

JUDGE

Trial Judge Did Not Err in Ordering Removal of Spectators from Courtroom

State v. Dean, ___ N.C. App. ___, 674 S.E.2d 453 (7 April 2009).

The court ruled that the trial court did not abuse its discretion in ordering the removal of four spectators in a gang-related murder trial when jurors had expressed concern for their own safety, and the trial court specifically found that the spectators were talking in the courtroom in violation of a pretrial order and had not followed orders of the court.

Trial Judge Erred in Not Exercising Discretion When Denying Jury's Request for Transcripts of Testimony of Victim and Defendant

State v. Long, ___ N.C. App. ___, 674 S.E.2d 696 (7 April 2009).

The court ruled that the trial judge erred in not exercising discretion when denying the jury's request for transcripts of testimony of the victim and the defendant. The court also ruled that the error was prejudicial and ordered a new trial.

Trial Judge Erred by Failing to Grant Defendant's Request to Remove Juror With Remaining Peremptory Challenge After Judge Had Reopened Jury Voir Dire

State v. Thomas, ___ N.C. App. ___, 673 S.E.2d 372 (3 March 2009).

After the jury was impaneled and the trial had begun, the trial judge learned that one of the seated jurors had attempted to contact an employee in the district attorney's office before impanelment. Voir dire was reopened, the trial judge questioned the juror, and allowed the parties to do so as well. The judge did not allow the defendant to remove the juror with a remaining peremptory challenge. The court ruled that the judge erred under *State v. Holden*, 364 N.C. 404 (1997) (once trial judge reopens examination of a juror, each party has absolute right to exercise any remaining peremptory challenges to excuse juror).

(1) Trial Judge Did Not Abuse Discretion in Precluding Defendant as Discovery Sanction From Asserting 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. (1) The court ruled that the judge did not abuse his discretion in precluding the two defenses as a discovery sanction. (Author's note: The defendant waived a constitutional objection to the judge's ruling by failing to raise that objection at trial.) The court noted that the trial judge's decision to allow the defendant to use two defenses (accident and duress) demonstrates that the judge affirmatively exercised his discretion and precluded only those defenses that would have

prejudiced the state (obtaining experts at a late date).

(2) No Unanimity-of-Verdict Violation When Judge Instructed on Victim Being Mentally

Incapacitated or Physically Helpless

(3) Trial Judge Erred in Instruction on Mental Incapacity Because Instruction Must Require State to Prove That Mental Incapacity Was Due to Act Committed on Victim

State v. Haddock, ___ N.C. App. ___, 664 S.E.2d 339 (5 August 2008).

The defendant was convicted of second-degree rape in a case when the victim had lost consciousness from excessive alcohol consumption. (2) The court ruled, relying on *State v. Hartness*, 326 N.C. 561 (1990), that there was no unanimity-of-verdict violation when the judge instructed on the victim being mentally incapacitated or physically helpless. The victim's condition (mentally incapacitated or physically helpless) constituted alternative ways of proving one rape, not separate rapes. (3) The court ruled that the trial judge erred in the instruction on mental incapacity because the instruction must require the state to prove that the mental incapacity was due to an act committed on the victim. The judge's instruction omitted the words in G.S. 14-27.1(2): "due to any act committed upon the victim." The court stated that the statute does not negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined in G.S. 14-27.1(3).

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.

Although Trial Judge Has Authority in Pretrial Hearing to Determine Existence of Aggravating Circumstances and to Declare Case To Be Noncapital Based on Lack of Evidence of Aggravating Circumstances, Trial Judge Lacks Authority to Declare Case To Be Noncapital Based on Insufficient Evidence of First-Degree Murder

State v. Seward, 362 N.C. 210, 657 S.E.2d 356 (7 March 2008).

The court ruled that although a trial judge has the authority in a pretrial hearing to determine the existence of aggravating circumstances and to declare a case to be noncapital based on a lack of evidence of aggravating circumstances, the trial judge lacks authority to declare a case to be noncapital based on insufficient evidence of first-degree murder.

