a pretrial release hearing under G.S. 15A-534.1, (2) double jeopardy for his multiple assault convictions, (3) his conviction for assault by strangulation was improper, and (4) insufficient evidence to support his kidnapping conviction. The Court of Appeals found no prejudicial error.

In January of 2020, defendant and a woman he was living with began arguing, culminating in defendant headbutting the woman several times. Eventually defendant began beating the woman and dragged her by her hair, then throwing her and choking her in the bedroom. The woman eventually hid her child in a closet and jumped out of a window on the third floor to escape defendant. The woman's mother attempted to intervene, but defendant

struck her in the mouth, busting the mother's lip. Defendant also took the mother's phone and threw it away, but she retrieved it to call police. After defendant was arrested, the magistrate did not set bond on his kidnapping charge, determining it to be a domestic violence act, and ordered the State to produce defendant for a hearing on conditions of pretrial release. The State did not comply with this order, and defendant remained in custody, not posing bond on any of the charges. After remaining in custody from March to September of 2020, defendant filed a motion to dismiss his kidnapping charge, arguing G.S. 15A-534.1 required dismissal. Defendant's charges were consolidated the next day with pretrial release conditions and a bond of $250,000; defendant did not post bond and remained in custody. The trial court also denied defendant's motion to dismiss. Defendant reached trial in November 2021, and was convicted after a bench trial, receiving credit for time served.

Considering (1), the Court of Appeals noted that the State admitted it did not hold the pretrial release hearing but explained the failure as inadvertent due to the onset of COVID-19. Analyzing the impact, the court explained "[t]he inadvertence does not excuse the State; rather, it is relevant to show the absence of a flagrant constitutional violation." Slip Op. at 11. The court also noted defendant did not post bond after his initial arrest, and "even if the State had held a timely pretrial release hearing on the kidnapping charge, Defendant would not have been released." *Id*. at 11. As a result, defendant could not show irreparable prejudice to the preparation of his case.

Next the court considered (2), as defendant argued the events constituted one long assault. The court disagreed, explaining there was an "interruption in the momentum" and "a change in location" between the events of the three assaults. *Id*. at 14-15. The court held each offense was separate and distinct, and found no merit in defendant's argument. The court applied the same analysis for (3), pointing to "a distinct interruption in the assaults" to justify defendant's convictions for assault inflicting serious bodily injury as well as assault by strangulation. *Id*. at 16.

Finally, the court took up (4), noting that defendant's acts of confining and removing the victim represented separate and distinct acts from the underlying assaults, justifying the kidnapping charge. The court explained that "Defendant's confinement of [the victim] by pulling her by the hair back into the bedroom, confining her in there by kicking at the locked door, and forcing her to escape by jumping from the third floor window, were separate, complete acts apart from Defendant's other assaults upon her." *Id*. at 19.

Trial court erred by extending probationary term without a finding of good cause, and by imposing an additional 45-day active term beyond the statutory deadline.

State v. Jackson, COA22-984, ___ N.C. App. ___ (Oct. 17, 2023). In this Perquimans County case, defendant appealed the trial court's finding that he violated the terms of his probation, arguing the trial court extended his probation after the probationary term had expired without a finding of good cause. The Court of Appeals agreed, vacating the order and remanding to the trial court to determine if good cause exists.

Defendant, a town council member, was placed on probation for striking another council member in October 2018. After entering an *Alford* plea to assault of a government official, defendant was sentenced in December 2019 to 60 days of imprisonment, suspended for 24 months supervised probation with 15 days of active term, and a curfew from 7pm to 6am. Defendant's probation officer filed violation reports alleging that defendant violated the curfew and left the county without prior approval. The matter was initially set for an August 2020 hearing, but after continuances, the matter did not reach a hearing until February of 2022. By that time, defendant's probationary term had expired, ending in December 2021. After the February 2022 hearing, the trial court entered an order extending defendant's probation for another 12 months and ordering a 45-day active term as a condition of special probation. Defendant appealed.

