

COUNSEL

Court Rules That State Trial Court on Post-Conviction Review Incorrectly Applied Prejudice Standard Under *Strickland v. Washington* Concerning Ineffective Assistance of Counsel

Sears v. Upton, <http://www.supremecourt.gov/opinions/09pdf/09-8854.pdf>.

The defendant was convicted in a state court of a capital offense and sentenced to death. On post-conviction review of the death penalty proceeding, the state trial court determined that the performance of defendant's counsel in presenting mitigating evidence had been constitutionally inadequate under *Strickland v. Washington*, 466 U.S. 668 (1984), but the defendant had not been prejudiced to require a new death penalty proceeding. The Court ruled that the state court had incorrectly applied the prejudice standard to the facts in this case (see the Court's opinion for its analysis of the facts and law). The Court reversed the judgment denying post-conviction relief to the defendant and remanded the case to state court for a new determination whether the defendant had been prejudiced.

(1) State Appellate Court's Upholding Capital Sentencing Hearing's Mitigation Jury Instructions and Forms Was Not Contrary to, Or Unreasonable Application of, Clearly Established Federal Law

(2) State Appellate Court's Rejection of Defendant's Ineffective Assistance of Counsel Claim Was Not Contrary to, Or Unreasonable Application of, Clearly Established Federal Law

Smith v. Spisak, 130 S. Ct. 676, ___ L. Ed. 2d ___ (12 January 2010).

The defendant was convicted in a state court of three murders and sentenced to death. He filed a habeas corpus petition in federal court alleging that constitutional errors occurred at his trial. The Court ruled: (1) the state appellate court's upholding of the capital sentencing hearing's mitigation jury instructions and forms [see *Mills v. Maryland*, 486 U.S. 367 (1988)] was not contrary to, or an unreasonable application of, clearly established federal law; and (2) the state appellate court's rejection of defendant's ineffective assistance of counsel claim concerning defense counsel's jury argument was not contrary to, or an unreasonable application of, clearly established federal law; the Court alternatively ruled that even if the deferential standard of review under 28 U.S.C. § 2254(d)(1) was inapplicable, it would reject the defendant's claim.

Defendant's Willful Obstruction and Delay of Court Proceedings By Refusal to Cooperate With His Court Appointed Attorneys and Insisting His Case Would Not be Tried Forfeited His Right To Counsel

State v. Boyd, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 15, 2009). Holding that the defendant willfully obstructed and delayed court proceedings by refusing to cooperate with his appointed attorneys and insisting that his case would not be

tried; he thus forfeited his right to counsel. The defendant's lack of cooperation lead to the withdrawal of both of his court-appointed attorneys. His original appointed counsel was allowed to withdraw over disagreements with the defendant including counsel's refusal to file a motion for recusal of the trial judge on grounds that various judges were in collusion to fix the trial. In his first motion to withdraw, the defendant's next lawyer stated that the defendant did not want him as counsel and that he could not effectively communicate with the defendant. In his second motion to withdraw, counsel stated that the defendant had been "totally uncooperative" such that counsel "was unable to prepare any type of defense to the charges." Further, the defendant repeatedly told counsel that his case was not going to be tried.

(2) No Ineffective Assistance of Counsel When Defense Counsel Failed to Give Notice to State of Defenses of Voluntary Intoxication and Diminished Capacity

State v. McDonald, ___ N.C. App. ___, 663 S.E.2d 462 (5 August 2008). The defendant was convicted of attempted first-degree murder and a felonious assault. On the first day of trial, the state moved for an order precluding the defendant from asserting any of the defenses covered by G.S. 15A-905(c) because the defendant had not responded to the state's reciprocal motions for discovery and notice of defenses. The trial judge ruled that the defendant would be permitted to assert the defenses of accident and duress, but was barred from asserting any other defenses. The defendant had informed the judge that he also wanted to assert the defenses of voluntary intoxication and diminished capacity, but was barred from doing so by the judge's ruling. (2) The court ruled that there was no ineffective assistance of counsel when defense counsel failed to give notice to the state of the defenses of voluntary intoxication and diminished capacity. Reviewing the evidence in this case, the court concluded that the defendant cannot show that there was a reasonable probability that the outcome of the trial would have been different.

Trial Judge Erred by Allowing Defendant to Represent Himself at Trial for Speeding in Excess of 15 M.P.H. (Class 2 Misdemeanor) Without Complying With G.S. 15A-1242

State v. Taylor, 187 N.C. App. 291, 652 S.E.2d 741 (20 November 2007). The defendant was convicted of two charges of speeding in excess of 15 m.p.h. and appealed to superior court for trial de novo. The court ruled that the superior court trial judge erred by allowing the defendant to represent himself at trial without fully complying with G.S. 15A-1242 (defendant's waiver of right to counsel). Although the trial judge properly informed the defendant of a maximum 60-day imprisonment for a Class 2 misdemeanor, the judge failed to properly inform the defendant that he was also subject to a maximum \$1,000.00 fine for each charge. The court noted that under G.S. 7A-451(a)(1) an indigent defendant is entitled to

appointment of counsel for any case in which imprisonment or a fine of \$500.00 or more is likely to be adjudged. Because the sentencing options in this case were limited to community service and a fine, the possibility of such a fine was likely in this case, especially given that total maximum possible fine was \$2,000.00 for the two charges. The defendant would have been entitled to appointment of counsel if it had been determined that he was indigent.

(1) Defendant Did Not Make Clear Request for Counsel During Custodial Interrogation to Require Officer to Stop Interrogation

State v. Shelly, 181 N.C. App. 196, 638 S.E.2d 516 (2 January 2007).

The defendant was convicted of first-degree murder. (1) During custodial interrogation the defendant asked general questions about when he would get a lawyer and the officer truthfully told him that unless he had a personal lawyer that one would be appointed when he went to court. (See additional facts discussed in the court's opinion.) The court noted the informative nature of the conversation: the defendant asked questions and received answers from the officer in an effort to understand his rights and the interview process before choosing to invoke or forego his right to counsel. The court ruled, distinguishing *State v. Torres, 330 N.C. 517, 412 S.E.2d 20 (1992)*, and *State v. Steptoe, 296 N.C. 711, 252 S.E.2d 707 (1979)*, that the defendant did not make a clear request for counsel to require the officer to stop the interrogation.

Constitutional Law-Right to counsel--Conflict of interest--Representation of potential witness

State v Ballard 180 NCA 637 (2006)

The **trial court erred** in a double first-degree murder, double robbery with a deadly weapon, and conspiracy to commit robbery with a deadly weapon case by denying defense counsel's motion to withdraw based on his ongoing representation of a potential witness who had alleged exculpatory information although he could not be called based on the fact the witness's testimony could implicate him in unrelated criminal offenses, and defendant is entitled to a new trial, because: (1) the trial court never took control of the situation or fully advised defendant of the facts underlying the potential conflict as evidenced by defendant's continuing statements that he wanted both to keep his counsel and have the witness testify, a situation made impossible by the conflict; and (2) it cannot be concluded that defendant waived his right to conflict-free representation knowingly, intelligently, and voluntarily when the trial court failed to properly question and advise defendant on these matters.

