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Current Developments in Criminal Law Webinar
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Cases covered include published criminal and related decisions from the Fourth Circuit Court of Appeals and North Carolina appellate courts decided between Sept. 1, 2023, and Feb. 6, 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. ___ (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*.

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. ___ (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.

Warrantless search of vehicle for driver's identification after he fled the scene did not fall into any Fourth Amendment warrantless exception; search incident to arrest exception requires a contemporaneous arrest; automobile exception did not apply to immobilized vehicle

State v. Julius, 385 N.C. 331 (Oct. 20, 2023). In this McDowell County case, the Supreme Court reversed the Court of Appeals decision affirming the denial of the defendant's motion to suppress the results of a warrantless vehicle search. The Supreme Court held that the search and seizure were not justified under any applicable warrantless search exception and remanded the case to the trial court.

In May of 2018, sheriff's deputies responded to the scene of a hit-and-run where a vehicle was partially submerged in a ditch. The driver fled the scene before deputies arrived due to outstanding warrants against him, but the defendant was present and spoke to the deputies about the accident, explaining that it was her parents' car but she was not the driver. Because she could identify the driver only by his first name, one of the deputies began searching the vehicle for his identification without consent from the defendant. Eventually the deputy discovered a box that contained methamphetamine and drug paraphernalia, the defendant was arrested, and a search of her backpack found additional contraband. At trial, she moved to suppress the results of the search, arguing it violated the Fourth Amendment; the trial court denied the motion and she was convicted of possession and trafficking in methamphetamine. On appeal, the Court of Appeals majority affirmed the denial of the defendant's motion, finding that the warrantless search was incident to arrest and permitted. The dissent disagreed, noting the driver was not arrested, and pointed out the automobile was immobile, meaning the automobile exception also did not apply. The defendant appealed based upon this dissent, leading to the current case.

The Supreme Court noted that "the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as 'an inventory [search] or for officer safety.'" Slip op. at 8. The Court explained that the search incident to arrest exception to the warrant requirement is motivated by officer safety and preservation of evidence. Under applicable precedent, officers may search the area of a vehicle within reaching distance of a suspect being arrested and may conduct a search before an arrest if the arrest occurs contemporaneous with the search and probable cause existed. Here, the driver fled the scene and could not reach any part of the vehicle. Additionally, "the State presented no evidence at the suppression hearing that [the driver] was ever arrested, let alone arrested contemporaneously with the search of the vehicle." *Id*. at 11. Moving to the defendant, who was a bystander outside the vehicle, "[t]here was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers." *Id*. Under these circumstances, the Court held that the search incident to arrest exception was inapplicable.

The Court then turned to the automobile exception. It explained "[m]obility of the vehicle is a fundamental prerequisite to the application of the automobile exception." *Id*. at 12, quoting *State v. Isleib*, 319 N.C. 634, 637 (1987). Here, this essential element was missing, as the vehicle was stuck in a ditch. The Court observed that "[i]n fact, [a deputy] testified that he called a tow truck to remove the vehicle from the ditch." *Id*. at 13. The Court held this exception was also inapplicable to the case, and no other exceptions plausibly applied.

After determining the evidence was gathered in violation of the Fourth Amendment, the Court moved to whether the exclusionary rule, which would exclude the results of the search, should apply. Because the trial court previously concluded a valid search occurred, it never considered whether the exclusionary rule was an appropriate remedy. As a result, the Court remanded the matter for consideration of whether to exclude the evidence.

Chief Justice Newby concurred in part and dissented in part by separate opinion. He would have held that the deputies acted reasonably and did not violate the Fourth Amendment while searching the vehicle for the driver's identification. He concurred that the appropriate resolution if the defendant's Fourth Amendment rights were violated was to remand to the trial court. *Id*. at 18.

Divided panel affirms extension of stop for canine sniff based on extreme nervousness, inconsistent travel plans, and the presence of a gas can on the passenger seat

U.S. v. Smart , 91 F.4th 214 (Jan. 22, 2024). The defendant was travelling on the interstate in Louisiana when he was stopped for speeding 82 mph in a 70-mph zone. The state trooper thought the defendant seemed extremely nervous. He allegedly gave inconsistent answers about his travel plans and took long pauses between his answers to the trooper's questions. He stared straight ahead at the windshield and did not look at the trooper while they talked. The defendant also had a gas can sitting in the passenger seat. The trooper thought this was suspicious in light of the defendant's admission that he was on a long trip. The trooper was experienced as a drug interdiction officer and believed the gas can and other circumstances potentially indicated drug trafficking activity. A canine alerted on the car, and over 5 kilograms of cocaine was discovered under the seat.