The Court of Appeals looked first to G.S. 15A-1344(f), which allows a trial court to extend probation after the expiration of the term in certain circumstances. Relevant for this case, a trial court must find that the defendant violated a condition of probation, and then make a finding under (f)(3) that "for good cause shown and stated the probation should be extended." Slip Op. at 4. The court explained that "A finding of good cause 'cannot simply be inferred from the record.'" *Id*., quoting *State v. Morgan*, 372 N.C. 609, 617 (2019). Because the hearing here occurred after defendant's probation term expired, and the record contained no finding of good cause to satisfy G.S. 15A-1344(f)(3), the court remanded for further determination by the trial court.

The court also vacated the 45-day active term imposed after the expiration of defendant's probation, finding error by the trial court for two reasons. First, under the calculation required by G.S. 15A-1351(a), "the maximum period of confinement that could have been imposed as a condition of special probation was 15 days," which defendant had served at the beginning of his sentence. *Id*. at 6. Second, because the statute sets an outer deadline of "the end of the probationary term or two years after the date of conviction, whichever comes first," defendant's additional 45-day active term was outside the acceptable period. *Id*. at 7.

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Evidence

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. ___ (Jan. 16, 2024). In this Buncombe County case, 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 defendant to remove gum from his mouth but did not find that defendant was prejudiced by the error, upholding his conviction.

In March of 2021, an Asheville police officer observed defendant roll through a stop sign. The officer pulled over 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 defendant was arrested and taken to the Buncombe County Jail, a certified chemical analyst conducted a 15-minute observation period of defendant, followed by an Intoximeter breath analysis. After this first breath test, the analyst noted that 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 defendant had in his mouth at the time of the test.

Taking up defendant's argument, 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 defendant, noting the overwhelming evidence of 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.

Trial court took appropriate steps after being informed victim was drinking alcohol before her testimony, and did not abuse discretion in denying defendant's motion for mistrial.

State v. Thompson, COA22-1036, ___ N.C. App. ___ (Jan. 2, 2024). In this Chatham County case, defendant appealed his convictions for first-degree forcible rape, first-degree kidnapping, sexual battery, and assault of a female, arguing the trial court abused its discretion by denying his motion for a mistrial. The Court of Appeals found no error.

In April of 2019, defendant came to the victim's house and offered her drugs and alcohol. The two consumed the drugs and defendant eventually forced himself upon the victim, forcibly raping her while punching her repeatedly. When defendant came to trial, the victim took the stand to testify about the events. During her testimony, defense counsel took issue with the victim's "streamed sort of consciousness" testimony, and the State requested to be allowed more leading questions on direct examination. Slip Op. at 2. The trial court allowed voir dire to determine whether the victim's mental health issues necessitated more leading questions, and during this voir dire it was revealed that the victim had either bipolar or borderline personality disorder, PTSD, and a substance use or abuse disorder, and the victim had recently relapsed and was released from rehab the week before her testimony. She was also on medication for certain medical conditions. On the fourth day of the trial, the State informed the trial court that the bailiffs believed the victim had consumed alcohol that morning, and the victim took a portable breathalyzer, which resulted in a 0.0 BAC reading. However, the victim admitted she had "a sip of vodka" because of her nerves. *Id*.at 3. Later on recross, "[the victim] disclosed to the jury that she took a shot of alcohol that was in her purse upon arriving to the courthouse." *Id*. at 4. She also admitted to having a beer at lunch the day before.

Considering defendant's argument, the Court of Appeals noted "given the trial court's knowledge and consideration of the result of the breathalyzer test, we cannot conclude the trial court abused its discretion." *Id*. at 7. Instead, the trial court took "immediate and reasonable steps" to address the victim's behavior, and the trial court's decision to deny defendant's motion for a mistrial was a reasonable decision. *Id*. at 8.

(1) Failure to raise constitutional objection to blood draw at trial waived right to appeal; (2) no Confrontation Clause issue where testifying expert assisted in lab analysis and reviewed results; (3) previous DWIs admitted as Rule 404(b) evidence did not fail Rule 403 balancing test.

