

DEFENDANT

- (1) Defendant's Statements Were Not Inadmissible Under Rule 410**
- (2) Convictions Are Reversed Due to Absence of Acting-in-Concert Instruction**
- (3) Concurrent Habitual Felon Sentences for Convictions at Same Trial Are Authorized**
- (4) Sentence May Have Been Improperly Based on Defendant's Failure to Accept Pretrial Plea Offer**

State v. Haymond, ___ N.C. App. ___, ___ S.E.2d ___ (6 April 2010).

The defendant was convicted of multiple offenses involving break-ins, larcenies, and possession of stolen property concerning multiple victims. He received ten consecutive habitual felon sentences. The court ruled: (1) the defendant's statements during a pretrial hearing were not inadmissible under Rule 410 (statement made by defendant during plea discussions) because they were made during the defendant's various requests to the trial court and the defendant did not subjectively believe he was negotiating a plea with the prosecutor or with the prosecutor's express authority; (2) when the trial court did not instruct the jury on the theory of acting in concert and the evidence did not show that the defendant committed the offenses himself, the defendant's convictions must be reversed; (3) the trial court has the authority to impose concurrent habitual felon sentences for convictions that occur at the same trial; and (4) the trial court's statements at the sentencing hearing raised an inference that the trial court based its sentences at least in part on the defendant's failure to accept the state's plea offer at a pretrial hearing, and thus a new sentencing hearing must be held.

Trial Court Did Not Err by Prohibiting Defendant to Proceed Pro Se

State v. Wheeler, ___ N.C. App. ___, 688 S.E.2d 51 (19 January 2010).

The defendant before trial requested and was granted the right to proceed pro se. The trial court appointed standby counsel. During jury selection, the defendant informed the trial court that he wanted standby counsel to select the jury. After a colloquy with the defendant, the defendant agreed to allow standby counsel to represent him and no longer proceed pro se. The day after jury selection, the defendant sought to discharge counsel and proceed pro se. The defendant admitted to the trial court that he had already discharged four or five attorneys before trial. The trial court denied the defendant's motion to discharge counsel and proceed pro se. The court upheld the trial court's ruling. The defendant waived his right to proceed pro se when he told the trial court that wanted counsel to take over and select the jury.

State Appellate Court's Rejection of Defendant's Claim That State's Evidence Was Insufficient to Convict Defendant Was Not Unreasonable Application of Clearly Established Federal Law

McDaniel v. Brown, 130 S. Ct. 665, ___ L. Ed. 2d ___ (11 January 2010).

The defendant was convicted of sexual assault in a state court. The Court ruled the state appellate court's rejection of the defendant's claim that the state's evidence was insufficient to convict the defendant [see the standard in *Jackson v.*

Virginia, 443 U.S. 307 (1979)] was not an unreasonable application of clearly established federal law.

(1) Proof in Trial of Possessing Stolen Goods of Defendant's Knowledge or Reasonable Grounds to Believe Property Was Stolen May Be Inferred From Defendant's Buying Property at Fraction of Its Actual Cost

State v. Tanner, ___ N.C. App. ___, 666 S.E.2d 845 (7 October 2008).

The defendant was convicted of felony possession of stolen goods. (1) The defendant purchased a box full of hair products for three dollars and later purchased from the same person a refrigerator, CD player, and small television set for eighteen dollars. The court ruled, relying on *State v. Parker*, 316 N.C. 295 (1986), that this was sufficient evidence to prove that the defendant knew or had reasonable grounds to believe the property was stolen because such knowledge or belief may be inferred from defendant's buying property at a fraction of its actual cost.

(1) Defendant's Failure to Request Hearing to Contest Validity of 30-Day Civil DWI Revocation Barred Appellate Review of Revocation's Validity in Criminal Appeal

(2) State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal

(3) State Properly Showed That Person Who Withdrew Blood Sample for DWI Chemical Testing Was Qualified Person Under G.S. 20-139.1(c)

(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under *Crawford v. Washington*, 541 U.S. 36 (2004)

(5) 30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge

State v. Hinchman, ___ N.C. App. ___, 666 S.E.2d 199 (16 September 2008).