It is unclear whether this incident resulted in charges, but the defendant was linked by the DEA to an ongoing drug trafficking investigation in Virginia the next year. DEA agents learned of the Louisiana incident and received information from an informant that the defendant was the supplier of a local suspect. A controlled buy was successfully conducted. The defendant was placed under surveillance and was seen dumping trash bags lined with cocaine residue. Agents then obtained an order authorizing tracking of the defendant's car. This led to a traffic stop in Virginia by local authorities, where the defendant was found with $15,000 cash and an ounce of cocaine. A few months later, the DEA arranged for the defendant to be stopped and brought in for questioning. He initially agreed to cooperate and consented to searches of his homes. Guns and more evidence of drug trafficking were discovered there. Before charges were brought, the defendant fled and evaded capture for around 10 months. He was ultimately captured and charged with various drugs and firearms offenses in the Eastern District of Virginia. The defendant was acquitted of the gun charge at trial but convicted of distributing at least 5 kilos of cocaine and related drug offenses. He appealed, complaining in part that the district court erred in by denying his motions to suppress. A divided Fourth Circuit affirmed.

The defendant claimed that the initial Louisiana stop was extended without reasonable suspicion of a crime to permit the canine sniff. At the suppression hearing, the state trooper explained his concerns

about the defendant's extreme nervousness and the "clunky" conversation the two had on the roadside. Between his refusal to make eye contact, inconsistent travel plans, and the presence of a gas can on a long car trip, the district court found that the trooper had reasonable suspicion to extend the stop to investigate drug trafficking. The court agreed. It deferred to the district court's credibility determination that, in the officer's experience, a gas can inside a car during a long road trip is consistent with drug trafficking. Standing alone, that would not have been enough. But the defendant's answers and behaviors during the interaction further added to the trooper's suspicion. While routine nervousness should be viewed skeptically in the reasonable suspicion analysis, extreme nervousness—which the trooper here could articulate—remains a relevant consideration. Under the totality of the circumstances, the trooper had reasonable suspicion to extend the stop to conduct a sniff, and the district court's judgment denying the motion to suppress was affirmed.

The defendant also challenged the traffic stop in Virginia by local authorities resulting in the DEA interview, arguing police lacked probable cause for that stop and search. The court rejected this contention, noting the seizure of 5 kilos in Louisiana, the controlled buy in Virginia, the trash pull evidence, and the earlier Virginia traffic stop leading to the discovery of an ounce of cocaine. "This is more than enough to establish probable cause," for that stop, search, and detention. *Smart* Slip op. at 19, n.11.

The court also rejected the defendant's argument that his rights under the Speedy Trial Act were violated and the district court's judgment was affirmed by the majority.

Judge Traxler concurred in a separate opinion to further explain the evidence supporting reasonable suspicion for Louisiana stop's extension. The trooper testified that, unlike most cars seeing a trooper pull onto the highway behind them, the defendant did not initially slow down or move to the right. He appeared to be trying to pull ahead of traffic, and only at the point of getting ahead of a pack of cars did he change lanes. The defendant admitted to speeding 80/70 when he was stopped. During the awkward conversation where the defendant would not look at the trooper and gave awkward answers to routine travel questions, and his answers about his plans were inconsistent. The trooper sensed that the defendant was considering fleeing and at one point asked the defendant if he was ok. The defendant's unusual behavior and extreme nervousness was also corroborated at the suppression hearing by the defendant's testimony that he was high on cocaine during the stop.

Judge Wynn dissented. He disagreed with the majority that the Louisiana trooper had reasonable suspicion to extend that stop. He disputed the value of the defendant's nervousness, noting that the defendant exhibited no signs of nervousness once he exited the car. This included the defendant making eye contact with the trooper and speaking normally, without any pauses. He also would have discounted the inconsistent travel plans. The defendant said he was headed to Mississippi from Louisiana and was ultimately travelling to North Carolina. The path to North Carolina from the location of the stop included going through the portion of Mississippi consistent with the defendant's answers. The defendant had an NC license and license plate. According to Judge Wynn, ". . . law enforcement's misunderstanding of geography shouldn't be able to establish reasonable suspicion." *Id.* at 40 (Wynn, J., dissenting). Left with only the gas can, Judge Wynn would have held that the motion to suppress the Louisiana stop should have been granted. In closing, he noted:

> After today, all an officer has to do is describe a driver's nervousness as extreme and give one or two otherwise innocent facts a nefarious gloss and, *viola*, reasonable suspicion.