Constitutional Law--Right to Counsel--Conflicts of Interest

State v Mims 180 NCA 403 (2006)

The trial **court erred** in a trafficking in heroin by possession and possession of drug paraphernalia case **by failing to conduct a hearing regarding defense counsel's potential conflict** of interest where defendant claimed possession of the heroin and the paraphernalia to protect the father of her child who was represented by defense counsel's boss, because: (1) the right to counsel under the United States and North Carolina Constitutions includes a right to representation that is free from conflicts of interest; (2) when a trial court is made aware of a possible conflict of interest, the trial court must take control of the situation and should conduct a hearing to determine whether there exists such a conflict of interest that defendant will be prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the Sixth Amendment; (3) the failure to hold such a hearing in and of itself constitutes reversible error; (4) defendant did not waive her right to conflict-free counsel; and (5) it cannot be determined from the face of the record whether an actual conflict of interest adversely affected defense counsel's performance, and an evidentiary hearing must be conducted by the trial court on remand.

Constitutional Law Effective Assistance of Counsel Issue Not Raised on Appeal

State v. Simpson 176 NCA 719 (2006).

Defendant received effective assistance of appellate counsel even though his counsel did not challenge his sentence for error under *Apprendi v. New Jersey*, 530 U.S. 466 and *Ring v. Arizona*, 536 U.S. 584 because, at the time, the prevailing law in North Carolina and many jurisdictions was that there was no applicability to noncapital cases. Moreover, a criminal defendant has no right to counsel past the initial appeal; defendant's argument that counsel should have pursued the case through the state and federal Supreme Courts is without merit.

Evidence and Witnesses § 1233 (NCI4th) -- Statements to Cellmate -- Cellmate not State Agent -- No Sixth Amendment Violation

State v Taylor 332 NC 372 (1992)

The trial court did not err in concluding that defendant's cellmate was not an agent of the State and that incriminating statements made by defendant to his cellmate were not obtained in violation of defendant's Sixth Amendment right to counsel where no evidence was presented that the cellmate was deliberately placed in the cell with defendant in order

to obtain information from him; the cellmate approached the police first; the police had made no previous agreement with the cellmate to obtain information, and the cellmate received no payment or promise for supplying information; the police told the cellmate that they could make no deals in exchange for information and that the cellmate was not an agent of the State; and the cellmate's testimony during the hearing on the motion to suppress tended to show that defendant voluntarily made all the statements to the cellmate.

Constitutional Law § 353 (NCI4th); Evidence and Witnesses § 1233 (NCI4th) -- Statements to Cellmate --Cellmate not State Agent -- No Interrogation -- No Fifth Amendment Violation

State v Taylor 332 NC 372 (1992)

Defendant's right against self-incrimination under the Fifth Amendment was neither implicated nor violated by the admission of defendant's statements to a cellmate where (1) the cellmate was not an agent of the State and (2) defendant initiated the conversations with the cellmate and no interrogation occurred.

Constitutional Law--Right to Remain Silent--Miranda Protections Not Applicable When Questioned by Neither an Officer nor Someone Acting as an Agent

State v Pittman, 174 NCA 745 (2005)

The trial court did not commit plain error in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by **allowing the child's mother to testify regarding defendant's failure to respond to questions she asked him in letters concerning why he kidnapped their daughter**, because: (1) the mother's testimony did not reference any silence of defendant in response to questioning by law enforcement, and Miranda's protections apply only when a defendant is subject to custodial interrogation; (2) the mother's questions were posed by her and the record contains no indication that she was acting at the behest of law enforcement; and (3) **even if Miranda were applicable, defendant chose not to remain silent when he voluntarily wrote back to the mother.**

Constitutional Law--Right to Counsel-Waiver of Counsel--Pro Se Representation

State v Hoover, 174 NCA 596 (2005)

The trial court did not err in a first-degree statutory rape case by permitting defendant to waive his right to counsel and allowing him to proceed pro se, because: (1) the trial court fully complied with N.C.G.S. § 15A-1242 before allowing defendant to waive his right to counsel; and (2)

the court's findings of fact support its decision to permit defendant to waive his right to counsel and proceed pro se.

Constitutional Law--Effective Assistance of Counsel--Failure to Move for Motion to Suppress Inculpatory Statement and Evidence

State v Dent, 174 NCA 459 (2005)

Defendant did not receive ineffective assistance of counsel in a possession of a controlled substance on the premises of a local confinement facility case based on his counsel's failure to move to suppress his inculpatory statement to law enforcement officers as well as the evidence seized during the search of his person, because: (1) there was no meritorious basis to support suppression of defendant's statements or the marijuana found on his person; (2) **the officers' comments qualify as those normally attendant to arrest and custody, and are thus not considered as questions or interrogation for purposes of Miranda;** and (3) defendant is unable to demonstrate a reasonable probability that but for his counsel's failure to move to suppress the evidence, the result of the proceeding would have been different.

Constitutional Law--Ineffective Assistance of Counsel--Retrial on Procedural Error--Failure to Raise Double Jeopardy at Trial--No Error

State v Mason, 174 NCA 206 (2005)

A claim for ineffective assistance of counsel based on trial counsel's failure to argue that defendant's retrial was double jeopardy lacked merit because defendant could not show a reasonable probability that the indictment would have been dismissed had the motion been argued. Defendant may not be retried if the reversal was based upon the sufficiency of the evidence; **here, the defect was procedural.**

Confessions and Incriminating Statements--Custodial Interrogation--No Unequivocal Invocation of Right to Silence

State v. Forte, 360 NC 427 (2006)

Defendant did not unequivocally invoke his right to silence during custodial interrogation, and his written statement was properly admitted in his capital trial, where defendant unexpectedly answered "no" when asked if he wanted to answer any more questions at that time, an officer asked defendant what he meant, defendant responded that he was tired and would answer more questions after he had a chance to sleep, and after sleeping for several hours, defendant affirmed his willingness to continue and reviewed and signed the written statement. Under these circumstances, **defendant's "no" was ambiguous and the**

officer did not violate defendant's constitutional rights by asking for amplification.

The Court ruled that the erroneous deprivation of the defendant's counsel of choice is structural error requiring the automatic reversal of the defendant's conviction.

United States v. Gonzalez-Lopez, (26 June 2006). US Sup Ct

Constitutional Law-Effective Assistance of Appellate Counsel_Portions of Trial not Recorded

State v Verrier, 173 NCA 123 (2005)

It is beyond the function of the Court of Appeals to modify statutory law concerning recordation of all trial proceedings, and defendant's assignment of error concerning effective assistance of appellate counsel where trial counsel did not move for recordation was overruled. N.C.G.S. § 15A-1241(a) and (b).

Constitutional Law-Effective Assistance of Counsel-Statements and Arguments

State v. al-Bayyinah 359 NC 740 (2005)

Defendant did not receive ineffective assistance of counsel in a capital sentencing proceeding where he argued that his counsel conceded prior crimes without his consent, made inappropriate statements, and did not adequately test the State's case. Defense counsel made the tactical decision to try to lessen the impact of defendant's prior convictions and gain credibility by discussing the convictions openly; he attempted to have the jury understand his role as advocate; and he attempted to appeal to the jury's empathy for a living being.

Constitutional Law-Right to Counsel-Gunshot Residue Test

State v. Page 169 NCA 127 (2005)

While it was **error to fail to advise defendant of his right to have counsel present during a gunshot residue test**, the error was not prejudicial because defendant did not assign error to the admission of statements made during the test. **The physical evidence would have been seized even if counsel had been present.**

Constitutional Law--Right to Counsel--Indigent Defendant--Retained Counsel--Court Appointment of Assistant Counsel

State v. Davis 168 NCA 321 (2005)

The trial **court erred** in a first-degree murder case by **failing to appoint assistant counsel to defendant's privately retained counsel** under N.C.G.S. § 7A-450(b1) where defendant was otherwise indigent and the **State was seeking the death penalty**, because: (1) our Supreme Court has already assumed that when a defendant has retained one counsel in a capital case, he still may be entitled to an appointed assistant counsel if he is otherwise indigent; (2) N.C.G.S. § 7A-450 provides that retaining counsel does not itself remove a defendant's indigent status where necessary expenses cannot be met; and (3) assistant counsel which cannot be retained falls within a necessary expense of a capital defense which the State must provide or defendant must waive.

