

SENTENCING

Defendant's Federal Habeas Application Was Not Barred as "Second or Successive" Application

Magwood v. Patterson, <http://www.supremecourt.gov/opinions/09pdf/09-158.pdf>.

The defendant was convicted in state court of murder, sentenced to death, and the conviction and sentence were affirmed by a state appellate court. He sought federal habeas corpus relief, which granted a new sentencing hearing. He then was sentenced to death again in state court. He filed a federal habeas corpus application challenging the new death sentence. The Court ruled that the second habeas application was not barred under federal law as a "second or successive" application.

Sentence Imposed at Re-Sentencing Hearing Violated G.S. 15A-1335

State v. Daniels, ___ N.C. App. ___, 691 S.E.2d 78 (6 April 2010).

The defendant was convicted of first-degree rape and first-degree kidnapping. He was sentenced to consecutive terms of imprisonment of 307 to 378 months for the first-degree rape conviction and 133 to 169 months for the first-degree kidnapping conviction. He appealed his sentences to the North Carolina Court of Appeals, which remanded for new sentencing hearing for both convictions, requiring the trial court to either (1) arrest judgment for the first-degree kidnapping conviction and resentence for second-degree kidnapping; or (2) arrest judgment for the first-degree rape conviction and resentence for first-degree kidnapping. The trial court chose the first option, sentencing the defendant from 370 to 453 months for first-degree rape and a consecutive 46 to 65 months for second-degree kidnapping. The court ruled that the trial court's sentence for first-degree rape violated G.S. 15A-1335 because it exceeded the sentence imposed at the first sentencing hearing. The court distinguished *State v. Moffitt*, 185 N.C. App. 308 (2007) (court may consider whether new sentences in the aggregate are greater than original sentences in the aggregate), noting that the ruling in that case addressed the consolidation of the defendant Moffitt's multiple convictions at his resentencing hearing, whereas defendant Daniels' convictions were not consolidated.

(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.

Sentence Enhancement Under G.S. 14-3(c) (Misdemeanor Committed Because of Victim's Race) Was Properly Applied When White Defendant Committed Misdemeanor Assault Against White Victim Because Victim Had Interracial Relationship With Black Person

State v. Brown, ___ N.C. App. ___, 689 S.E.2d 210 (16 February 2010).

The defendant was convicted of assault with a deadly weapon, a Class A1 misdemeanor. He was sentenced as a Class H felon under G.S. 14-3(c) (offense was committed because of the victim's race). The evidence showed that the white defendant assaulted the white victim because the victim had an interracial relationship with a black person. The court ruled, relying on cases from other jurisdictions, that the sentencing enhancement was properly applied to the defendant.

A Defendant's Stipulation to Existence of Out-Of-State Convictions and Classification Can Support a "Default" Classification for Prior Record Level Purposes

State v. Henderson, __ N.C. App. __, __ S.E.2d __ (Dec. 8, 2009).

A defendant's stipulation to the existence of out-of-state convictions and their classification as felonies or misdemeanors can support a "default" classification for prior record level purposes. However, a stipulation to substantial similarity is ineffective, as that issue is a matter of law that must be determined by the judge.

Trial Court Did Not Err in Assigning One Point to Prior Record Level Under G.S. 15A-1340.14(b)(6) (All Elements of Present Offense Are Included in Prior Offense For Which Defendant Was Convicted)

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (3 November 2009).

The defendant was convicted of delivery of a controlled substance, cocaine, and a sentencing hearing was held. The defendant had a prior conviction for delivery of a controlled substance, marijuana. The court ruled, relying on *State v. Ford*, ___ N.C. App. ___, 672 S.E.2d 689 (2009), that the trial court did not err in assigning one point to the defendant's prior record level under G.S. 15A-1340.14(b)(6) (all elements of present offense are included in prior offense for which defendant was convicted).

Prosecutor's Jury Argument at Sentencing Hearing on Aggravating Factor That Discussed Effect of Jury's Finding of Aggravating Factor on Defendant's Sentence Was Inaccurate and Misleading—Result of Court of Appeals Opinion Is Affirmed

State v. Lopez, 363 N.C. 535, 681 S.E.2d 271 (28 August 2009), affirming result, 188 N.C. App 553 (2008).