> Police officers' opinions cannot be unassailable. Otherwise, we undermine the protections of the Fourth Amendment for every traveler on the road. *Id*. at 42.

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. ___ (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.

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.

Limited cross-examination at probable cause hearing on charges different from those the defendant was ultimately tried on did not provide the defendant an adequate opportunity to cross-examine the witness; new trial for Confrontation Clause violation

State v. Smith, 287 N.C. App. 614 (2023) (unpublished). Two women who called 9-1-1 from a McDonald's restaurant to report that a man in an orange van was trying to kidnap them and force them into prostitution. Officers initially charged the man with two counts of second-degree kidnapping, one for each victim. Three weeks later, the younger woman testified for the State at a recorded probable cause hearing in district court.

The State subsequently obtained indictments for first-degree kidnapping and attempted human trafficking of a minor, both charges relating to the younger woman. Before trial, the State made a motion to declare the younger woman unavailable and sought to admit her testimony from the

probable cause hearing at trial. Over the defendant's objection on confrontation grounds, the trial court ruled that the prior testimony would be admissible at trial. The defendant was convicted.

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause of the Sixth Amendment to the U.S. Constitution bars the State from introducing testimonial statements unless certain exceptions apply. Where the witness is unavailable for trial and the defendant had prior motive and opportunity to cross-examine the witness concerning the statement, the State may introduce the statement. *See id.*; *State v. Rollins*, 226 N.C. App. 129 (2013). Here, the Court of Appeals in *Smith* pointed to three aspects of the proceedings in district and superior court in concluding that the defendant's confrontation rights had been violated.

First, the court stressed that the defendant faced different charges in district court from the charges ultimately pursued at trial in superior court. The probable cause hearing in district court involved two counts of second-degree kidnapping, but the State subsequently obtained indictments on first-degree kidnapping and attempted human trafficking. These charges involved new elements to prove and new facts at issue, elements and facts that the defendant could not possibly have tested through cross-examination at the probable cause hearing because they were not on the table in district court.

Second, the court noted that the defense lacked discovery at such an early stage of the proceedings. By statute, the probable cause hearing must be held within 15 working days of the initial appearance before a district court judge. *See* G.S. 15A-606(d). Generally, both the State and the defense are just getting a handle on the case at this point and statutory discovery requirements do not yet apply. The Court of Appeals noted that the defense could not mount a robust cross-examination sufficient to comport with constitutional requirements without having received the State's investigative file.

Third, the Court of Appeals quoted the transcript from the district court proceedings at length to demonstrate that the defense's cross-examination was curtailed by the State's sustained objections. For example, when the defense inquired into whether the victim feared the defendant, the State objected, noting that it was a probable cause hearing, not a trial in superior court. The Court of Appeals was concerned that the defense did not have free rein to engage with the witness, and thus the opportunity to cross-examine was inadequate.

Weighing these three concerns, the Court of Appeals concluded that the defendant's confrontation rights had been violated and vacated the convictions.

Danny Spiegel blogged about the *Smith* decision, here, and Phil Dixon blogged about a similar issue, here.

Substitute expert testimony regarding sexual assault examination did not violate Confrontation Clause

State v. Ball, COA 22-1029, ___ N.C. App. ___ (Jan. 16, 2024). In this Macon County case, the defendant appealed his convictions for forcible rape, kidnapping, burglary, assault on a female, and interfering with an emergency communication, arguing in part that the trial court erred by allowing expert testimony about a sexual assault nurse examination ("SANE") from a nurse who did not conduct the examination. The Court of Appeals found no error.

In May of 2019, the defendant appeared at the door of the victim's home, telling her that his car was stuck in a ditch, and he needed a place to stay for the night. The man was known to the victim through previous employment, and she offered her guesthouse to him for the night. According to the victim's testimony, the defendant then reappeared at her door asking for a cigarette lighter, barged in when she opened the door, and raped her on her bed. The victim eventually escaped and found officers from the sheriff's department, who arrested the defendant as he slept in the victim's bed. The victim underwent a SANE the next morning. At trial, the defendant moved to dismiss the kidnapping charge, arguing the State did not admit evidence he confined the victim separate from his alleged sexual assault; the trial court denied the motion. The State called a forensic nursing supervisor to testify regarding the SANE report, although she was not the nurse that performed the SANE. The defendant did not object to the nurse expert's testimony, and he was subsequently convicted of all charges.