(1) Defendant's Stipulation at Sentencing Hearing That Ohio Convictions Were Substantially Similar to North Carolina Offenses Was Ineffective Because Sentencing Judge Must Make Finding

(2) Trial Judge Did Not Err in Using Fact That Defendant Was on Probation and Pretrial Release When He Committed Offenses To Increase Both His Prior Record Level and To Aggravate His Sentence

State v. Moore, 188 N.C. App. 593, 656 S.E.2d 287 (5 February 2008).

The court ruled: (1) the defendant's stipulation that his Ohio convictions were

substantially similar to North Carolina offenses was ineffective because the sentencing judge must make that finding, based on the ruling in *State v. Palmateer*, 179 N.C. App. 579 (2006); and (2) the trial judge did not err in using the fact that the defendant was on probation and pretrial release when he committed the offenses to increase both his prior record level and to aggravate his sentence.

Trial Judge Erred Under G.S. 15A-910 In Sanctioning Defendant By Excluding Testimony of Two of Defendant's Mental Health Experts—Ruling of Court of Appeals Is Modified and Affirmed

State v. Gillespie, 362 N.C. 150, 655 S.E.2d 355 (25 January 2008), modifying and affirming, 180 N.C. 514, 638 S.E.2d 481 (19 December 2006).

The court ruled that the trial judge erred under G.S. 15A-910 (sanctions for failing to comply with discovery) in sanctioning the defendant by excluding the testimony of two of the defendant's mental health experts. The court reviewed the facts in this case and concluded that it was readily apparent that the trial judge based his ruling to sanction the defendant solely on the conduct of the defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a criminal proceeding can trigger a trial judge's authority under G.S. 15A-910 to sanction a party.

Proper Remedy Under Defendant's Motion for Appropriate Relief When Defendant Was Sentenced to Illegal Concurrent Sentence Pursuant to Plea Agreement Was to Allow Defendant to Withdraw Guilty Plea; Judge Had No Authority to Order Sentence to Run Concurrently

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (26 January 2007), reversing, 167 N.C. App. 276, 605 S.E.2d 168 (7 December 2004).

The defendant pled guilty to armed robbery in 1992 when the law required the

sentence to run consecutively to any sentences being served. However, the state and the defendant in the plea agreement agreed that the sentence would run concurrently with the sentences the defendant was then serving. The judge sentenced the defendant for the armed robbery, but did not indicate whether it was to run concurrently or consecutively. The Department of Correction recorded the sentence as consecutive to the sentence he then was serving. The defendant filed a motion for appropriate relief requesting that he be allowed to withdraw his guilty plea. The trial court judge hearing the motion for appropriate relief instead ordered the sentence to run concurrently. The court ruled, relying on *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998), that the proper remedy was to allow the defendant to withdraw his guilty plea, and the defendant could proceed to trial or attempt to negotiate another plea agreement. The judge at the MAR hearing had no authority to order the sentence to run concurrently. The defendant was not entitled to specific performance of the plea agreement that would result in an illegal sentence.

Trial Court Did Not Have Jurisdiction to Revoke Probation When Hearing Was Conducted After Probationary Period Had Ended, and Judge Failed to Make Required Finding Under G.S. 15A-1344(f)(2)—Ruling of Court of Appeals Is Affirmed

State v. Bryant, 361 N.C. 100, 637 S.E.2d 532 (15 December 2006), affirming, 176 N.C. App. 190, 625 S.E.2d 916 (21 February 2006) (unpublished opinion).

The court ruled that the trial court did not have jurisdiction to revoke the defendant's probation when the revocation hearing was conducted after the probationary period had ended, and the judge revoking probation failed to make a finding required under G.S. 15A-1344(f)(2) that the state had made a reasonable effort to notify the probationer and to conduct the hearing earlier.

Trial Judge Abused Discretion in Granting Defendant and Counsel Five Minutes to Decide Whether to Present Evidence—Ruling of Court of Appeals Is Reversed

State v. Williams, 361 N.C. 78, 637 S.E.2d 523 (15 December 2006), reversing, 175 N.C. App. 640, 625 S.E.2d 147 (7 February 2006).