The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A

district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (1) The court ruled that the defendant's failure to request a hearing to contest the validity of the revocation order barred appellate review of the revocation order's validity in the criminal appeal of the DWI conviction. (2) The court ruled that the state's motion to appeal to superior court the district court judge's order dismissing the DWI prosecution properly specified a legal basis of the appeal. The state's motion to appeal asserted there was no competent evidence to support the dismissal order, and the dismissal was contrary to law. (3) The court ruled that the state properly showed that the person who withdrew the blood sample for DWI chemical testing was a qualified person under G.S. 20-139.1(c). The trooper testified that he saw a person draw the blood sample at a hospital blood lab. The person was working at the lab and had a lab tech I uniform and name tag, and there was limited access to that area. (4) The court ruled, relying on *State v. Heinricy*, 183 N.C. App. 585 (2007), and *State v. Forte*, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). (5) The court ruled, relying on *State v. Evans*, 145 N.C. App. 324 (2001), that the 30-day DWI civil license revocation was not punishment under Double Jeopardy Clause to bar the later prosecution of the DWI charge. The court rejected the defendant's argument that the delay of 135 days between the defendant's arrest and the license revocation in effect was punishment under the Double Jeopardy Clause.

Trial Judge Did Not Violate Defendant's Right to Proceed Pro Se

State v. Worrell, ___ N.C. App. ___, 660 S.E.2d 183 (6 May 2008).

The trial judge, after making the appropriate inquiries of the defendant, allowed the defendant to represent himself. The court appointed the defendant's previously appointed counsel as standby counsel. The judge then heard several of the pro se defendant's pretrial motions. After the defendant appeared confused during one of the motions, the judge suggested that the defendant may want standby counsel to represent him. Later, after a denial of the defendant's motion to continue the trial, the defendant voluntarily revoked his waiver of appointed counsel and informed the judge that he would be represented by his court-appointed counsel. Based on these and other facts, the court ruled that the judge did not violate the defendant's right to proceed pro se.

Trial in Defendant's Absence Did Not Violate Defendant's Rights

State v. Russell, 188 N.C. App. 625, 655 S.E.2d 887 (5 February 2008). The defendant was convicted of breaking and entering a motor vehicle and being an habitual felon. The defendant was present in the courtroom for his trial when jury selection began. However, the defendant was absent during the remainder of jury selection and during the trial. The court reviewed the facts in this case and ruled, relying on *State v. Richardson*, 330 N.C. 174 (1991), and *State v. Davis*, 186 N.C. App. 242, 650 S.E.2d 612 (2007), that the trial judge did not abuse his discretion in conducting the trial in the defendant's absence. Although a doctor's letter confirmed the defendant's location in a hospital, it was insufficient to show that his absence from trial was involuntary or due to immediately necessary medical treatment.

Miranda Ruling Was Inapplicable to Officer's Request for Consent Search After Defendant Had Asserted Right to Counsel

State v. Cummings, 188 N.C. App. 598, 656 S.E.2d 329 (5 February 2008). The defendant was advised of his Miranda rights and waived them. Shortly after questioning began, he requested a lawyer and questioning stopped. However, an officer then asked for the defendant's consent to search his vehicle, which he granted. The court upheld the trial judge's denial of the defendant's motion to suppress evidence seized as a result of the consent search. The court noted that *State v. Frank*, 284 N.C. 137 (1973), had ruled that Miranda warnings are inapplicable to searches and seizures. The court also stated that it found persuasive many federal court cases that have ruled that asking for a consent search is not interrogation under Miranda; for example, *United States v. Shlater*, 85 F.3d 1251 (7th Cir. 1996), and *United States v. McCurdy*, 40 F.3d 1111 (10th Cir. 1994).

Trial Judge Did Not Err in Allowing Trial to Continue in Defendant's Absence When He Failed to Appear When Trial Had Reconvened

State v. Davis, ___ N.C. App. ___, 650 S.E.2d 612 (2 October 2007). The court ruled that the trial judge did not err in allowing the trial to continue in the defendant's absence when he failed to appear when the trial had reconvened. The record showed that the defendant knew of the date and time that the trial reconvened and failed to appear or provide a reasonable excuse for his absence.