The court first gave an overview of the applicable Confrontation Clause issues, noting "an expert witness may properly base her independent opinion 'on tests performed by another person, if the tests are of the type reasonably relied upon by experts in the field,' without violating the Confrontation Clause." *Id*.at 15, quoting *State v. Fair*, 354 N.C. 131, 162 (2001). Here, the nurse expert's qualifications were established, and she testified about her independent conclusions after reviewing the SANE, subject to cross-examination by the defendant. The court found no error in admitting the SANE and expert testimony under these circumstances.

Phil Dixon blogged about a substitute analyst testimony case under consideration at the U.S. Supreme Court that may affect North Carolina law, here.

Mandatory masking of all trial attendees and witnesses during COVID-19 pandemic did not violate the defendant's Confrontation Clause rights

U.S. v. Maynard, 90 F.4th 706 (Jan. 11, 2024). In this case from the Southern District of West Virginia, the defendant was a police officer charged with civil rights violations relating to the use of excessive force against an arrestee. The district court required all people in the courtroom during trial to wear a face mask covering their mouths and noses. The defendant objected to this ruling, arguing that clear face shields would be an adequate substitute and seeking for those to be used in place of opaque face masks. The district court denied the motion. Face masks were worn by everyone in the courtroom at all times during the trial, including by testifying witnesses. The defendant was convicted at trial and sentenced to 108 months in prison. He appealed, challenging the masking requirement at trial as a Sixth Amendment Confrontation Clause violation.

The Confrontation Clause generally entitles a criminal defendant to confront his or her accusers in court in person. The U.S. Supreme Court recognized a narrow exception to the right of face-to-face confrontation in *Maryland v. Craig*, 497 U.S. 836 (1990). There, a child witness was permitted to testify remotely by video to avoid the possibility of further traumatization from personally testifying before the defendant. Under *Craig*, when the denial of confrontation rights advances an important public interest and protections exist to ensure the reliability of the remote testimony, face-to-face confrontation may be denied without violating the Confrontation Clause. The court applied *Craig* to affirm the trial court.

The defendant was tried by a jury in November 2021 amidst the delta variant surge of COVID-19. At this point of the pandemic, more than 70,000 lives had been lost to the disease in the U.S. West Virginia specifically had lost more than 5,000 lives. Guidance from the Centers for Disease Control ("CDC") recommended masking in public at the time. The CDC had also warned that masking was more effective

than face shields. The government's interest in protecting public health amounted to an important public policy interest on these facts. Protections were in place during the trial to ensure the reliability of witness testimony. Like in *Craig*, the witnesses were sworn, subject to cross-examination, and observable by the jury. Unlike *Craig*, the witnesses were physically present in the courtroom. While the jury was not able to view the facial expressions of the witnesses, they were still largely able to gauge the credibility of witnesses by judging other witness characteristics. This was, according to the court, "even more protective of the defendant's interests than was the case in *Craig*." *Maynard* Slip op. at 10. The central protections of the Confrontation Clause—the ability to confront and cross-examine one's accusers—were preserved here. In the court's words:

> …[J]urors assess credibility not only by facial expressions, but also by the words the witnesses said, how they said them, their body language, their pauses, their mannerisms, and all the other intangible factors that are present in a trial. So we can't say that a mask covering only a witness's nose and mouth violates the Confrontation Clause. *Id.* at 11 (cleaned up).

The defendant also argued that *Craig* was overruled by *Crawford v. Washington*, 541 U.S. 36 (2004) (establishing the modern Confrontation Clause analysis and overruling the former indicia of reliability test). The court rejected this argument as well. While *Crawford* overruled *Roberts v. Ohio*, 448 U.S. 56 (1980), the kind of remote testimony at issue in *Craig* was not before the Court there and the Court has never since explicitly overruled *Craig*. Mere tension with a subsequent case is not enough; U.S. Supreme Court caselaw remains good law unless and until the Court overrules it. *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (per curiam) (so holding).

Challenges to the use of sentencing enhancements for causing serious bodily injury and for obstruction of justice by perjury were also rejected, and the judgment of the district court was unanimously affirmed in full.

Former SOG member Ian Mance blogged about issues surrounding criminal trials and masking in a 2021 post, here.