Constitutional Law--Effective Assistance of Counsel--Alleged Concession of Guilt

State v. Alvarez 168 NCA 487 (2005)

Defendant was not denied effective assistance of counsel in a double first-degree murder, first-degree kidnapping, and robbery with a firearm case based on his counsel allegedly conceding defendant's guilt twice during the closing argument to the jury, because: (1) taken in context with counsel's closing argument that all events arose in a drug deal gone bad, the concession that defendant was the getaway driver related to an intended drug deal, not a murder, and was the crux of defendant's argument throughout trial; (2) the other pertinent comment that if the jury found defendant not guilty of going to the victim's residence to commit an armed robbery, "you will find him guilty of everything else or not guilty of everything else" merely spoke to the charges involved and the resulting practical implications rather than being a reference to or indication of defendant being guilty of the crimes charged; (3) neither attorney conceded defendant's guilt to the crimes charged or to any lesser-included offense; and (4) defendant failed to show that his counsels' performance was so deficient that they were not acting as counsel for defendant and that the deficiencies complained of deprived defendant of a fair trial.

Constitutional Law--Effective Assistance of Counsel--Strategic Decision After Sufficient Investigation

State v. Frogge 359 NC 228 (2005)

The trial **court erred** in a first-degree murder case by determining that **defendant did not receive effective assistance of counsel at his second capital sentencing proceeding** based on the fact that defense counsel decided not to pursue evidence of defendant's organic brain damage through neurological testing but instead pursued a defense predicated on other grounds, and defendant's **death sentence is reinstated**, because: (1) defense counsel cannot be said to have acquired only rudimentary knowledge of defendant's history from a narrow set of sources

when defense counsel interviewed defendant and his siblings and obtained defendant's school records, hospital records, correctional systems records, and psychological reports; (2) defense counsel had the benefit of watching the first trial unfold and seeing what worked and what did not, specifically noting that a defense which took defendant's head injury into account had been unsuccessful; and (3) defense counsel fully investigated defendant's social and medical history and provided that information to two experts, neither expert indicated to counsel a necessity for neurological testing, and counsel reasonably relied on their experts as they made the difficult but necessary choices as to which theory of defense to pursue.

Constitutional Law--Effective Assistance of Counsel--Failure to Present Diminished Capacity Defense—Trial Strategy

State v. Poindexter 359 NC 287 (2005)

Although the trial court properly vacated defendant's death sentence and ordered a new capital sentencing hearing based on ineffective assistance of defendant's trial counsel during his 2002 sentencing proceeding for first degree murder, **defendant did not receive ineffective assistance of counsel based on his attorneys' failure to present a diminished capacity defense during the guilt-innocence phase of defendant's 2002 capital trial, because:** (1) diminished capacity is a means of negating the ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation and as such is inconsistent with defendant's claim of innocence; and (2) although defense counsel pursued a defense of insanity, rather than insanity and diminished capacity, decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by our Supreme Court.

Constitutional Law--Effective Assistance of Counsel--Failure to Record Jury Selection

State v. Moore 167 NCA 495 (2004)

A defendant did not receive ineffective assistance of counsel where his counsel did not record jury selection, which precluded appeal of a Batson issue. **The case does not fall into the limited circumstances where prejudicial error may be assumed,** and satisfactory, race-neutral reasons were presented for the peremptory challenges.

Constitutional Law--Per Se Ineffective Assistance of Counsel--Concession of Lesser-Included Offenses

State v. Randle 167 NCA 547 (2004)

Defendant did not receive per se ineffective assistance of counsel in a first-degree rape and first-degree sexual offense case based on his

counsel's closing argument that allegedly conceded defendant's guilt to lesser included offenses without first obtaining defendant's consent, because: (1) counsel in the instant case never actually admitted the guilt of defendant to any charge, nor did counsel claim that defendant should be found guilty of some offense; (2) defense counsel advocated for defendant's innocence by arguing that there was no penetration of the victim; (3) defense counsel argued that there was reasonable doubt since there are factors that need to be considered in either of the rape charges as to whether penetration actually occurred; (4) defense counsel argued that defendant should not be charged with first-degree rape or first-degree sexual offense since there was no serious injury to the victim; and (5) the trial court asked defendant numerous times whether he consented to defense counsel admitting guilt to any offense, including lesser-included offenses, and defendant stated he did not authorize it but stated he did not desire a mistrial.

Law Enforcement Officers Deliberately Elicited Statements from Defendant in Violation of His Sixth Amendment Right to Counsel

Fellers v. United States January 26, 2004

A grand jury indicted the defendant for conspiracy to distribute methamphetamine. Law enforcement officers went to the defendant's home to arrest him. They knocked on the door, the defendant answered the door, and they identified themselves and asked if they could come in. The defendant invited them in. The officers advised him that they wanted to discuss his involvement in methamphetamine distribution. They informed him that they had a federal warrant for his arrest and that a grand jury had indicted him for conspiracy to distribute methamphetamine. They then told him that the indictment referred to his involvement with certain people, four of whom they named. The defendant then told the officers that he knew the four people and had used methamphetamine during his association with them. After spending 15 minutes in the defendant's home, the officers took the defendant to a county jail. There they advised the defendant for the first time of his Miranda rights. He waived those rights and reiterated the incriminating statements that he had made in his home. The Court ruled, relying on *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and other cases, that the officers deliberately elicited the statements that the defendant made in his home in violation of his Sixth Amendment right to counsel. The discussion at home occurred after the defendant had been indicted, outside the presence of counsel, and in the absence of any waiver of the defendant's Sixth Amendment rights. Responding to the argument that the defendant's statements were not the product of interrogation by the officers, the Court noted that standard of deliberating eliciting statements under the Sixth Amendment is different from the Fifth Amendment custodial interrogation. [Author's note: If the officers had advised the defendant of

his Miranda rights and had obtained a valid waiver of those rights at his home, then under *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), the statements likely would have been properly obtained. For a discussion of the distinction between Fifth and Sixth Amendment rights to counsel, the Sixth Amendment right to counsel, and waiver of the Sixth Amendment right to counsel, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, pp. 206-10 (3d. ed. 2003).] The Court remanded the case to the federal court of appeals to determine whether the defendant's statements at the county jail were admissible—that is, whether the rationale of *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), applies to the Sixth Amendment violation in this case. [Author's note: For a summary of *Elstad*, see Robert L. Farb, *Arrest, Search, and Investigation in North Carolina*, p. 466 (3d. ed. 2003).]