State v. Taylor, COA23-423, ___ N.C. App. ___ (April 2, 2024). In this Columbus County case, defendant appealed her conviction for second-degree murder based on driving while impaired (DWI) and reckless driving, arguing error in (1) denying her motion to suppress the results of a blood sample, (2) admitting a lab report prepared by an expert who did not testify, and (3) admitting evidence under Rule of Evidence 404(b) of previous DWIs and bad driving. The Court of Appeals found no error.

In February of 2018, defendant caused a tractor-trailer to crash because she was driving very slowly in the right-hand lane of a highway. The driver of the tractor-trailer was killed when the cab caught fire after the accident. Several witnesses noted defendant's slow responses and movements, and a State Highway Patrol trooper noticed cans of aerosol duster in her purse. The trooper took defendant to a hospital, and she consented to a blood draw. Before trial defendant filed a motion to suppress the blood draw based on violations of G.S. 20-16.2, and a motion to limit Rule 404(b) evidence of prior DWIs and bad driving, but the trial court denied both motions. During the trial, the State offered two lab reports based on the blood sample, showing defendant had Difluoroethane (a substance from aerosol dusters), Xanax, and several other prescription drugs in her blood. Defense counsel objected to the lab reports on Sixth Amendment grounds as the testifying expert was not the scientist who authored the reports, but the trial court admitted them into evidence.

Reviewing (1), the Court of Appeals first noted that defendant's objection to the blood sample at trial was based upon G.S. 20-16.2 (implied consent to chemical analysis), not on Fourth Amendment constitutional grounds. Here, the court pointed to *State v. Davis*, 364 N.C. 297 (2010), for the proposition that defendant's failure to raise the constitutional issue by objection at trial resulted in her waiving the argument. Because defendant also did not renew the statutory argument on appeal, the court declined to address either issue.

Moving to (2), the court explained "this case is not one in which the expert witness testifying in court did not personally participate in the testing." Slip Op. at 14. Instead, the expert witness called by the State had participated in the lab analysis even though she was not listed as the author of the report, and she had reviewed the results as if she had conducted the tests herself. The court held that defendant's Confrontation Clause rights were not violated because "[a]s an expert with personal knowledge of the processes involved and personal participation in the testing, [the State's expert] was the witness whom Defendant had a right to cross-examine, and she was indeed subject to cross-examination at trial." *Id*. at 15.

Reaching (3), the court explained defendant's argument rested upon the Rule 404(b) evidence failing the Rule of Evidence 403 balancing test, arguing the probative value did not outweigh the prejudicial nature of the evidence. The court noted each of the incidents were probative of malice and knowledge of the danger of defendant's actions. When considering prejudice, the court explained that "[n]one of the prior incidents related to any particularly shocking or emotional facts that would have inflamed the jurors" and held the trial court properly denied defendant's motion. *Id*. at 18.

Criminal Offenses

A single kick to a dog constituted "cruelly beat" for felony cruelty to animals.

State v. Doherty, COA23-820, ___ N.C. App. ___ (May 7, 2024). In this Davie County case, defendant appealed his conviction for felony cruelty to animals, arguing error in (1) denying his motion to dismiss because a single kick to a dog could not constitute "cruelly beat" and (2) failing to instruct the jury on the lesser-included offense of misdemeanor cruelty to animals. The Court of Appeals found no error.

In November of 2019, a woman was walking her dog on the street in front of defendant's house, when a car approached. Because there were no sidewalks, the woman and her dog stepped into defendant's yard to let the car pass; the car stopped because the occupants knew the woman, and they chatted about her husband's health issues. As this conversation took place, defendant ran out of his home and kicked the dog in the stomach, then ran back into his house. The dog had serious internal injuries and required emergency veterinary treatment, including an overnight stay in the veterinary hospital.

Taking up (1), the Court of Appeals explained that the statute did not define "cruelly beat" for purposes of cruelty to animals, making this a matter of first impression. The court first looked to the meaning of "beat" and whether it required repeated strikes, determining that it "could be understood to mean both a hard hit or strike, or repeated strikes." Slip Op. at 9. Taking this understanding and combining it with the intent of the General Assembly to

protect animals from unnecessary pain, the court concluded "under the plain meaning of the words, 'cruelly beat' can apply to any act that causes the unjustifiable pain, suffering, or death to an animal, even if it is just one single act." *Id*.