Pleadings

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. ___; 895 S.E.2d 337 (Dec. 15, 2023). In this Craven County case, the State appealed a Court of Appeals majority opinion holding the indictment charging the defendant with going armed to the terror of the public was deficient as it did not allege that the conduct occurred on a public highway. The Supreme Court found no error in the indictment and reversed the Court of Appeals.

The defendant was indicted for waiving a gun around and firing randomly in two parking lots during September of 2019. After the 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 the 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.

Indictment for CCE charge was fatally flawed because it did not specify the criminal acts committed; jury verdict was not fatally ambiguous as trafficking by possession or by transportation were both acts supporting conspiracy conviction

State v. Guffey, COA22-1043, ___ N.C. App. ___ (Jan. 16, 2024). In this McDowell County case, the defendant appealed his convictions for conspiracy to traffic in methamphetamine and aiding and abetting a continuing criminal enterprise ("CCE"), arguing (1) the CCE indictment was fatally flawed as it did not specify each of the acts committed under the CCE, and (2) the conspiracy verdict was fatally ambiguous, as it was impossible to determine if the jury unanimously found trafficking by possession or by transportation. The Court of Appeals majority agreed regarding (1), vacating the CCE conviction, but the court upheld the conspiracy to traffic methamphetamine conviction in (2).

The defendant was an admitted participant in a drug trafficking enterprise, but was not an organizer or employee of the principal operation, instead being a routine purchaser of drugs for resale. Considering (1), the Court of Appeals noted that G.S. 90-95.1 defines the offense of CCE, and that the federal crime in 21 U.S.C. § 848 has nearly identical wording. This led the court to consult applicable precedent in *Richardson v. United States*, 526 U.S. 813 (1999), for the idea that specificity of illegal conduct is essential in a CCE indictment. The court found no such specificity here, explaining:

> The indictment does not allege that the enterprise engaged in any specific conduct, only defining the CCE as "a continuing series of violations of Article 5 of Chapter 90 of the General Statutes" and generally naming the participants and their positions in the trafficking scheme's hierarchy. A juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant's acts advanced them; while the indictment specifies that Defendant aided and abetted the CCE "by trafficking in methamphetamine[,]" it says nothing of why the enterprise with which Defendant dealt constituted a CCE. Slip Op. at 8-9.

This led the court to hold that "each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense" and that "a valid indictment under N.C.G.S. § 90-95.1 requires the

state to specifically enumerate the acts alleged." *Id*. at 9. Because the State did not do so in the current case, the indictment was fatally defective and the court vacated the CCE conviction.

Moving to (2), the court explained that the core of the defendant's argument was that failing to distinguish between trafficking by possession and by transportation rendered the jury's verdict fatally ambiguous. The court drew a distinction between disjunctive jury instructions that (a) would allow a jury to find defendant guilty of any one of multiple underlying offenses, or (b) various alternative acts that establish elements of the single offense being charged. Here, the court found (b), as "[w]here a conspiracy charge disjunctively lists multiple offenses . . . each underlying offense does not create a separate conspiracy, but is instead an alternative act by which a Defendant may be found guilty of the singular conspiracy alleged." *Id*. at 11. This led the court to find no fatal ambiguity for the defendant's conspiracy conviction.

Judge Stroud concurred in part and dissented in part by separate opinion and would have found no fatal ambiguity (1), allowing the CCE conviction to stand. *Id*. at 13.

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

Defendant knowingly and intentionally waived his right to counsel and forfeited his right to counsel through misconduct, justifying denial of his motion to continue to obtain new counsel

State v. Moore, ___ N.C. App. ___; 893 S.E.2d 231 (Oct. 3, 2023). In this Onslow County case, the defendant appealed his conviction for first-degree murder, arguing error in (1) denial of his right to counsel, and (2) denial of his motion to continue. The Court of Appeals found no error.

