

## ASSAULT ON OFFICER

### **The Pivotal Element For Assault On An Officer Is Whether The Assault Occurred While Officer Was Discharging Duties, What Crime The Arrest Was For Is Immaterial.**

*State v. Roman*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 4, 2010).

There was no fatal variance between a warrant charging assault on a government officer under G.S. 14-33(c)(4) and the evidence at trial. The warrant charged that the assault occurred while the officer was discharging the duty of arresting the defendant for communicating threats but at trial the officer testified that the assault occurred when he was arresting the defendant for being intoxicated and disruptive in public. The pivotal element was whether the assault occurred while the officer was discharging his duties; what crime the arrest was for is immaterial.

### **Assuming Without Deciding That Officer's Entry Into Defendant's Home Violated Fourth Amendment, Exclusionary Rule Did Not Bar Evidence of Defendant's Assault on Officer After Entering Home**

*State v. Parker*, 188 N.C. App. 616, 655 S.E.2d 860 (5 February 2008).

The defendant was convicted of assault with a firearm on a law enforcement officer. The court ruled, relying on *State v. Miller*, 282 N.C. 633 (1973), and *State v. Guevara*, 349 N.C. 243 (1998), that assuming without deciding that an officer's entry into the defendant's home violated the Fourth Amendment, the exclusionary rule did not bar evidence of the defendant's assault on the officer after entering the home.

### **No Double Jeopardy Bar to Prosecute Resisting, Delaying, or Obstructing Public Officer After Acquittal of Assault on Government Officer Based on Same Incident**

*State v. Newman*, 186 N.C. App. 382, 651 S.E.2d 584 (16 October 2007).

The defendant was tried in district court for resisting, delaying, or obstructing a public officer (RDO), second-degree trespass, and assault on a government officer. The defendant was convicted of the RDO and trespass charges and found not guilty of the assault. The defendant appealed the two convictions for trial de novo in superior court. The superior court judge dismissed the RDO charge, and the state appealed. The court ruled that the state had the right to appeal the dismissal. The court then ruled that there was no double jeopardy bar to prosecute RDO after the acquittal of the assault charge. The court noted North Carolina case law that RDO is neither the same nor a lesser offense of the assault charge. The court noted, however, that there could still be a double jeopardy bar based on the same-evidence test for double jeopardy set out in *State v. Summrell*, 282 N.C. 157 (1982). After examining the evidence, the court ruled there was no double jeopardy violation because there was different evidence to support the RDO and

assault charges. [Author's note: The court was bound by the Summrell ruling and thus was required to apply the same-evidence test. However, that test does not appear to be a component of double jeopardy analysis, because the United States Supreme Court applies an elements test—but not an additional same-evidence test. See, for example, *United States v. Dixon*, 509 U.S. 688 (1993).]

### **Trial Judge Erred in Not Submitting Lesser Offense of Misdemeanor Assault on Government Officer in Trial of Felony Assault with Deadly Weapon on Government Officer When Evidence Did Not Support Finding as a Matter of Law That Hands and Water Together Were Deadly Weapon**

*State v. Smith*, \_\_\_ N.C. App. \_\_\_, 650 S.E.2d 29 (18 September 2007).

The defendant was convicted of assault with a deadly weapon on a government officer under G.S. 14-34.2 involving an assault on a law enforcement officer who was attempting to arrest the defendant at a river. The court ruled that the trial judge erred in not submitting the lesser offense of misdemeanor assault on a government officer when the evidence did not support a finding as a matter of law that the defendant's hands and water together were a deadly weapon.

### **(2) Sufficient Evidence of Assault When Defendant Reached for Weapon During Struggle with Law Enforcement Officers**

### **(3) Trial Judge Erred in Instructing on Attempted Assault, Which Is Not Recognized Crime**

*State v. Barksdale*, 181 N.C. App. 302, 638 S.E.2d 579 (2 January 2007).

The defendant was convicted of attempted assault with a deadly weapon on a law enforcement officer and possession of firearm by a felon. After chasing the defendant, three officers tackled him and then struggled in trying to subdue him on the ground. After an officer had handcuffed the defendant's right wrist, he noticed a chrome-plated handgun in the grass about six inches from the defendant's left hand. Although none of the officers saw the defendant touch the gun, the defendant was reaching for the gun with his outstretched hand. They applied even greater force and finally subdued him. They then retrieved the gun, which was dry and warm even though the ground was wet from rain earlier in the evening and the weather was cool. (2) Based on the common law definition of assault (the pertinent part of the definition, "the unequivocal appearance of an attempt" with force and violence to do some immediate physical injury), the court ruled that there was sufficient evidence of assault when the defendant reached for the weapon during his struggle with the law enforcement officers. (3) The court ruled, relying on *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10 (1972), that the trial judge erred in instructing on the offense of attempted assault, because attempted assault is not a recognized crime.