The defendant was convicted of first-degree murder and sentenced to life imprisonment without parole. At the close of the state's case around 4:00 p.m. on the second day of trial, defense counsel asked for an adjournment for the day or at least some time to decide whether to present evidence. The trial judge stated that he would give five minutes. Defense counsel asked for fifteen minutes. The trial judge denied that request. Defense counsel told the judge that he did not know the extent of the state's evidence until it was presented. The judge again said five minutes. The defendant did not present any evidence. The court ruled that the judge abused his discretion in only giving five minutes. The court noted that defense counsel had a list of twenty to thirty witnesses that the state might call, but the state rested on the afternoon of the second day of trial having only called twelve witnesses. Also, the defendant and defense counsel had a great deal to consider given the weaknesses in the testimony of the state's witnesses. The court also noted the gravity of the charge of first-degree murder.

Criminal Law--prayer for judgment--no presumption of judicial or prosecutorial vindictiveness

State v. Trusell, 170 NCA 33 (2005)

The trial court did not err by granting the State's prayer for judgment for a second charge of robbery with a dangerous weapon after defendant's appeal of his conviction of first-degree kidnapping and subsequent resentencing to a lesser sentence for second-degree kidnapping, because: (1) there is no presumption of vindictiveness when a trial court sentences on a prayer for judgment continued following appeal of a separate conviction; and (2) defendant failed to demonstrate actual vindictiveness even though the record indicated some spurious motivation on the part of the prosecutor to correct his own error in sending the wrong appellate record for review to the Court of Appeals since the trial court articulated a legitimate reason for sentencing defendant on the robbery with a dangerous weapon charge. See Farb p. 21

Sentencing--habitual felon--evidentiary hearing without motion from either party--not an advisory opinion

State v. Brewington, 170 NCA 264 (2005)

The trial court did not issue an impermissible advisory opinion or commit plain error by conducting an evidentiary hearing prior to the beginning of the habitual felon phase when no motion for such a hearing had been properly made before the court, because: (1) the trial court has the inherent authority to conduct an evidentiary hearing outside the presence of a jury sua sponte to clarify questions of admissibility and to prevent undue delay in the proceedings; and (2) by conducting the hearing out of the presence of the jury and prior to the presentation of evidence during the habitual felon phase, the trial court was able to resolve any arguments and concerns regarding the evidence and the habitual felon proceedings before the jury proceeded without any delay.

Criminal Law–mistrial–failure to object

State v. Cummings, 169 NCA 249 (2005)

A trial court judge appropriately entered a mistrial (in effect) when he discovered that he had personal knowledge of an impaired driving case after the State began its evidence, recessed, and rescheduled the trial before another judge. Defendant made no objection at the time, despite being given the opportunity, and so waived the objection on appeal.

Evidence; Judgments–pretrial suppression hearing–decision announced out of term–nullity

State v. Trent, 359 NC 583 (2005)

An armed robbery defendant received a new trial where the court announced its denial of defendant's suppression motions 7 months after the suppression hearing and after a new term had begun. The rule is longstanding: the court was required to enter its ruling during the term when the motions were heard. The order was a nullity when it was entered, so that defendant's failure to object was not an implied consent, and prejudicial error review is not reached.

Judges—overruling one another—double jeopardy

State v. Cummings, 169 NCA 249 (2005)

A district court judge could not dismiss an impaired driving case on double jeopardy grounds following a mistrial where another judge had already denied the motion. The rule that one superior court judge may not modify, overrule, or change the judgment or order of another also applies to district court judges. See Farb P. 20

Judges--superior court judge reconsidering order by another superior court judge--motion to suppress heroin

State v. Woolridge, 357 NC 544 (2003)

The trial court erred in maintaining a dwelling for keeping or selling controlled substances, trafficking in heroin by possession, trafficking in heroin by manufacturing, and conspiracy to traffic heroin by possession case when one superior court judge reconsidered an order by another superior court judge that originally granted defendant's motion to suppress the heroin and upon reconsideration denied defendant's motion to suppress, because: (1) an order of one superior court judge may be reconsidered by another only if the party seeking to alter the original order makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter; and (2) in this case the State did not present evidence of a substantial change of circumstances warranting reconsideration of the order, but instead presented the same or similar evidence based upon the new legal theory of inevitable discovery doctrine that the State could have presented to the first judge.