Defense Counsel's Strategic Decision to Concede to Jury, Without Defendant's Explicit Consent, Defendant's Guilt of First-Degree Murder at Guilt/Innocence Phase of Capital Trial and to Present Evidence and Argue for Life Imprisonment at Penalty Phase, Was Not Per Se Ineffective Assistance of Counsel

Florida v. Nixon, December 13, 2004

The Court ruled that a defense counsel's strategic decision to concede to the jury, without defendant's explicit consent, defendant's guilt of first-degree murder at the guilt/innocence phase of a capital trial and to present evidence and argue for life imprisonment at the penalty phase, was not per se ineffective assistance of counsel under the Sixth Amendment. Defense counsel had attempted to explain this proposed strategy to the defendant at least three times, but the defendant was generally unresponsive; he never verbally approved or protested the strategy. At trial, defense counsel conceded the defendant's guilt of first-degree murder during the opening statement, cross-examined some of the state's witnesses and objected to the introduction of some of the state's evidence, contested aspects of the jury instructions, and in closing argument conceded the defendant's guilt but reminded the jury of the importance of the penalty phase. At the penalty phase, the defense counsel presented eight witnesses, including two mental health experts, and argued for life imprisonment. The Court rejected a state appellate court's ruling that defense counsel's concession of guilt was per se ineffective assistance of counsel. The Court instead ruled that the issue of ineffective assistance of counsel must be judged under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court stated that a presumption of prejudice is not appropriate based solely on a defendant's failure to provide express consent to a tenable strategy that counsel has adequately disclosed to and discussed with the defendant. [Author's note: Compare the Court's ruling with the legal standard set out in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (there is ineffective assistance of counsel per se under the Sixth

Amendment when defendant's counsel admits the defendant's guilt to the jury without the defendant's consent).]

Evidence–Attorney-Client Privilege–Information Regarding Third Party

In re Investigation of Death of Eric Miller 358 NC 364 (2004)

The trial court correctly ordered that some of the statements made by a now-deceased client to an attorney be revealed where those statements concerned a third party, did not implicate the client, and were not privileged. The information was provided to the trial court in a sealed affidavit, which the court reviewed under the mandate of a prior Supreme Court opinion. Portions of the trial court's order were modified: the use of "interest of justice" language was unnecessary and contrary to the prior opinion, the trial court did not need to determine the harm to this client in this case, and any dispute over whether the attorney may be interviewed is to be determined by the trial court, with the cautionary note that this is a very narrow exception to the attorney-client privilege.

Indigent Defendants--Capital Trial--Right to Two Counsel

State v. Tirado 358 NC 551 (2004)

An indigent defendant's statutory right to the assistance of two attorneys was not violated when one of his attorneys was absent during a portion of his codefendant's sentencing hearing, because: (1) N.C.G.S. § 7A-450(b1) does not require, either expressly or impliedly, that both of a capital defendant's attorneys be present at all times for all matters; (2) the trial court properly complied with the statute by appointing two counsel to represent defendant months before the trial began; and (3) defendant consented to his counsel's absence for a previously scheduled vacation when the other attorney remained.

Effective assistance of counsel--conflict of interest--prior representation of State's witness

State v. Smith 163 NCA 771 (2004)

The trial court did not err by not removing a defendant's counsel for a conflict of interest where defense counsel had represented a State's witness in an unrelated civil case. Defendant did not point to any instance in which counsel was less than diligent in cross-examining the witness.

Constitutional Law--Right to Counsel--Separate Charges

State v. Strobel 164 NCA 310 (2004)

It was permissible for the police to question defendant about a robbery charge outside the presence of the attorney who had been appointed to represent her in the conspiracy to commit robbery charge, because: (1) robbery and conspiracy to commit robbery are separate crimes; and (2) defendant's Sixth Amendment right to counsel had not attached to the robbery with a dangerous weapon charge.

Indigent Defendants--Waiving Appointed Counsel--Proceeding Pro Se--Necessary Inquiry

State v. Cox 164 NCA 399 (2004)

A defendant's cocaine convictions were reversed where he clearly and unequivocally said that he would represent himself, the trial court told him to execute a waiver, and the judge never proceeded with the statutorily required waiver. The inquiry described in N.C.G.S. § 15A-1242 is mandatory in every case where the defendant requests to proceed pro se.

Attorneys--Substitution of Counsel--Medical Condition--Effective Assistance of Counsel

State v. Morgan 359 NC 131 (2004)

The trial court did not err in a capital first-degree murder case by removing defendant's second chair counsel and substituting another attorney in her stead, because: (1) the trial court had reason to question the attorney's competency as an advocate at the time of defendant's trial based on her recent brain surgery and pending radiation therapy; and (2) realizing that the attorney's current medical condition could affect her ability to provide competent legal assistance and thereby interfere with defendant's constitutional right to effective assistance of counsel, the trial court justifiably and properly removed her.

Constitutional Law--Effective Assistance of Counsel--Concession of Guilt Without Defendant's Consent

State v. Matthews 358 NC 102 (2004)

A defendant in a capital first-degree murder case received ineffective assistance of counsel per se based on defense counsel's concession of defendant's guilt to second-degree murder during closing arguments of the guilt/innocence phase of the trial without defendant's consent, and the case is remanded for a new trial because: (1) Harbison, 315 N.C. 175 (1985), requires more than implicit consent based on an overall trial strategy and defendant's intelligence; (2) neither the trial court's order, the trial transcripts, nor the Harbison hearing transcripts indicate that defendant's counsel advised him they were going to concede his guilt to

second-degree murder; and (3) the record does not indicate defendant knew his attorney was going to concede his guilt to second-degree murder.

Constitutional Law--Effective Assistance of Counsel--Failure to Timely File Motion to Suppress Evidence

State v. Lemonds 160 NCA 172 (2003)

A defendant in a trafficking in marijuana by possession and trafficking in marijuana by manufacture case was not denied effective assistance of counsel based on defense counsel's failure to timely file a motion to suppress the evidence of growing marijuana seized from defendant's residence after the police conducted two thermal imaging scans of defendant's residence revealing a heat signature consistent with a marijuana-growing operation, because: (1) even without the results of the thermal imaging tests conducted on defendant's residence, there was sufficient information before the magistrate to support a finding of probable cause to believe defendant was growing marijuana; and (2) the thermal imaging was only a single nonessential component of an extensive investigation into defendant's activities, and therefore, it is unlikely that defendant's motion to suppress would have been granted had it been filed in a timely manner. **See Farb p. 23**

Constitutional Law--Indigent Defendants--Court-Appointed Counsel--Appointment Fee-Constitutionality

State v. Webb 358 NC 92 (2003)

The appointment fee required by N.C.G.S. § 7A-455.1 in order for an indigent defendant to obtain court appointed counsel regardless of the outcome of the criminal proceeding is a cost of prosecution that violates the language of Art. I, § 23 of the N.C. Constitution prohibiting the assessment of costs against acquitted defendants. However, the unconstitutional portions of the statute requiring payment of the fee "at the time of appointment" and "regardless of the outcome of the proceedings" and granting a credit to any defendant who pays the fee prior to the final determination of the action may be severed so that the rest of the statute remains enforceable and constitutionally permits the State to continue collecting the fee from indigent defendants after they have been convicted or pled guilty or nolo contendere.

Constitutional Law--Effective Assistance of Counsel--Failure to Move to Dismiss

State v. Pratt 161 NCA 161 (2003)

The failure to request dismissal of an armed robbery charge was not ineffective assistance of counsel where defendant was unable to show that the request would have brought a different result. There was sufficient

evidence to support a finding that defendant used a boxcutter, even though he denied it, and he admitted committing common law robbery. Although the victim testified that he did not feel that his life was threatened, that testimony merely rebuts the presumption that his life was threatened (which rose from the use of a dangerous weapon) and leaves the dangerous character of the weapon to the jury. **See Farb p. 13 Armed Robbery**

Defense Counsel Provided Ineffective Assistance Under Sixth Amendment When Representing Defendant at Capital Sentencing Hearing

Wiggins v. Smith (26 June 2003).

The Court ruled that the defendant's two defense counsel provided ineffective assistance under the Sixth Amendment when representing the defendant at his capital sentencing hearing **when they decided not to expand their investigation of the defendant's life history for mitigating evidence.** (See the Court's detailed discussion and analysis of the facts in this case.)