Defendant's Admission Through Counsel That He Had Violated Probation Conditions Was Sufficient; Trial Judge Did Not Need to Personally Examine Defendant Concerning His Admission

State v. Sellers, ___ N.C. App. ___, 649 S.E.2d 656 (4 September 2007).

A probation violation report was filed against the defendant. The defendant through counsel admitted to two of the violations alleged in the report. The trial judge heard from the probation officer concerning the violations. The trial judge found that the defendant willfully violated the terms of his probation, revoked the probation, and activated his suspended sentence. The court ruled that unlike when a defendant pleads guilty, a trial judge is not required to personally examine a defendant concerning his admission that he violated probation. The defendant's admission through counsel was sufficient.

Defendant Failed to Properly Present Legal Argument in Trial Court During Proceedings on Motion for Appropriate Relief and Thus Did Not Preserve Argument for Appellate Review

State v. Moore, ___ N.C. App. ___, 648 S.E.2d 288 (7 August 2007).

The defendant was convicted and then later filed a motion for appropriate relief, seeking a new trial based on newly discovered evidence. At the hearing on the motion, the defendant sought to expand on the legal grounds alleged in his written motion for appropriate relief. However, the defendant failed to file a written amendment to his motion, nor could the defendant's argument be considered a new motion for appropriate relief under G.S. 15A-1420, based on the facts in this case. The court ruled that the defendant failed to properly present the legal argument in the trial court during the proceedings on the motion for appropriate relief and thus did not preserve the argument for appellate review.

3. Criminal Law_defendant shackled during trial_no abuse of discretion

State v Oglesby, 174 NCA 658 (2005)

There was no abuse of discretion in ordering a defendant shackled during trial where the bailiff had expressed concern that defendant would run, the matter was addressed in defendant's presence but without the jury, the shackles were not to be seen by the jury, defendant would not have to walk or stand before the jury in shackles, and, although the jury was not instructed to ignore the shackles, there was no showing that the jurors were aware of or affected by the restraint.

2. Criminal Law--removal of defendant from courtroom during trial--restraint of defendant at trial

State v. Ash 169 NCA 715 (2005)

The trial court did not err in a first-degree murder and conspiracy to commit robbery with a dangerous weapon case by restraining and removing defendant from the courtroom during trial, because: (1) defendant has a right to be present during each stage of his trial, but in a noncapital case, may waive that right through disruptive behavior; (2) the transcript revealed numerous outbursts by defendant during jury selection; (3) the trial court followed the requirement of N.C.G.S. § 15A-1032(b)(1) and defendant waived the instruction required under N.C.G.S. § 15A-1032(b)(2); (4) defendant failed to object to his restraint at trial and thus waived appellate review of this argument; and (5) N.C.G.S. § 15A-1031 allows the trial court to order a defendant to be subjected to physical restraint in the courtroom when it is reasonably necessary to maintain order, prevent defendant's escape, or to provide for the safety of persons.

2. Criminal Law--physical restraint of defendant--abuse of discretion standard

State v. Forrest 168 NCA 614 (2005)

The trial court did not abuse its discretion in an attempted first-degree murder, habitual misdemeanor assault inflicting serious injury, and habitual misdemeanor assault on a law enforcement officer case by requiring defendant to be physically restrained while in the courtroom including being secured to his chair, being handcuffed, and being masked during his trial, because: (1) the trial court's determination that it was both necessary and appropriate for the security of court personnel to restrain defendant in this manner at trial was supported by ample evidence when defendant was on trial for attempted first-degree murder and two counts of habitual misdemeanor assault arising out of a brutal attack on his former attorney and his subsequent biting of a sheriff's deputy which occurred in the courtroom during a previous trial and after which it took five men to subdue defendant; (2) at the hearing on defendant's objection to being restrained, the State forecast evidence of defendant's guilty plea from a 1996 Nash County jail incident where he attacked another of his former attorneys while incarcerated; (3) defendant spat on a Wake County sheriff's deputy shortly before being brought into court for pretrial proceedings and interrupted the proceedings at various times with profane outbursts; (4) during pretrial proceedings, defendant was eventually removed from the courtroom to a nearby room where he continued to speak very loudly and abusively to the security officers in their presence and in the hearing of the court; (5) defendant relayed to his counsel threats to disrupt the trial if he was required to appear in court while physically restrained; and (6) the trial court complied with the procedural requirements of N.C.G.S. § 15A-1031 by giving defendant an

opportunity to object to being restrained, by conducting a hearing following defendant's objection, by making appropriate findings of fact following the hearing, by entering in the record its reasons for ordering defendant restrained in this manner, and by instructing the jury to disregard defendant's restraints.