Moving to (2), the court explained that defendant was not entitled to the instruction on a lesser-included offense as, after establishing the "cruelly beat" element of the charge, "there was no dispute as to the evidence supporting felony cruelty to animals." *Id*. at 15.

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

State v. Buck, COA23-606, ___ N.C. App. ___ (May 7, 2024). In this New Hanover County case, 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 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, defendant met the victim to sell him marijuana; instead of paying defendant for the marijuana, the victim grabbed the drugs and ran. 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.

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, defendant 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 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 defendant could be charged with hit-and-run for an intentional action, it dispensed with 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 defendant's various challenges to his convictions.

Moving to the clerical error, the court acknowledged that the judgment finding 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.

"In operation" has a common meaning, when a person is in the driver's seat of vehicle and engine is running, and jury did not need specific instruction on that meaning.

State v. Shumate, COA23-256, ___ N.C. App. ___ (Dec. 19, 2023). In this McDowell County case, 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 defendant's motion to dismiss. The Court of Appeals disagreed, finding no error.

In June of 2022, 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. 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 defendant fired a shot into the vehicle, representing substantial evidence to survive a motion to dismiss.

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

State v. Hill, COA22-620, ___ N.C. App. ___ (Dec. 19, 2023). In this Onslow County case, 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 defendant putting a sticker with a product code for a Tupperware container over the product code on a sewing machine box. The manager followed 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, defendant scanned the sticker, which resulted in a $7.98 charge for a $227 sewing machine. 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 defendant had done here. The court pointed out that G.S. 14-72.1(d) seemed to more appropriately reflect the repurposing done by 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 with defendant 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, defendant's argument of a fatal variance failed when applied to the misdemeanor larceny charge. Additionally, the court noted that the sewing machine was left behind when 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 Standing concurred in the result only.

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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. ___ (Feb. 20, 2024). In this Wake County case, 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 defendant's convictions.

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, defendant was charged for falsely recording that the sheriff and chief deputy had completed mandatory in-service training and firearms qualifications. After a trial, defendant was found guilty of twelve counts of obstruction of justice.

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 defendant may have committed another offense from common law such as "misconduct in public office." *Id*. at 15.

Going armed to the terror of the public does not require allegation that defendant's conduct occurred on a public highway.

State v. Lancaster, 240A22, ___ N.C. ___ (Dec. 15, 2023). In this Craven County case, the State appealed a Court of Appeals majority opinion holding the indictment charging defendant with going armed to the terror of the public was deficient as it did not allege defendant's conduct occurred on a public highway. The Supreme Court found no error in the indictment and reversed the Court of Appeals.

Defendant was indicted for waiving a gun around and firing randomly in two parking lots during September of 2019. After defendant was convicted, his counsel filed an *Anders* brief with the Court of Appeals. After conducting an *Anders* review of the record, the Court of Appeals applied *State v. Staten*, 32 N.C. App. 495 (1977), and determined that defendant's indictment was fatally flawed as it was missing the essential element that defendant committed his acts on a public highway. The State appealed based upon the dissent, which would have held that the allegations were sufficient.

Taking up the appeal, the Supreme Court disagreed that going armed to the terror of the public "includes an element that the criminal conduct occur on a public highway." Slip Op. at 6-7. Because going armed to the terror of the public is a common law crime, the Court examined the long history of the offense in English law and its adoption in North Carolina. After documenting the lengthy history of the offense, the Court explicitly overturned the Court of Appeals interpretation in *Staten*, explaining:

> [T]he elements of the common law crime of going armed to the terror of the public are that the accused (1) went about armed with an unusual and dangerous weapon, (2) in a public place, (3) for the purpose of terrifying and alarming the peaceful people, and (4) in a manner which would naturally terrify and alarm the peaceful people.

Id. at 14. After dispensing with the "public highway" argument, the Court confirmed that the indictment in question "adequately alleged facts supporting each element of the crime of going armed to the terror of the public." *Id*. at 16.

Justice Dietz did not participate in the consideration or decision of the case.