**(1) Instruction -- Right to Resist Unlawful Arrest**

**(2) Evidence--Prior Crimes or Bad Acts--Warrant For Arrest From Another State For Probation Violation**

*State v. Brewington 170 N.C. App. 264 (2005)*

**(1)** The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by denying defendant's request for a jury instruction on the right to resist an unlawful arrest, because: 1) upon discovering illegal narcotics on the driver's person, the police had probable cause to search the stopped vehicle in which defendant was a passenger; and 2) at the moment defendant slid into the driver's seat of the stopped vehicle, tried to start the car, and ignored the officer's command to stop, a violation of N.C.G.S. § 14-223 occurred and defendant was subject to arrest. **(2)** The trial court did not err in an assault on a governmental officer with a deadly weapon and reckless driving case by admitting evidence of a warrant for defendant's arrest from the State of Virginia for a probation violation, because: 1) the outstanding warrant was admissible under N.C.G.S. § 8C-1, Rule 404(b) since it provided a possible explanation or motive for defendant's actions on 10 September 2001; and 2) although defendant contends the trial court did not instruct the jury that the evidence was admitted for a limited purpose only, defendant did not request a limiting instruction.

**(1) Prisons and Prisoners -- Malicious Conduct by Prisoner -- Motion to Dismiss -- Sufficiency of Evidence -- Custody**

**(2) Prisons and Prisoners -- Malicious Conduct by Prisoner -- Instruction -- Custody**

*State v. Ellis 168 N.C. App. 651 (2005)*

**(1)** The trial court did not err by denying defendant's motion to dismiss the charge of malicious conduct by a prisoner based on alleged insufficient evidence of defendant being in custody, because: 1) the Fourth Amendment "free to leave" test is to be applied to determine whether an individual was in custody under N.C.G.S. § 14-258.4; and 2) substantial evidence shows that at the moment defendant smeared fecal matter on an officer, a reasonable person would have believed that he was not free to leave. **(2)** The trial court did not err by instructing the jury on the custodial element of malicious conduct by a prisoner, because: 1) the test is whether a reasonable person would have felt free to leave under the circumstances; and 2) in light of the "free to leave" test concerning the custody element of N.C.G.S. § 14-258.4, defendant has failed to show, and a review of the record and transcript do not indicate, that the instructions to the jury were misleading.

## **Prisons and Prisoners -- Malicious Conduct by Prisoner -- Failure to Instruct on Misdemeanor Assault on Law Enforcement Officer as Lesser-Included Offense**

*State v. Crouse 169 N.C. App. 382 (2005)*

The trial court did not err by denying defendant's request to submit misdemeanor assault on a law enforcement officer as a lesser-included offense of malicious conduct by a prisoner, because: 1) misdemeanor assault on a law enforcement officer is not a lesser-included offense of malicious conduct by a prisoner; 2) although an assault may be included in the commission of malicious conduct by a prisoner, it need not be; and 3) the legislature intended to address a different problem with each offense when assaults on government officials have been criminalized to punish and prevent attacks against government officials trying to perform public duties whereas the criminalization of malicious conduct by a prisoner is directed at deterring and punishing the projecting of bodily fluids or excrement at governmental employees by those in custody whether or not such conduct amounts to an assault.

## **Constitutional Law -- Double Jeopardy -- Convictions for Assault With a Deadly Weapon on a Government Official and Assault With a Deadly Weapon**

*State v. Spellman 167 N.C. App. 374 (2004)*

The trial **court did not violate defendant's right against double jeopardy** by sentencing him for both assault with a deadly weapon on a government official and assault with a deadly weapon, because: 1) the facts underlying defendant's indictment for assault with a deadly weapon with intent to kill are not the same facts used to indict defendant for assault with a deadly weapon on a government official; 2) the facts underlying the jury's verdict of guilty are not the same for both offenses since one occurred when defendant's vehicle struck an officer and ran over his leg whereas the second instance occurred after defendant reentered the vehicle and drove it toward the officer thereby placing the officer in fear of injury; and 3) the evidence tended to show that defendant employed his thought process prior to committing the second assault which occurred at a distinct and separate time after the first assault was complete.