3. Constitutional Law--right to be present at trial--denial of waiver of right

State v. Forrest 168 NCA 614 (2005)

The trial **court did not abuse its discretion** in an attempted first-degree murder, habitual misdemeanor assault inflicting serious injury, and habitual misdemeanor assault on a law enforcement officer case arising out of defendant's assault of his attorney while in court for an unrelated criminal matter by **denying defendant's oral motion that he be allowed to waive his right to be present at trial** because, although defendant correctly notes that in a noncapital trial defendant's right to be present is personal and may be waived, defendant neither submitted a written waiver of his appearance nor any other writing in support of his oral motion to waive his right to be present at trial as required by N.C.G.S. § 15A-1011(d).

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.

2. Criminal Law--shackling of defendant at trial--adequate findings required

State v. Jackson 162 NCA 695 (2004)

The general rule is that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances, and should the trial court in its sound discretion decide shackling is a necessary means for a safe and orderly trial, the determination must be supported by adequate findings.

2. Criminal Law--shackling of defendant's legs--reasonably necessary

State v. Holmes 355 NC 719 (2002)

The trial court did not abuse its discretion in a first-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by ordering over defendant's objection that defendant remain shackled by the legs during the trial, because: (1) records showed that defendant had numerous instances of misconduct while in jail awaiting trial; (2) immediately prior to trial, defendant began fighting with officers when defendant discovered that contraband in his possession had been confiscated; (3) such restraint was reasonably necessary to maintain order and to provide for the safety of persons; (4) defendant's past disregard for order and the safety of others while in custody is a reasonable indicator that defendant may exhibit the same conduct during trial; (5) an incident requiring six people to forcefully subdue defendant occurred a mere twelve days prior to the hearing in question; (6) the trial court considered the factors listed in the Tolley case; (7) the leg shackles were not visible to the jury; and (8) defendant cites to nothing in the record suggesting that defendant was impaired by the restraint, and the trial court indicated that the initial ruling would be reconsidered on a daily basis.

Criminal Law—defendant restrained—no abuse of discretion

State v. Simpson 153 NCA 807 (2002)

The trial court did not abuse its discretion by ordering that defendant be restrained during an armed robbery prosecution based on defendant's 1989 escape from a state prison where the court pledged to ensure that the jury would not see defendant restrained, and the record fails to show that the jury could see the restraints.

5. Evidence--defendant's demeanor after arrest--relevancy--lay opinion

State v. Lloyd 354 NC 76, 2001

The trial court did not abuse its discretion in a capital first-degree murder prosecution by admitting testimony of two of the State's witnesses concerning defendant's demeanor as calm at the time of his arrest within an hour of shooting the victim, because: (1) the testimony was relevant under N.C.G.S. § 8C-1, Rule 401 since it tended to negate defendant's claim that the shooting was accidental and shed light on both the circumstances of the murder and on defendant's intent and state of mind at the time of the offense; (2) the probative value of the testimony was not substantially outweighed by unfair prejudice, N.C.G.S. § 8C-1, Rule 403; and (3) the lay testimony was based upon the investigators' personal observations of defendant for a period of time and was helpful to a clear understanding of whether defendant acted with intent or whether the shooting was an accident, N.C.G.S. § 8C-1, Rule 701.