Effective Assistance of Counsel--Expert Opinion on Defendant's Mental State

State v. McClary 157 NCA 70 (2003)

The trial court did not commit plain error in a first-degree murder case by allowing the chief of forensic psychiatry at Dorothea Dix Hospital (chief) to give his opinion as to defendant's mental state at the time of the shooting and defendant's sixth amendment right to effective assistance of counsel was not violated, because: (1) defendant placed his mental condition at issue first by moving to continue the trial due to his psychiatric illness, and then by asserting the defense of diminished capacity and his inability to formulate the intent to kill; and (2) although the chief evaluated defendant by court order for the purpose of determining his capacity to proceed, his personal observations taken together with the other materials considered provided an adequate basis for his opinion that defendant was capable of forming the requisite intent to kill at the time of the shooting.

Constitutional Law--Right to Counsel--Waiver

State v. King 158 NCA 60 (2003)

A pro se defendant who had been represented by six attorneys voluntarily waived his right to counsel and elected to proceed pro se where he clearly and unequivocally expressed his desire to proceed pro se to one judge in response to questions posed in accordance with N.C.G.S. § 15A-1242, stated a week later to a different judge that he had misunderstood the first

judge, and said under oath that he nonetheless wanted to waive appointed counsel and would represent himself if he did not hire a lawyer.

Constitutional Law--Effective Assistance of Counsel--Concession of Guilt--Harbison Waiver--Not Conditional--Insanity Plea Not Pursued--Concession Still Valid

State v. Berry 356 NC 490 (2002)

The trial court in a capital first-degree murder prosecution was justified in assuming that a Harbison waiver remained valid throughout the trial where the waiver was given in anticipation of an insanity plea, defendant's opening argument admitted possible participation but argued insanity, and the insanity plea was not pursued after the prosecution revealed new evidence during the trial. Defendant did not expressly or impliedly condition his consent to acknowledge guilt upon presentation of an insanity defense and never formally withdrew his plea.

Constitutional Law--Right to Counsel--Disqualification of Retained Counsel--Conflict of Interest

State v. Taylor 155 NCA 251 (2002)

The trial court did not violate defendant's Sixth Amendment right to counsel in a second-degree murder case by disqualifying defendant's retained counsel based on a conflict of interest, because: (1) defendant's retained counsel was previously retained by the victim as her attorney for a domestic action against her husband; (2) defendant's retained counsel gave notice of his intent to use a power of attorney, prepared by the attorney giving defendant power of attorney over the victim's interests while the attorney was counsel of record for the victim in a domestic case, for the benefit of defendant; (3) the attorney's representation of defendant would inescapably be adverse to the victim within the meaning of Revised Rule of Professional Conduct 1.7 since defendant was on trial for the victim's murder and the attorney, in defense of defendant for that murder, could be called upon to impeach statements made by the victim during his dual representation; (4) although the attorney was representing defendant in a matter unrelated to his representation of the victim, the attorney had a duty of loyalty and care to the victim which could have been compromised by this dual representation; (5) the attorney was privy to some information regarding the victim's personal life and habits and her state of mind after having represented her for some fifteen months in her divorce proceedings, and this information would be helpful in defending the person accused of her murder; (6) although the attorney was not actually called as a witness to testify, the possibility certainly existed and would have violated Revised Rule of Professional Conduct 3.7; and (7) defendant was not prejudiced when his newly appointed attorney had five months to prepare for trial.

Constitutional Law–Right to Counsel–Sixth Amendment–Adversary Proceedings Not Begun

State v. Lippard 152 NCA 564 (2002)

A murder defendant's Sixth Amendment right to counsel was not violated where he was interviewed in New Orleans by North Carolina detectives without his attorney present even though his attorney had asked that defendant not be interviewed. Defendant had been arrested but not indicted and his Sixth Amendment right to counsel had not attached. Moreover, defendant had knowingly waived his rights; the State's provision of constitutionally sufficient information will not be defeated because a defendant does not fully appreciate the ramifications.

Constitutional Law--Effective Assistance of Counsel--Attempt to Fire Court-Appointed Attorney

State v. Gant 153 NCA 136 (2002)

The trial court did not err in a forgery and uttering case by ordering defendant to proceed with trial immediately either with his court-appointed attorney, who defendant wanted to discharge, or pro se because: (1) one of the letters defendant offered as an exhibit signified that he attempted to fire his appointed counsel on 14 March 2001 and defendant offered no evidence on the date of his motion on 30 April 2001 that he had made any arrangements to obtain private counsel after writing the letter; and (2) the court's interest in the speedy disposition of defendant's criminal charges was paramount since defendant failed to timely act on his right to obtain private counsel.

Court Extends Sixth Amendment Right to Counsel to a Misdemeanor When the Punishment Includes a Suspended Sentence

Alabama v. Shelton (20 May 2002)

Before discussing the ruling in this case, the following prior Court rulings are summarized: A defendant has a Sixth Amendment right to counsel for a misdemeanor trial in which actual imprisonment is imposed, but not when a fine is the only punishment. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979). A defendant has a Sixth Amendment right to counsel for all felony trials, regardless of the punishment imposed on conviction. See the discussion in *Alabama v. Shelton* of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and later cases. The Court ruled in *Alabama v. Shelton* that a defendant has a Sixth Amendment right to counsel at a misdemeanor trial in which the sentence on conviction includes a suspended sentence. Thus, a judge may not impose a suspended sentence after a trial without counsel for a misdemeanor unless (1) an indigent defendant has waived his or her right to the assistance of counsel and the right to appointed counsel, or (2) a

non-indigent defendant has waived the right to the assistance of counsel. Effect of ruling. For all misdemeanor convictions, including traffic misdemeanors such as speeding over 15 miles over the speed limit, a judge may not constitutionally impose a suspended sentence unless the defendant had counsel or properly waived counsel. A judge does not violate a defendant's Sixth Amendment right to counsel if the judge orders a fine, costs, or restitution without counsel or waiver of counsel-as long as a suspended sentence is not imposed. Of course, a defendant who currently has a suspended sentence obtained in violation of *Alabama v. Shelton* may not have that suspended sentence revoked and activated. See also *State v. Neeley*, 307 N.C. 247 (1982).

This ruling may also affect: (1) prosecuting other offenses, such as **habitual misdemeanor assault and habitual impaired driving**, in which prior misdemeanor convictions are offered to prove an element of these offenses, (2) **impeaching a defendant at trial**, or (3) **sentencing the defendant**. If a conviction was obtained in violation of *Alabama v. Shelton*, then it will be inadmissible at trial or sentencing. A defendant must prove the invalidity of the conviction under the procedures set out in G.S. 15A-980. (Whether a conviction may be "saved" by excising the suspended sentence-as was done by the Alabama Supreme Court in *Alabama v. Shelton* on direct appeal of the conviction-is an issue for future litigation.)

Issues not decided in *Alabama v. Shelton*. The Court did not decide whether a defendant's Sixth Amendment right to counsel would be violated if a defendant was held in contempt of court and an active sentence imposed for failing to pay a fine, costs, or restitution for a misdemeanor conviction in which the defendant did not have counsel or waive counsel. The Court also did not decide whether its ruling is retroactive to invalidate prior misdemeanor convictions obtained in violation of the ruling.