### **(1) Assault -- on Government Official -- Car Used as Deadly Weapon -- Lesser Charge Not Submitted**

### **(2) Assault -- on Government Official -- Sufficiency of Evidence -- Knowledge That Officer Was Government Official**

*State v. Batchelor 167 N.C. App. 797 (2005)*

**(1)** The trial court did not err by refusing to submit the charge of assault on a government official (a misdemeanor) as a lesser offense to assault on a government official with a deadly weapon (a felony). The only additional element

required for the felony is use of a deadly weapon, and the evidence showed that defendant drove his car directly toward a deputy standing in defendant's driveway, and then drove at high speed directly at two officers' vehicles in their lane of travel, finally crashing into a third officer's car. The key element in determining whether a weapon is deadly per se is how it is used; here the evidence leads to but one conclusion. (2) The trial court did not err by denying a motion to dismiss charges of assault on a government official with a deadly weapon where defendant contended that there was insufficient evidence that he knew that the officers were government officials. It was daylight, the officers were wearing uniforms or identifying clothes, their cars had police lights on top, two were marked "Sheriff," and two of the cars had their blue lights on as they chased defendant.

**(1) Assault -- on Law Enforcement Officer --- Serious Injury or Serious Bodily Injury--Felony**

**(2) Assault -- on Law Enforcement Officer--Lesser Offense of Misdemeanor Assault--Instruction Refused**

*State v. Crawford 167 N.C. App. 777 (2005)*

(1) An indictment was sufficient to charge the felony of assault on a law enforcement officer under N.C.G.S. § 14-34.7 even though it alleged the infliction of "serious injury" rather than "serious bodily injury." The manifest intent of the Legislature in enacting N.C.G.S. § 14-34.7 was to punish as a felony assaults against law enforcement officers inflicting serious injury or serious bodily injury. (2) The trial court did not err in a prosecution for assault on a law enforcement officer inflicting serious bodily injury by not instructing the jury on the lesser offense of assault inflicting serious injury. N.C.G.S. § 14-34.7 aggravates misdemeanor assault inflicting serious injury when the offense is against a law enforcement officer; there is no evidence that the victim here was not a law enforcement officer.

**(1) Assault -- Firearm on Law Officer -- Lesser-Included Offenses -- Assault by Pointing a Gun -- Assault With a Deadly Weapon**

**(2) Constitutional Law -- Double Jeopardy -- Assault With Deadly Weapon -- Assault With Firearm on Law Officer**

*State v. Dickens 162 N.C. App. 632 (2004)*

(1) The trial court did not commit plain error by failing to instruct the jury on the offenses of assault by pointing a gun and assault with a deadly weapon as lesser-included offenses of assault with a firearm on a law enforcement officer, because:

1) assault by pointing a gun was not a lesser-included offense when it does not include the element of pointing a gun at a person; and 2) the evidence indicated that defendant knew or had reasonable grounds to know that the pertinent individual was an officer, and the mere possibility that a jury might reject the evidence that defendant knew he was an officer does not require submission of assault with a deadly weapon as a lesser-included offense. (2) The trial court committed plain error by failing to arrest judgment on the assault with a deadly weapon conviction because this conviction and the conviction for assault with a firearm on a law enforcement officer amounted to double jeopardy.

### **Assault -- Assault With Deadly Weapon on Governmental Official -- Use of Dog -- Sufficiency of Evidence**

*State v. Cook* 164 N.C. App. 139 (2004)

The trial court did not err by denying defendant's motions to dismiss the charges of assault with a deadly weapon on a governmental official at the close of the State's evidence and at the close of all evidence even though defendant contends there was insufficient evidence to prove the deadly weapon element based on the use of a dog, because: 1) the dog in this case could be considered a deadly weapon not only if it was deadly by its nature, but also if it was used by defendant in a deadly manner or if the police officers perceived the dog to be deadly in its use; and 2) there was sufficient evidence from which the jury could find that defendant used the dog as a deadly weapon.

### **Assault -- Assault on Law Enforcement Officer -- Motion to Dismiss -- Sufficiency of Evidence**

*State v. Pelham* 164 N.C. App. 70 (2004)

The trial court did not err by failing to dismiss the assault on a law enforcement officer indictments even though defendant contends there was a variance regarding the evidence for the phrase "by shooting at him," because: 1) allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded when testing the sufficiency of the indictment; and 2) the Court of Appeals has previously held that the phrase "to wit: by shooting him with said pistol" in an indictment for this charge was surplusage and should be disregarded, and the present indictment is so similar that a similar outcome is dictated.

### **(1) Evidence -- Acquittal of Related Offense -- Chain of Circumstances -- Admissible**

### **(2) Police Officers -- Obstructing Charge -- Assault on an Officer Acquittal -- Not Relevant**

*State v. Bell* 164 N.C. App. 83 (2004)

(1) Events leading to a charge of assaulting an officer (upon which defendant was acquitted in district court) were admissible in defendant's trial for obstructing an officer because the events formed a chain of circumstances. (2) Acquittal of assault on an officer is not relevant to guilt of obstructing an officer and was properly excluded from a prosecution for obstructing an officer.