Jury--conversions with jury foreman alone--failure to summon full jury into courtroom for instructions

State v. Robinson, 160 NCA 564 (2003)

The trial court erred in a conspiracy to traffic in cocaine, trafficking in cocaine, and possession with intent to sell or deliver cocaine case by engaging in three conversations with the jury foreman alone regarding the charges and jury deliberations outside the presence of the remainder of the jury, and defendant is granted a new trial, because: (1) the full jury must be summoned into the courtroom when giving instructions on the law applicable to the case under N.C.G.S. § 15A-1234; (2) it cannot be known whether the jury foreman truly understood the answers provided to him by the trial court or whether he conveyed them correctly to the other jurors; and (3) it is impossible to know whether the other jurors themselves understood the instructions provided to them by the foreman when deliberating and deciding their verdict.

Constitutional Law; Jury–trial by twelve person jury–seating of alternate juror

State v. Hardin, 161 NCA 530 (2003)

A defendant was entitled to a new trial where a juror was replaced by an alternate juror after deliberations were begun, which resulted in a verdict by more than twelve people. N.C. Const. art. I, § 24.

Judges–testimony by magistrate–condition of impaired driving defendant–no prejudice

State v. Lewis, 147 NC App 274 (2001)

There was no prejudicial error in an impaired driving prosecution where a magistrate was allowed to give her opinion as to defendant's impairment. Testimony by a judicial official giving an opinion about the condition of a person who appeared before that official is disapproved; however, there was no prejudicial error in this case because the magistrate's testimony was cumulative and only tended to corroborate the officers.

Judges, Justices, and Magistrates § 26 (NCI4th) - suppression hearing - judge who issued

warrant - recusal not required

State v. Montserrat, 125 N.C. App. 22 (1997)

The trial judge did not err in failing to recuse himself from a suppression hearing where the judge issued the search warrant and presided over a hearing to suppress evidence seized pursuant to the search warrant. There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge although it is the better practice to allow a different judge to rule upon the validity of such a warrant. Further, Canon 3(C) (1) (a) of the Code of Judicial Conduct does not require the trial judge to recuse himself.

Judges, Justices, and Magistrates § 27 (NCI4th) noncapital first-degree murder motion to recuse denied no error

State v. Scott, 343 N.C. 313, 471 S.E.2d 605 (1996)

The trial court did not err in a first-degree murder prosecution by not recusing himself or by failing to have the recusal motion heard by another judge where defendant alleged that the judge had publicly expressed a strong opinion about the victim's credibility and defendant's relationship with her, had presided over criminal proceedings in which defendant was being tried, and had a son who was a prosecutor in that county. Defendant did not present substantial evidence that there was an appearance of partiality by the judge, and, since there were no facts presented to cause a reasonable person to doubt the judge's partiality, there was no error in the failure to refer the motion to another judge. N.C.G.S. § 15A-1223.

Judges, Justices, and Magistrates § 27 (NCI4th) first-degree murder judge's acceptance of codefendant's plea no recusal

State v. Vick, 341 N.C. 569 (1995) ___ S.E.2d ___

The trial court did not err by not recusing itself from a first-degree murder

prosecution where the judge had accepted a guilty verdict in the trial of defendant's codefendant and found coercion as a mitigating factor, but found that the aggravating factors outweighed the mitigating factors.

Criminal Law 1681 (NCI4th) judgment modified during term no error

State v. Sammartino, 120 N.C. App. 597 (1995) ___ S.E.2d ___

Because the original judgments and modified judgments in this case were entered during the week of court assigned to the trial court judge, and because there had been no adjournment sine die, the trial court had authority to modify the judgments increasing defendant's prison terms.

Criminal Law 991 (NCI4th) - setting aside guilty verdict - entry of not guilty verdict improper

State v. Morgan, 108 N.C. App. 673 (1993) 425 S.E.2d 1

Though the district court could properly set aside a guilty verdict, it could not thereafter enter a verdict of not guilty; rather, the case must be remanded for a new trial.