After Thanksgiving in 2017, the defendant borrowed his girlfriend's car and drove from Florida to North Carolina, telling her that he was visiting family. After arriving in North Carolina, the defendant contacted a prostitute and eventually killed her and buried her body in a remote area at the end of a dirt road. During the same December 2017 time period, the defendant met with a different prostitute, who would later testify about how the defendant took her to the same area, raped her, and stole all the money from her purse. When the defendant indicted for murder in 2018, he was represented by his sister, a Georgia attorney who was admitted *pro hac vice* for the trial. The defendant also had a series of local attorneys represent him, all of whom withdrew due to disputes with the defendant and his sister. During these disputes, the defendant's sister apparently filed several complaints with the N.C. State Bar against defense counsel and prosecutors. Eventually, the trial court revoked the sister's *pro hac vice* admission due to her lack of experience and interference with other counsels' ability to prepare. When the matter reached trial, the defendant had another appointed counsel, but several days after opening statements, the appointed counsel moved to withdraw, explaining that the defendant had asked her to stop representing him; she also informed the trial court that the defendant had implied she should withdraw for her own safety. The trial court conducted a colloquy with the defendant, where he told the trial court that he was not happy with the appointed counsel and understood that he would be forfeiting his right to an attorney. After the trial court allowed counsel to withdraw, the trial went forward with the defendant representing himself; he did not present evidence, cross-examine witnesses, or give a closing argument. The defendant was ultimately convicted, and subsequently filed a motion for appropriate relief (MAR). The trial court denied the MAR, finding that the defendant forfeited his right to counsel by misconduct. The defendant's appeals of his conviction and the denial of his MAR led to the current opinion.

Taking up (1), the Court of Appeals first explained the distinction between a knowing and voluntary waiver of counsel under G.S. 15A-1242, and forfeiture of counsel by misconduct, referencing *State v. Blakeney*, 245 N.C. App. 452 (2016). Although the record indicated that the defendant signed a written waiver of counsel that was certified by the trial court, the waiver was not included on appeal. Despite this absence, the court explained that the missing waiver and certification document did not invalidate the defendant's waiver of his right to counsel. After determining the trial court clearly advised the defendant of his rights and the consequences of waiving an attorney, the court found that he had "clearly waived and/or forfeited his right to further court-appointed counsel." Slip op. at 32. The court then explored the forfeiture ruling, noting that the N.C. Supreme Court had first recognized that a defendant could forfeit counsel in *State v. Simpkins*, 373 N.C. 530 (2020), and had expanded on the analysis in *State v. Harvin*, 382 N.C. 566 (2022), and *State v. Atwell*, 383 N.C. 437 (2022). Slip op. at 35-36. After examining the defendant's conduct, including the interference from his sister and the seven attorneys representing him through the process, the court concluded he had committed "serious misconduct" sufficient to forfeit counsel, in addition to his "knowing and voluntary waivers of counsel." *Id*. at 42.

Turning to (2), the court explained that the defendant filed his motion intending to replace the attorney he had just fired after the jury was already empaneled and the State was presenting its case-in-chief. Because no attorney could have adequately represented him in the middle of his trial, and because the defendant had waived and forfeited his right to counsel in (1), the court found no error in denial of the motion.

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

"Opening the door" to discussion of victim's friendly nature did not entitle defendant to question victim's father regarding contents of victim's phone in front of the jury

State v. McKoy, 385 N.C. 88 (Sept. 1, 2023). In this Durham County case, the Supreme Court affirmed the Court of Appeals majority decision upholding the defendant's voluntary manslaughter conviction.

In December of 2016, the defendant was driving out of his neighborhood when he was followed by the victim. The defendant was familiar with the victim and felt that the victim was violent and posed a threat to his safety. After the victim cut the defendant off and blocked his way forward, the defendant backed up, but found himself stuck in a ditch. As the victim approached his car, the defendant pulled out a gun and fired at the victim. The gunshot hit the victim in the back of the head as he ran from the gunfire, killing him. At trial, the defendant argued he was acting in self-defense, even though no gun was found on the victim. Defense counsel attempted to question the victim's father about the contents of the victim's phone, including photos of the victim and friends holding guns. The trial court did not permit this questioning, despite defense counsel's argument that the State had opened the door to

examining this issue after testimony regarding the victim's happy, friendly nature. On appeal, the Court of Appeals majority found that the trial court properly applied the Rule of Evidence 403 balancing test and excluded the evidence, and that even if this was error, it was not prejudicial. The dissent would have found that the line of questioning opened the door to allowing the phone evidence and that the defendant was entitled to a new trial.

The Supreme Court explained the issue on appeal as "whether, if the door was opened, defendant had the right to ask [the victim's father] specific questions about the cell phone's contents in front of the jury." Slip op. at 11. The Court explained that the concept of opening the door predated the modern rules of evidence, and that frequently the concept was no longer needed due to the structure of the modern rules. Despite the State's opening the door on "otherwise irrelevant or inadmissible evidence," the trial court retained the power to act as gatekeeper under Rule 403. *Id*. at 14. This gatekeeping function is reviewed for abuse of discretion on appeal, a standard that is "a steep uphill climb" for an appealing party. *Id*. at 15. Here, the trial court struck a balance that the Supreme Court found not an abuse of discretion.