### **Criminal Law -- Malicious Conduct by a Prisoner -- Misdemeanor Assault on a Government Official**

*State v. Cogdell* 165 N.C. App. 368 (2004)

The trial court did not err by failing to instruct on misdemeanor assault on a government official as a lesser-included offense of malicious conduct by a prisoner, because: 1) assuming arguendo that misdemeanor assault on a governmental official is a lesser-included offense of malicious conduct by a prisoner, defendant failed to make the factual showing required to support a jury instruction on that offense; and 2) defendant concedes the only essential element of malicious conduct by a prisoner not also an element of misdemeanor assault on a government official is the element that defendant was in custody at the time he acted, and the State's evidence at trial established that defendant was in police custody when he spat at an officer.

**(1) Assault -- on Officer with Firearm -- Sufficiency of Indictment**

**(2) Assault -- on Officer with Firearm -- Sufficiency of Evidence**

**(3) Assault -- on Officer with Firearm -- Failure to Submit Lesser Included Offenses -- No Plain Error**

**(4) Assault -- on Officer with Firearm -- Failure to Instruct on Self-Defense**

*State v. Thomas* 153 N.C. App. 326 (2002)

(1) The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends the indictment failed to allege that defendant knew or had reasonable grounds to know that the person he assaulted was a law enforcement officer, because: 1) the indictment properly charged the offense in the language of N.C.G.S. § 14-34.5(a); and 2) although the indictment does not specifically aver that defendant knew the person was a law enforcement officer, the indictment does allege defendant willfully committed an assault on a law enforcement officer which indicates defendant knew that the person he was assaulting was a law enforcement officer. (2) The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends there was insufficient evidence that he knew or had

reasonable grounds to know that the person he assaulted was a law enforcement officer, because: 1) the officer arrived on the scene in a marked patrol car and was dressed in uniform, and the area was illuminated by a streetlight even though it was nighttime; 2) defendant told the person that if he let defendant go that defendant would stop, implying that defendant knew the person had the authority to keep or detain defendant; and 3) even when approached by two more officers who came to the first officer's aid, defendant continued to struggle and resist apprehension. (3) The trial court did not commit plain error in an assault on a law enforcement officer with a firearm case by failing to submit the possible verdicts of assault with a deadly weapon and assault by pointing a gun, because: 1) the trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention; and 2) there was no evidence that defendant did not know the person he assaulted was an officer, and the State presented sufficient evidence to meet the knowledge requirement of the offense. (4) The trial court did not err in an assault on a law enforcement officer with a firearm case by failing to give an instruction on self-defense as requested by defendant, because: 1) there was no evidence that defendant had a reasonable belief that he was required to use force against the officer in order to avoid death or great bodily harm; 2) the evidence establishes that defendant was the aggressor in the struggle with the officer; and 3) there was no evidence that the officer was making an unlawful arrest or that he was using excessive force.

### **Firearms and Other Weapons -- Assault With Firearm on Law Enforcement Officer -- Jury Instructions -- Defendant's Right to Defend Himself -- Pointing of Firearm**

*State v. Childers 154 N.C. App. 375 (2002)*

The trial court did not err by failing to give jury instructions that defendant had a right to defend himself with regard to an unlawful arrest and that the firearm he possessed at the time of his arrest was required to be pointed at or toward the alleged victims to find defendant guilty of assault with a firearm on a law enforcement officer, because: 1) the evidence did not support defendant's contention that he was subjected to an unlawful arrest; and 2) the State did not need to prove that he pointed a firearm at a law enforcement officer but instead needed to prove that defendant put on a show of force or violence sufficient to put a person of reasonable firmness in fear of immediate physical threat.

### **Assault -- On an Officer with a Firearm -- Sufficiency of Evidence**

*State v. Haynesworth 146 N.C. App. 523 (2001)*

The trial court did not err by denying a defendant's motion to dismiss a charge of assault with a firearm on a law enforcement officer where there was uncontroverted evidence that the officer was in the performance of his duties when an altercation with defendant took place and that defendant was aware of

the officer's status as an officer, and further evidence which, when viewed in the light most favorable to the State, shows that defendant pointed the gun directly at the officer, that the show of force was sufficient to put a person of reasonable firmness in fear of immediate physical injury, and that defendant was holding the gun when it fired as one would properly hold a pistol.

### **Assault -- Firearm on a Law Enforcement Officer -- Sufficiency of Evidence**

*State v. Locklear, 136 N.C. App. 716 (2000)*

The trial court did not err in an assault with a firearm on a law enforcement officer case by denying defendant's motion to dismiss at the end of the State's evidence, based on the theory that the assaulted officer was not a government officer at the time of the incident since he was outside the jurisdiction of the Red Springs Police Department.