The court ruled that a prosecutor's jury argument (at a sentencing hearing on an aggravating factor) that discussed the effect of the jury's finding of an aggravating factor on the defendant's sentence was inaccurate and misleading. The prosecutor's discussion of the sentencing grid was inaccurate. In addition, the prosecutor's argument was misleading because it indicated potential sentencing ranges for the defendant when the defendant's sentencing range had not been, and in this case could not be, determined when the argument was made. The court stated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

(1) Defendant May Not Be Sentenced for Both Involuntary Manslaughter and Felony Death by Vehicle Based on Same Death

(2) Defendant May Not Be Sentenced for Both Felony Death by Vehicle and DWI Based on Same Incident

(3) Trial Court Did Not Commit Error Concerning Defendant's Right to Unanimous Verdict When Involuntary Manslaughter Jury Instruction on Culpable Negligence Allowed Jury to Consider One or More Traffic Violations to Establish Element

(4) Court Orders Remand for Resentencing

State v. Davis, ___ N.C. App. ___, 680 S.E.2d 239 (4 August 2009).

The defendant was convicted of DWI, involuntary manslaughter, and felony death by vehicle arising from a crash in which the defendant was impaired and one person died as a result of the crash. The trial court imposed sentences for all three convictions. (1) Although the court, based on North Carolina Supreme Court cases, rejected the ruling in *State v. Williams*, 90 N.C. App. 614 (1988), that the offenses of felony death by vehicle and involuntary manslaughter have the same elements, it ruled that the legislature did not intend that a defendant could be sentenced for convictions of both offenses. (2) The court ruled, relying on *State v. Richardson*, 96 N.C. App. 270 (1989), that the defendant could not be sentenced for both DWI and felony death by vehicle. (3) The court ruled, relying on *State v. Funchess*, 141 N.C. App. 302 (2000), that the trial court did not commit error concerning the defendant's right to a unanimous verdict when the involuntary manslaughter jury instruction on culpable negligence allowed the jury to consider one or more traffic violations to establish the element. (4) The court ordered that on remand for resentencing, if the trial court vacates the conviction of involuntary manslaughter and sentences the defendant for felony death by vehicle, then the court must arrest the DWI judgment. If the trial court vacates the felony death by vehicle conviction, the defendant may be sentenced for both involuntary manslaughter and DWI.

Trial Court Did Not Commit Error in Its Rulings When Jury Returned Nonunanimous Life

Sentence Recommendation

State v. Maness, 363 N.C. 261, 677 S.E.2d 796 (18 June 2009).

The defendant was convicted of first-degree murder and sentenced to death. After deliberating in the sentencing hearing for a little more than one and one-half hours, the jury indicated that it had reached a verdict. The foreperson affirmed on the sentencing form that the jury unanimously recommended a life sentence. The oral responses of the jury were consistent with the answers written on the sentencing form. During the polling of the individual jurors, the fourth juror answered “No” when asked whether his recommendation was consistent with the verdict sheet. The trial court called a bench conference and defense counsel moved that the court impose a life sentence, which the court denied. The court stated that the statute imposed a duty to direct the jury to retire and begin deliberations again. However, at the defendant’s request and with the state’s consent, the court completed the polling of the other jurors. Six of the remaining eight jurors stated they disagreed with the life sentence recommendation. After the polling appeared to be complete, the third juror indicated disagreement with the life sentence recommendation. The court declared that there was not a unanimous sentencing recommendation and its duty under North Carolina law was to direct the jury to resume deliberations. The jury was given a recess and defense counsel moved for a mistrial. Defense counsel noted the varied emotions expressed by both sides when the verdict had initially been announced, and that no verdict could now command confidence. The court denied the motion in its discretion. After deliberating again for just over an hour, the jury reached a unanimous death sentence recommendation. The trial court in its discretion denied the defendant’s renewed motion for a mistrial. The supreme court noted that G.S. 15A-1238, dealing with criminal trials in superior court, requires the jury to deliberate further if a poll indicates nonunanimity. However, the death sentencing hearing statute, G.S. 15A-2000(b), is silent. The court stated that the only authorization for the trial court to impose a life sentence is when the jury cannot, within a reasonable time, agree to its sentence recommendation. The court agreed with the trial court that it lacked authority to impose a life sentence in this case, given the time the jury had deliberated and the lack of evidence suggesting they could not agree or were having trouble reaching a sentencing recommendation. The court also ruled that the trial court did not err in denying in its discretion the defendant’s motions for mistrial based on the courtroom reactions when the verdict was initially returned.