The Court went beyond the abuse of discretion analysis to determine that, even if the trial court committed abuse of discretion, the defendant was not prejudiced by the decision and was not entitled to a new trial. The Court noted that the jury found the defendant guilty of voluntary manslaughter, meaning that they found he was acting in self-defense but that he used excessive force when doing so. The Court explained that there was no reasonable way the evidence would have convinced the jury that the defendant was acting appropriately, as he had never seen or heard about the contents of the victim's phone prior to the shooting. *Id*. at 18. Likewise, the evidence would not have supported the jury finding that the victim had a gun or shot at the defendant and could not have rebutted the evidence showing the victim was fleeing when he was shot in the back. After making this determination, the Court concluded "[t]here is no reasonable possibility that a ruling in defendant's favor [on the phone evidence] would have led to a different jury verdict." *Id*. at 20.

Shea Denning blogged about the *McKoy* case, here.

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

"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.

Homicide

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, 187A22, ___ N.C. ___; 895 S.E.2d 355 (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. ___ (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, 208PA22, ___ N.C. ___ (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.

Theft Crimes

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. ___; 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.

Sentencing and Probation

Sentence entered seven years after prayer for judgment continued did not represent unreasonable delay; prayer for judgment continued was not final judgment as it did not impose conditions amounting to punishment

State v. McDonald, 290 N.C. App. 92 (August 1, 2023). In this Robeson County case, the defendant appealed his conviction for misdemeanor death by vehicle, arguing error as (1) the prayer for judgment

continued (PJC) was intended to be a final judgment in the matter, and (2) the almost seven-year delay in entering judgment was unreasonable. The Court of Appeals affirmed the trial court's judgment.

In October of 2011, the defendant crossed the center line of a roadway when attempting to turn left, causing a collision with a motorcyclist who died of injuries sustained in the collision. The defendant pleaded guilty to misdemeanor death by vehicle in October of 2014. The plea agreement required him to plead guilty and acknowledge responsibility in open court, and stated the trial court would then enter a prayer for judgment in the matter. In August of 2020, the defendant was charged with involuntary manslaughter due to another motor vehicle accident, and the State moved to pray judgment in the misdemeanor death by vehicle case. Over the defendant's opposition, the trial court granted the State's motion and entered a judgment imposing a sentence of imprisonment that was suspended for supervised probation.

Considering issue (1), the Court of Appeals noted that applicable precedent has made a distinction between PJCs that impose conditions "amounting to punishment" versus PJCs that do not. Slip op. at 5. Conditions amounting to punishment include fines and imprisonment terms, whereas orders such as requiring the defendant to obey the law or pay court costs do not represent punishment for this distinction. Here the court found no conditions amounting to punishment and rejected the argument that the trial court's statement "that he hoped 'both sides can have some peace and resolution in the matter'" represented an intention for the judgment to be final. *Id*. at 7.

Turning to (2), the court noted that a sentence from a PJC must be entered "within a reasonable time" after the conviction, and looked to *State v. Marino*, 265 N.C. App. 546 (2019) for the considerations applicable to determining whether the sentence was entered in a reasonable time. Slip op at 8-9. Here, the court noted the circumstances supported a finding of reasonableness, as (1) the State delayed its motion to pray judgment until the defendant committed a second motor vehicle offense, (2) the defendant tacitly consented to the delay by not objecting to the PJC and not asking for judgment to be entered, and (3) the defendant could not show actual prejudice by the delay of entering a sentence.

Judge Riggs dissented by separate opinion. She would have held that the delay divested the trial court of jurisdiction to enter the sentence.

Trial court failed to strictly adhere to plea agreement when imposing a 30-day split sentence not mentioned in the agreement.

State v. Robertson, ___ N.C. App. ___; 892 S.E.2d 456 (Sept. 5, 2023). In this Cabarrus County case, the defendant appealed judgment entered on his guilty plea, arguing that the trial court refused to allow him to withdraw his plea after imposing a sentence differing from the plea agreement. The Court of Appeals agreed, vacating the judgment and remanding for further proceedings.

In August of 2022, the defendant entered a plea agreement for felony fleeing to elude arrest. The agreement specified that he would receive a suspended sentence in the presumptive range. However, at the plea hearing, the trial court imposed an additional "split sentence of 30 days" in jail as a special condition of probation. Slip op. at 2. Defense counsel moved to strike the plea, but the trial court denied the motion.