4. Criminal Law - motion for mistrial - defendant in handcuffs in courtroom

State v. Ward, 354 N.C. 231 (2001)

The trial court did not abuse its discretion in a first-degree murder trial by denying defendant's motion for a mistrial under N.C.G.S. § 15A-1061 after defendant was led by a deputy sheriff into the courtroom wearing handcuffs in view of prospective jurors even though the trial court did not conduct a voir dire of the prospective jurors regarding this incident, because: (1) the incident did not result in any actual prejudice to defendant; (2) defendant was not handcuffed during the course of the trial; (3) the entire incident transpired within a matter of seconds and the jurors could have seen no more than a glimpse of defendant's wrists in the handcuffs; and (4) the trial court's decision not to conduct an inquiry was a reasoned one so that unwanted attention was not drawn to the fact that defendant had been handcuffed.

9. Criminal Law--restraint of defendant during trial--shackle or leg brace—safety

State v. Wilson 354 NC 493 (2001)

The trial court did not abuse its discretion in a first-degree murder prosecution by ordering, over defendant's objection, that defendant be restrained throughout the trial with either a shackle or a leg brace for safety reasons, because: (1) an officer testified that officers had a lot of trouble with defendant while he was in jail, including his involvement in at least two fights; (2) the trial court considered the seriousness of the charges against defendant, and made the ultimate determination on the issue after hearing the officer's testimony; and (3) nothing in the record supports a conclusion that the restraint violated defendant's constitutional rights since defendant was restrained by a leg brace hidden under his clothing, and the trial court allowed defendant to walk to the witness stand outside the presence of the jury to avoid any possible prejudice.

1. Criminal Law - Handcuffs on defendant - outside courtroom

State v. Elliott, 137 N.C. App. 282 (2000)

The trial court did not err in an assault inflicting serious injury case by denying defendant's motion for a mistrial based on a juror seeing defendant in handcuffs outside of the courtroom during a recess of the trial. The restraint of a defendant, outside the courtroom, is within the sound discretion of the officer charged with the custody of the defendant

6. Indigent Defendants - capital trial - two appointed attorneys - absence of one attorney from courtroom - no statutory or constitutional violation

State v. Thomas, 350 N.C. 315 (1999)

The absence of one of an indigent defendant's court-appointed defense attorneys several times during his capital trial did not violate defendant's right under N.C.G.S. § 7A-450(b1) to be represented by two attorneys in a capital case or prevent defendant's two appointed attorneys from effectively defending him since (1) the statute does not require, either expressly or impliedly, that both of a capital defendant's attorneys be present at all times for all matters, and (2) although one attorney left the courtroom during the questioning of a prospective juror, during defendant's testimony, during the instruction conference in the guilt and sentencing phases, and during arguments of the prosecutor, the longest of those absences was just four minutes, the court was in recess or held at ease during several of those absences, and the other appointed attorney was present in the courtroom during each of those absences.

5. Constitutional Law, Federal - self-incrimination - robbery - acting in concert - codefendant not required to testify

State v. Stanfield, 134 N.C. App. 685 (1999)

The trial court did not err in a robbery case when it did not allow defendant to call his codefendant to testify after the codefendant pled guilty outside the presence of the jury and claimed he would invoke his Fifth Amendment privilege not to incriminate himself if called as a witness because defendant did not proffer the evidence he sought to elicit from his codefendant and merely wanted the jury to speculate. In addition, the fact that defendant was being tried on the theory of acting in concert meant the codefendant's admission of his involvement would not exonerate defendant.

2. Criminal Law - shackling of defendant - findings by trial court

State v. Thomas, 350 N.C. 315 (1999)

The reasons given by the trial court for ordering defendant shackled during his first-degree murder trial were sufficient to permit appellate review of the trial court's ruling and complied with the requirements of N.C.G.S. § 15A-1031.

13. Criminal Law § 358 (NCI4th Rev.) - first-degree murder - defendant shackled during sentencing

State v. White, 349 N.C. 535 (1998)

The trial court did not abuse its discretion during a capital sentencing proceeding by ordering that defendant be shackled during the proceeding. The decision was a rational exercise of the court's discretion and was reasonably necessary to maintain order or provide for the safety of persons. Defendant cites no law for the argument that the trial court has a duty to explore lesser means of restraint before shackling a defendant;

moreover, in this case the court both considered and employed lesser alternatives prior to shackling defendant.