Right to Counsel - Waiver - Motion to Suppress Prior Convictions

State v. Fulip, 355 N.C. 171 (2002)

The trial court did **not err** in a felony possession of stolen goods case by **denying defendant's motion to suppress prior convictions** under N.C.G.S. § 15A-980 used in finding defendant to be an habitual felon based on its conclusion that defendant waived his right to counsel for the 1993 Rockingham County conviction, because: (1) the findings of fact were sufficient to indicate that the trial court considered the necessary factors under N.C.G.S. § 7A-457 in determining whether defendant had knowingly, intelligently, and voluntarily waived his right to counsel including defendant's age, education, and mental state at the time he signed the waiver; (2) defendant's statements indicated that he knew that he was charged with two felonies and that the assistant district attorney was

offering to drop only one of those felonies in exchange for a plea to the other felony and probation, and defendant stated he did not need an attorney in order to avail himself of this offer; (3) defendant admitted knowing what his rights were and clearly and unequivocally expressed his desire not to have an attorney represent him; (4) the fact that defendant was seventeen years old with a ninth-grade education is not enough, absent other evidence, to conclude that defendant was unable to understand the nature and consequences of the proceedings against him or the decision that he made regarding waiver of counsel; and (5) defendant's signature on the waiver of counsel form combined with his testimony in which he stated multiple times that he did not wish to have an attorney represent him, and the fact that defendant signed a transcript of plea in 1993 acknowledging that he understood his rights, the charges against him, and that he was pleading guilty to a felony, provides added evidence that defendant knowingly, intelligently, and voluntarily waived counsel.

Sixth Amendment Right to Counsel–Questioning–Adversarial Proceeding not Instituted

State v. Hyatt 355 NC 642 (2002)

A first-degree murder defendant's Sixth Amendment right to counsel had not attached at the time of questioning where adversarial proceedings in the form of a formal charge, preliminary hearing, indictment, information, or arraignment had not been instituted against him.

Fifth Amendment Right to Counsel–Insufficient Request

State v. Hyatt 355 NC 642 (2002)

A capital first-degree murder defendant did not invoke his Fifth Amendment right to counsel where defendant allegedly asked his father at the father's residence to get him an attorney but the two officers present testified that they did not hear defendant request an attorney; defendant's request while in the interrogation room to speak to his father did not invoke his Fifth Amendment right to counsel because his father was not in a position to offer him the legal assistance necessary to protect his rights; defendant's statement during interrogation that his father wanted him to have an attorney did not constitute an unambiguous request for counsel; and defendant's willingness to speak to officers unassisted by counsel after his rights were read to him, printed out for his review, and explained to him after his ambiguous utterances regarding his father's wishes constituted a waiver.

Right to Counsel–Waiver–Defendant Not Aware of Counsel's Presence in Police Station

State v. Hyatt 355 NC 642 (2002)

A capital first-degree murder suspect knowingly waived his right to counsel even though he was kept unaware that an attorney retained for him by his father was outside the interrogation room and the State did not interfere with defendant's right to counsel by denying the lawyer's repeated requests for access to his client. The right to counsel is personal to defendant and an otherwise intelligent, knowing, and voluntary waiver is unaffected by a suspect's lack of knowledge about his or her attorney's wishes or efforts.

Request to Dismiss Appointed Counsel—Mere Request Insufficient

State v. Hyatt 355 NC 642 (2002)

The trial court did not err in a prosecution for first-degree murder and other crimes by denying defendant's motion to substitute appointed counsel with retained counsel 6 days into the trial where defendant argued that filing the motion is itself an adequate indicator of serious problems in the attorney-client relationship. However, the denial of such a motion has been upheld where no justifiable basis was offered for the replacement and where doing so would obstruct the orderly procedure of trial.

Confessions and Incriminating Statements--Motion to Suppress--Sixth Amendment Right to Counsel

State v. Stokes 150 NCA 211 (2002)

The trial court did not violate defendant's Sixth Amendment right to counsel in a first-degree felony murder and felonious child abuse case by denying defendant's motion to suppress a purported confession made by defendant to an officer who was walking by the cell block where defendant was being held and who initiated the conversation with defendant even though a first-degree murder warrant had been secured and served on defendant, and defendant had been arrested and had appeared before a magistrate, because: (1) an arrest warrant for first-degree murder in North Carolina is not a formal charge such that the Sixth Amendment right to counsel is invoked; (2) a defendant's Sixth Amendment right to counsel does not attach either at the issuance of the warrant or at the time of his arrest upon the warrant; and (3) a defendant's appearance before a magistrate does not trigger his Sixth Amendment right to counsel since no adversary judicial proceedings have commenced at that point.

Confessions and Incriminating Statements--Motion to Suppress--Fifth Amendment Right to be Free from Self-Incrimination

State v. Stokes 150 NCA 211 (2002)

The trial court violated defendant's Fifth Amendment right to be free from self-incrimination in a first degree felony murder and felonious child abuse case by denying defendant's motion to suppress a purported

confession made by defendant to an officer who was walking by the cell block where defendant was being held and who initiated the conversation with defendant, and defendant is entitled to a new trial because: (1) defendant was in custody at the time the statement to the officer was made; (2) defendant was being interrogated by the officer since the officer's question of "how?" is the type of question that necessarily invites a response, and the officer's question was designed for the purpose of eliciting a response he knew or should have known was reasonably likely to be incriminating; (3) defendant's meeting with his counsel, as well as his arrest and the passage of nineteen hours, diluted the first and only Miranda warning given to defendant; and (4) the State failed to meet its burden to show admission of defendant's statement to the officer was harmless beyond a reasonable doubt.

Effective Assistance of Counsel--Failure to Move to Suppress Evidence

State v. China 150 NCA 469 (2002)

A defendant did not receive ineffective assistance of counsel in a second-degree burglary case based on defense counsel's failure to move to suppress evidence obtained during a warrantless search of defendant's apartment, because: (1) the warrantless entry into defendant's residence did not violate defendant's Fourth Amendment rights since the officer could have reasonably believed that someone in the house was in need of immediate assistance based on the violent screaming emanating from inside the apartment as he approached the front door along with the two victims; and (2) once inside the apartment, the officer's seizure of the victim's jewelry in plain view was lawful.

Attorneys--Criminal Case--Motion to Withdraw Denied--Unlimited Written Notice of Representation

State v. Bailey 145 NCA 13 (2001)

The trial court did not err in a prosecution arising from the sexual abuse of a child by denying a motion to withdraw by defendant's attorney where the attorney had made a written notice of representation pursuant to N.C.G.S. § 15A-141 without indicating the limited extent of his representation. The attorney was thus obligated to represent defendant at all subsequent stages of the case. N.C.G.S. § 15A-141(1), (3).

Effective Assistance of Counsel--Defense Counsel's Statement that Murder was Especially Heinous, Atrocious, or Cruel--Tactical Decision

State v. Fletcher, 354 N.C. 455 (2001)

A defendant was not denied his Sixth Amendment right to effective assistance of counsel in a first-degree murder resentencing proceeding even though defense counsel made the statement during closing arguments

that the murder was especially heinous, atrocious, or cruel, because: (1) the decision to make this concession was agreed to by defendant and did not fall below the required objective standard of reasonableness; and (2) the evidence in the case leaves little doubt that this murder was especially heinous, atrocious, or cruel, and counsel could reasonably have decided upon a strategy of conceding this aggravating circumstance to gain credibility with the jury.

Ineffective Assistance of Counsel--Procedure for Raising

State v. Fair, 354 NC 131, 2001

Ineffective assistance of counsel (IAC) claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required. IAC claims prematurely asserted on direct appeals will be dismissed without prejudice to defendant's right to reassert them during a subsequent motion for appropriate relief (MAR) proceeding. When an IAC claim is raised on direct appeal, defendants are not required to file a separate MAR in the appellate court during the pendency of that appeal.