(2) Ruling in Roper v. Simmons Does Not Affect Admissibility of Prior Convictions To Prove Aggravating Circumstance, G.S. 15A-2000(e)(3) (Prior Violent Felony Conviction), Even If Defendant Committed Violent Felonies Before Eighteenth Birthday

State v. Garcell, 363 N.C. 10, ___ S.E.2d ___ (20 March 2009).

The defendant was convicted of first-degree murder and sentenced to death. The defendant was eighteen years, five months old when he committed the murder. (2) The court also ruled that Roper did not affect the admissibility of prior convictions to prove the aggravating circumstance, G.S. 15A-2000(e)(3) (prior violent felony conviction), even

if the defendant committed the violent felonies before his or her eighteenth birthday.

Trial Judge Properly Found One Point Under G.S. 15A-1340.16(b)(6) in Determining Defendant's Prior Record Level in Sentencing for Habitual Felon

State v. Ford, ___ N.C. App. ___, 672 S.E.2d 689 (3 February 2009).

The defendant was convicted of attempted felony larceny and then pled guilty to being an habitual felon. The defendant had previously been convicted of felony larceny. The court ruled, relying on *State v. Bethea*, 122 N.C. App. 623 (1996), that the judge properly found one point under G.S. 15A-1340.16(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating the defendant's prior record level; G.S. 15A-1340.16(b)(6) is not contrary to the provisions of G.S. 14-7.6. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over \$1,000.

No Ex Post Facto Violation When Defendant's Points for Prior Record Level Were Increased Under G.S. 15A-1340.14(c) Because of Change in Classification of Prior Conviction

State v. Watkins, ___ N.C. App. ___, 672 S.E.2d 43 (3 February 2009).

When the defendant committed the offenses for which he was being sentenced, the punishment for the sale of cocaine was a Class G felony. When the defendant was convicted in 1997 of sale of cocaine, the punishment was a Class H felony. As required by G.S. 15A-1340.14(c), the prior conviction was treated as a Class G felony in determining the defendant's prior record level. The court ruled, relying on *State v. Mason*, 126 N.C. App. 318 (1997), and *State v. Wolfe*, 157 N.C. App. 22 (2003), that there was no ex post facto violation in determining the defendant's prior record level.

Stipulation Signed by Prosecutor and Defense Counsel in Section III of AOC-CR-600 Supported Judge's Finding of Defendant's Prior Record Level

State v. Hussey, ___ N.C. App. ___, 669 S.E.2d 864 (16 December 2008).

The court ruled that a stipulation signed by the prosecutor and defense

counsel in Section III of AOC-CR-600 (worksheet on prior record level) supported the judge's finding of the defendant's prior record level. The court distinguished *State v. Jeffrey*, 167 N.C. App. 575 (2004) (presentation of worksheet to judge is insufficient to support judge's finding of prior record level), because AOCCR- 600 in that case did not contain a stipulation. [Author's note: The worksheet in *Hussey* apparently did not contain out-of-state convictions that would require an appropriate judicial finding; see *State v. Palmateer*, 179 N.C. App. 579 (2006).]

(2) Judge Did Not Improperly Base Sentence on Defendant's Insistence on Jury Trial

State v. Anderson, ___ N.C. App. ___, 669 S.E.2d 793 (16 December 2008).

The defendant surreptitiously placed a camera in his stepdaughter's bedroom. The camera was connected by a cord to the defendant's computer located in another room. After the camera was discovered, the computer was taken to the sheriff's office. Investigation of the computer's hard drive discovered child pornography. The defendant was convicted of misdemeanor peeping and appealed for trial de novo. He was also indicted, based on the child pornography in the computer, for ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor. At a conference with the prosecutor and defense counsel before trial, the judge commented that if the two parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea negotiations. The defendant at a single trial was convicted of all 21 charges and sentenced to imprisonment. The court ruled: (2) the defendant failed to show that it can be reasonably inferred that the defendant's sentence was improperly based, even in part, on his insistence on a jury trial;

(1) Juvenile Court Judge Erred in Entering Separate Dispositions for Juvenile Adjudicated Delinquent of Two Offenses in Same Court Session

(2) Juvenile Stipulated to Delinquency History Points and History Level

In re D.R.H., ___ N.C. App. ___, 668 S.E.2d 919 (2 December 2008).