After reviewing the applicable case law and statutes, the Court of Appeals held that the trial court erred by failing to strictly adhere to the terms of the plea agreement. Based upon the transcript, it appeared that the trial court felt the addition was permitted because the plea agreement did not mention special conditions related to probation. The court explained:

> Our courts have held that strict adherence to plea arrangements means giving the defendant what they bargained for. . . [t]o the extent the terms of the arrangement—including whether the parties had agreed to the imposition of a special condition of probation—were unclear, the trial court should have sought clarification from the parties rather than impose a sentence it decided was appropriate. *Id*. at 6-7.

The judgment was therefore vacated, and the matter remanded for further proceedings below.

Trial court's statement regarding "choice" during sentencing hearing was not obviously referencing defendant's choice for a jury trial

State v. Pickens, 385 N.C. 351 (Oct. 20, 2023). In this Wake County case, the Supreme Court reversed the Court of Appeals decision vacating the defendant's sentence for improper consideration of the choice to pursue a jury trial, reinstating the original sentence.

From August-September of 2015, the defendant, a middle-school chorus teacher, repeatedly raped and assaulted an eleven-year-old student in the bathroom of the middle school as the student took her daily trips to the school nurse for medication. The student eventually reported the details of the assaults, leading to the defendant's trial and ultimate conviction for statutory rape and statutory sexual offense with a child in October of 2019. The Court of Appeals majority found that the trial court improperly considered the defendant's choice to pursue a jury trial when imposing three consecutive sentences. The State subsequently appealed based upon the divided panel, leading to the current opinion. The North Carolina Supreme Court reversed.

The Court noted the strong protection for an accused's right to a trial by jury, and the necessity of a new sentencing hearing if the trial court imposed a sentence "at least in part because defendant . . . insisted on a trial by jury." *Id*. at 15, quoting *State v. Boone*, 293 N.C. 702, 712 (1977). The issue in the current case was whether the "choice" referenced in the sentencing hearing was the defendant's decision to plead not guilty and pursue a jury trial. The Court examined relevant precedent and explained that the statement must be reviewed with the entire record. Here, reviewing the entirety of the trial court's statement, it was unclear if the trial court was referring to the defendant's choice to pursue a jury trial or to "the egregious nature of [defendant]'s crimes and his decision to commit those crimes." *Id*. at 20. The Court concluded that this ambiguity did not overcome the "presumption of regularity" enjoyed by the trial court's sentence. *Id*. This led the Court to reinstate the defendant's original sentence.

Expunction

Pleading to lesser-included offense did not represent dismissal for purposes of expungement under G.S. 15A-146

State v. Lebedev, COA23-249, ___ N.C. App. ___; 895 S.E.2d 455 (Nov. 7, 2023). In this Orange County case, the defendant appealed (1) three orders by the Orange County District Court denying his petition

to expunge traffic misdemeanors, and (2) the order of the Orange County Superior Court denying his petition for writ of certiorari. The Court of Appeals unanimously affirmed.

Between April of 2009 and August of 2011, the defendant was charged with speeding three separate times in three unrelated incidents. Each time he pleaded to a lesser-included offense speeding offense. In November of 2022, the defendant filed three separate expungement petitions with the district court, seeking expunction as to each of original charges. The district court denied the petitions, finding that the defendant was not charged with "multiple offenses" as required by G.S. 15A-146. The defendant then petitioned for review of that decision by way of a writ of certiorari to the superior court, which was also denied.

The Court of Appeals noted that the defendant's argument hinged on the statutory interpretation of G.S. 15A-146. Citing the relevant language from subsection (a1): "[i]f a person is charged with multiple offenses and any charges are dismissed, then that person or the district attorney may petition to have each of the dismissed charges expunged." Slip op. at 4. The court explained that while the statute did not define what constituted a "dismissal," it was a common word with an unambiguous meaning. Although the court determined no charges were dismissed in this matter, the defendant argued that "the legislature nonetheless intended defendants to be able to petition to expunge misdemeanor charges that did not ultimately result in a conviction." *Id*. at 5. The court found this interpretation to be "imaginative" but ultimately flawed, as "it incorrectly conflates the concept of pleading down to a lesser included offense with that of an actual dismissal." *Id*. at 6. Having established that amending the charge to reflect a lesser-included offense did not represent dismissal under G.S. 15A-146, the court affirmed the denial of the defendant's various petitions as without merit.

Sex Offender Registration

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

State v. Fritsche, 344PA21, ___ N.C. ___; 895 S.E.2d 347 (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

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.