Capital Sentencing--Strategy--Defendant's Wishes

State v. Grooms, 353 N.C. 50 (2000)

The trial court did not err in a capital prosecution for first-degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence, because: (1) the Eighth and Fourteenth Amendments do not require a defendant to acquiesce in a trial strategy to present mitigating evidence where defendant and his counsel reach an absolute impasse; and (2) defendant was fully informed of and understood the potential consequences of his decision.

Effective Assistance of Counsel--Deferring to Defendant's Wishes not to Present Mitigating Evidence

State v. Grooms, 353 N.C. 50 (2000)

The trial court did not deny defendant his right to effective assistance of counsel in a capital prosecution for first degree murder by ordering defense counsel to defer to defendant's wishes not to present mitigating evidence, because: (1) defendant concedes in his brief that his counsel's performance was not deficient; and (2) defendant cannot show that the trial court's ruling prejudiced his defense when the trial court did not err in precluding defense counsel from presenting mitigating evidence.

Right to Counsel--Forfeiture--Pro Se Representation

State v. Montgomery, 138 N.C. App. 521 (2000)

The trial court did not violate defendant's constitutional right to counsel by holding that defendant forfeited his right to counsel and by requiring defendant to proceed pro se, because: (1) defendant was afforded ample opportunity over the course of fifteen months to obtain counsel; (2) defendant was twice appointed counsel as an indigent; (3) defendant twice released his appointed counsel and retained private counsel; (4) defendant became disruptive on two occasions in the courtroom over one of his private counsel's inability to secure additional continuances, resulting in the trial being delayed; (5) after being advised by the judge that the case would not be further continued and that his private counsel would not be permitted to withdraw, defendant refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay; and (6) defendant's purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts meant the trial court was not required to determine under N.C.G.S. § 15A-1242 that defendant had knowingly, understandingly, and voluntarily waived his right to counsel before requiring him to proceed pro se.

Right to Assistance of Counsel--Denial Based on Prior Waiver—Violation

State v. Sexton, 141 N.C. App. 344 (2000)

The trial court violated defendant's constitutional right to assistance of counsel in an action revoking defendant's probation and activating a ten-year prison sentence where defendant affirmatively requested the assistance of a public defender and the trial court was aware of defendant's desire for assistance but denied the request based on defendant's prior waiver, because: (1) defendant carried his burden of showing a change in his desire for assigned counsel; and (2) the record reflects his request was for good cause.

Right to Counsel--Forfeiture--Pro Se Representation

State v. Montgomery, 138 NC App 521 (2000)

The trial **court did not violate defendant's** constitutional right to counsel by holding that defendant forfeited his right to counsel and by requiring defendant to proceed pro se, because: (1) defendant was afforded ample opportunity over the course of fifteen months to obtain counsel; (2) defendant was twice appointed counsel as an indigent; (3) defendant twice released his appointed counsel and retained private counsel; (4) defendant became disruptive on two occasions in the courtroom over one of his

private counsel's inability to secure additional continuances, resulting in the trial being delayed; (5) after being advised by the judge that the case would not be further continued and that his private counsel would not be permitted to withdraw, defendant refused to cooperate with his counsel and assaulted him, resulting in an additional month's delay; and (6) defendant's purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts meant the trial court was not required to determine under N.C.G.S. § 15A-1242 that defendant had knowingly, understandingly, and voluntarily waived his right to counsel before requiring him to proceed pro se.

Effective Assistance of Counsel - Time for Preparation

State v. Rogers, 352 N.C. 119 (2000)

Defendant is entitled to a new trial because the trial court violated his rights to effective assistance of counsel when it denied defendant's repeated motions for a continuance under N.C.G.S. § 15A-952(g) in his capital sentencing proceeding since it is unreasonable to expect that any attorney could be adequately prepared in thirty-four days to conduct a bifurcated capital trial for this complex case involving incidents in multiple locations over a two-day period with numerous witnesses.

Right to Counsel--Incriminating Statements--Booking Exception

State v. Golphin 352 N.C. 364, 533 S.E.2d 168 (S. Ct. 2000)

The trial court did not violate one defendant's rights in a capital trial by denying his pretrial motion to suppress the incriminating statements he made to law enforcement officers after his arrest, based on the police continuing the custodial interrogation of defendant after he invoked his right to counsel, because: (1) a motion in limine was not sufficient to preserve this issue since defendant did not object when it was offered at trial; (2) defendant did not argue plain error in his brief, N.C. R. App. P. 10(c)(4); (3) the questions asked by the police were included in the booking exception for eliciting biographical information; (4) it is unreasonable to conclude the S.B.I. agent should have known his questions concerning biographical information were reasonably likely to elicit an incriminating response; and (5) defendant initiated the further discussion when he asked the agent and detective why they wanted to talk about the incident when it had been videotaped.

Right to Counsel--Incriminating Statements--No Standing

State v. Golphin 352 N.C. 364, 533 S.E.2d 168 (S. Ct. 2000)

The trial court did not violate defendant's rights in a capital trial by denying his codefendant's pretrial motion to suppress the incriminating statements the codefendant made to law enforcement officers after his

arrest because: (1) defendant has no standing to assert his codefendant's constitutional right to counsel; (2) defendant did not make a motion in limine to suppress his codefendant's statement, nor did he object at the time the statement was offered into evidence at trial, N.C. R. App. P. 10(b)(1); and (3) defendant did not argue plain error, N.C. R. App. P. 10(c)(4).

Right to Counsel--Pro Se Representation--Inadequate Inquiry

State v. Stanback 137 N.C. App. 583 (2000)

The trial court committed plain error by allowing defendant to proceed pro se in an armed robbery and kidnapping case because: (1) the trial court did not inquire as to whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments as required by N.C.G.S. § 15A-1242(3); and (2) neither the statutory responsibilities of standby counsel nor the actual participation of standby counsel is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.

Murder - Closing Argument - Evidence Closest to Proving Voluntary Manslaughter - Not Ineffective Assistance of Counsel

State v. Harvell, 334 N.C. 356 (1993)

Right to Counsel - Waiver of Sixth Amendment and N.C. Constitution Rights - Knowledge of Source not Required

State v. Palmer, 334 N.C. 104 (1993)

Custodial Interrogation - Invocation of Right to Counsel - Further Interrogation

State v. Pope, 333 N.C. 106 (1992)

When a defendant has invoked his Fifth Amendment right to counsel during custodial interrogation, an officer may not further interrogate the defendant about the crime for which defendant has been arrested or any other crime unless his attorney is present or the defendant himself initiates the interrogation.

Appointment of Counsel - Motion by Privately Retained Counsel to be Appointed - No Withdrawal

State v. Richardson, 342 N.C. 772

The trial court correctly ruled that defendant was not indigent and refused to change the status of defendant's privately retained counsel to appointed counsel in a prosecution for first-degree murder

Capital Murder Right to Counsel Attorney's Demand to be Present During Questioning

State v. Peterson, 344 N.C. 172 (1996)

A first-degree murder defendant's Fifth Amendment right to counsel was not invoked when his attorney demanded that he be present during any interrogation of the defendant and no finding of fact on this issue was necessary. A defendant's right to counsel is personal to him and he may waive this right even though his attorney has instructed the investigating officers not to talk to him. In light of the court's findings that support the conclusion that defendant's waiver of his rights was voluntarily, knowingly, and intelligently made, the statement would not have been inadmissible if the court had found that the attorney had advised officers not to talk to defendant.

Waiver of right to Counsel Misconduct no Loss of Right to Represent Self

State v. Cunningham, 344 N.C. 341 (1996)

Defendant waived his right to counsel when he adamantly refused to allow the public defender or anyone whose name was furnished by the public defender to represent him and stated that he would represent himself unless a specific member of the Michigan bar was appointed to represent him. Further, defendant did not lose the right to represent himself when his own outbursts caused him to be removed from the courtroom several times during the trial.

Closing Argument - Admission Defendant Guilty of Second-Degree Murder - Stipulation by Defendant - Consent to Admission - No Denial of Effective Assistance

State v. McNeill, 346 N.C. 233 (1997)

A defendant on trial for first-degree murder was not denied the effective assistance of counsel by his attorney's admission during closing argument that defendant was guilty of second-degree murder where defendant stipulated in writing that he stabbed the victim and proximately caused her death; the trial court found that defendant knowingly, voluntarily, and understandingly consented to the stipulation; and the stipulation conceded each of the elements of second-degree murder. **Where a defendant stipulates to the elements of an offense, defense counsel may infer defendant's consent to admit defendant's guilty of that offense.**

Waiver of Counsel - Failure to have Mental Evaluation of Defendant

State v. Rich, 346 N.C. 50 (1997)

The trial court did not err by allowing defendant to waive counsel and proceed pro se in a capital trial without having defendant evaluated by a mental health professional where there was nothing in the record tending to indicate that defendant was incompetent to waive his right to counsel or to proceed pro se; defendant was adamant and unequivocal about not wanting a mental health examination and insisted that he would not cooperate with a psychiatrist; and the trial court elicited the required information from defendant which was sufficient for the court to determine that defendant's decision was knowing and voluntary N.C.G.S. § 15A-1242.

Pro Se Defendant - Mental Capacity to Waive Counsel § Standby Counsel's Motion for Limited Appointment - Statutory and Constitutional Violation.

State v. Thomas, 346 N.C. 135 (1997)

The trial court erred by allowing the motion of standby counsel, filed over the pro se defendant's objection, to appoint standby counsel to represent defendant for the limited purpose of litigating his capacity to knowingly and intelligently waive his right to counsel and proceed pro se since the court's ruling allowing standby counsel to intervene and advocate a position over defendant's objection exceeded the authority granted by N.C.G.S. § 15A-1243, violated defendant's right to represent himself guaranteed by the Sixth Amendment to the U.S. Constitution and Art. I, § 23 of the N.C. Constitution, and violated the rule against a defendant proceeding both pro se and by counsel.

Jury Selection - Admission Defendant Holding Gun - Not Concession of Guilt - Not Ineffective Assistance of Counsel

State v. Strickland, 346 N.C. 443 (1997)

Defense counsel's statements during jury selection in a first-degree murder case that defendant was holding the gun that killed the victim at the time the victim was shot did not amount to a concession of guilt to which defendant had not agreed in violation of defendant's right to the effective assistance of counsel where the uncontroverted evidence showed that defendant was holding the gun when the victim was shot, and counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge.

Capital Murder - Request for Pro Se Defense - Mental Condition of

Defendant - Court's Inquiry

State v. LeGrande, 346 N.C. 718 (1997)

The trial court did not err in a capital first-degree murder prosecution by initially granting defendant's request to represent himself and later by not revoking his right of self-representation. When defendant first expressed his desire to represent himself, the trial court conducted the required inquiry and entered an order committing defendant for evaluation of his competency to proceed; the director of Forensic Psychiatry at Dorothea Dix Hospital found defendant competent to waive representation by an attorney and to proceed to trial; and the court found defendant competent to waive counsel, made the appropriate inquiry, and allowed defendant to sign a waiver of counsel. The trial court's findings show that defendant was able to respond to the court's inquiry in a manner that demonstrated that he understood the nature of the proceedings, comprehended the serious nature of his situation, and was prepared to proceed with his defense in a rational or reasonable manner. The trial court's inquiry was sufficient to determine that defendant's decision to proceed pro se was knowing and voluntary.

Capital Sentencing - Pro Se Defense - Comments by Defendant - Stand-by Counsel not Required to Assume Defense - No Error

State v. LeGrande, 346 N.C. 718 (1997)

The trial court did not err in a capital sentencing proceeding by not revoking defendant's right to represent himself and by not requiring standby counsel to assume the conduct of the defense where, during the sentencing testimony, defendant called the jurors the "antichrists"; declared that the jurors could "kiss his natural black ass in the window of Helig-Meyers"; that the jurors could pull the switch and let the good times roll"; and that defendant would meet them in hell where they would be required to worship him. As in *State v. Cunningham, 344 N.C. 341*, defendant was allowed to continue representing himself, as he wanted. *State v. Little, (15 June 1999)*. **The defendant asserted his right to counsel after his arrest.** A detective, who did not know of this assertion, approached the defendant and began to read Miranda rights to the defendant. Note: **Generally, a defendant's assertion of Miranda rights is imputed to all officers.** See *Arizona v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988)*. The defendant interrupted the detective and informed him that although he had told another officer that he wanted an attorney, he had changed his mind and now wanted to talk about the criminal charges. The detective properly gave Miranda warnings and obtained a waiver of rights, and then the defendant gave a statement to the detective. The court ruled, relying on *State v. Underwood, 84 N.C.*

App. 408, 352 S.E.2d 898 (1987) and other cases, that the **defendant reinitiated conversation with the detective after asserting his right to counsel.** Thus, the defendant's statement was admissible at trial.

Custodial Interrogation - Invocation of Right to Counsel -Subsequent Inculpatory Statements – Inadmissibility

State v. Jackson, 348 N.C. 52 (1998)

Defendant invoked his right to counsel during custodial interrogation when he stated, "I think I need a lawyer present," and an officer made a note that at "2:02 P.M. on 12-20-94, wants a lawyer present." Inculpatory statements made to officers after defendant invoked his right to counsel should have been excluded where defendant did not initiate the communication that led to his statements and his attorney was not present.

First-Degree Murder - Request for Counsel for Prior Offense - Sixth Amendment - Offense Specific

State v. Warren, 348 N.C. 80 (1998)

A first-degree murder defendant's Sixth Amendment right to counsel was not violated where he was arrested in High Point on a South Carolina warrant for first-degree murder, taken to Asheville and questioned about a murder there as well as murders in South Carolina and New York, and he first confessed to those murders, then confessed to the murder in High Point of Katherine Johnson which was the subject of this trial. Although defendant had been questioned about the disappearance of the Asheville victim, had requested counsel, and had been represented by counsel at a bond hearing for misdemeanor larceny of the Asheville victim's pocketbook and failure to produce title to a motor vehicle, the Sixth Amendment is offense-specific and had not attached to any of the homicides when defendant was arrested because no adversarial judicial proceedings had been instituted in the murder cases.

Right to Counsel - Pro Se Representation - Inadequate Inquiry

State v. Hyatt, 132 N.C. App. 697 (1999)

The trial court erred by allowing a criminal defendant to proceed pro se without insuring that all constitutional standards were met where the written waiver signed by defendant asserted that he was informed of the charges against him, the nature of the statutory punishment, and the nature of the proceedings against him, but the record discloses that the trial court failed to inform defendant of any of those things. The record discloses only that the court met its mandate of informing defendant that he had the right to appointed counsel; this falls well short of the requirements of N.C.G.S. § 15A-1242.

Right to Counsel - Presence at Court-Ordered Psychiatric Examination

State v. Morganherring, 350 N.C. 701 (1999)

The trial court did not err in a first-degree murder prosecution by denying defendant's request to have counsel present at a court-ordered psychiatric examination. Two psychiatrists and one psychologist examined defendant at his insistence; while the State raised the possibility of an examination by a State-selected psychiatrist, no court ordered psychiatric examination occurred because defendant abandoned the insanity defense.