The juvenile was adjudicated delinquent of armed robbery and conspiracy

to commit armed robbery. (1) The court ruled that juvenile court judge erred under G.S. 7B-2508(h) (requires single disposition for consolidated offenses during juvenile court session) in entering separate dispositions for the juvenile who had been adjudicated delinquent of these two offenses in the same court session. (2) The court ruled that the juvenile stipulated to six delinquency history points and a high delinquency level. Relying on case law involving adult sentencing, *State v. Boyce*, 175 N.C. App. 663 (2006), and *State v. Eubanks*, 151 N.C. App. 499 (2002), the court ruled that the juvenile stipulated to the court counselor's prior history report when the juvenile's attorney received and reviewed the report and failed to object to it. The attorney had responded, "yes" to the judge's question whether the attorney had had an opportunity to review the report. In addition, the juvenile did not assert in his appellate brief that any of the prior adjudications in the report did not exist.

Defendant's Stipulation That Out-of-State Conviction Was Substantially Similar to North Carolina Offense Was Ineffective Because Judge Must Make Finding

State v. Lee, ___ N.C. App. ___, 668 S.E.2d 393 (18 November 2008).

The defendant stipulated during the sentencing hearing that a New Jersey conviction was substantially similar to a North Carolina offense for the prior record level points allocation. The court ruled, relying on *State v. Palmateer*, 179 N.C. App. 579 (2006), that the stipulation was ineffective because the "substantially similar" issue is a question of law that the judge must make.

Two Drug Trafficking Sentences Imposed at Same Sentencing Hearing Are Not Required Under G.S. 90-95(h)(6) to Be Imposed Consecutively to Each Other

State v. Walston, ___ N.C. App. ___, 666 S.E.2d 872 (7 October 2008).

The court ruled, relying on *State v. Bozeman*, 115 N.C. App. 658 (1994), that two drug trafficking sentences imposed at the same sentencing hearing are not required under G.S. 90-95(h)(6) to be imposed consecutively to each other.

Trial Judge Did Not Err in Finding Virginia Conviction to Be Substantially Similar to North Carolina Class A1 or 1 Misdemeanor and Assigning One Point in Calculating Defendant's Prior Record Level

State v. Sapp, ___ N.C. App. ___, 661 S.E.2d 304 (3 June 2008).

The court ruled that the trial judge did not err in finding a Virginia conviction to be substantially similar to a North Carolina Class A1 or 1 misdemeanor and assigning one point in calculating the defendant's prior record level. The Virginia conviction involved an assault on an employee of a secure juvenile facility while the defendant was confined there and the employee was attempting to break up a fight between prisoners. The court found the Virginia conviction to be "substantially similar" [statutory wording in G.S. 15A-1340.14(e)] to assault on a governmental employee under G.S. 14-33(c)(4), a Class A1 misdemeanor. The court noted that the Virginia statute need not contain the precise wording of the North Carolina statute to meet the "substantially similar" standard. Thus, the absence of language in the Virginia statute concerning the discharge of an official duty was not dispositive.

No Error in Calculating Prior Record Level For Murder and Attempted Murder Convictions to Assign Points to Both Prior Felony Drug Conviction and To Prior Conviction of Possession of Firearm by Felon, in Which Felony Drug Conviction Was Element of Possession of Firearm by Felon

State v. Goodwin, ___ N.C. App. ___, 661 S.E.2d 46 (20 May 2008).

The court ruled that there was no error in calculating the defendant's prior record level for second-degree murder and attempted first-degree murder convictions to assign points to both a prior felony drug conviction and to a prior conviction of possession of firearm by felon, in which the felony drug conviction was an element of possession of firearm by felon. The court reasoned, distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), that possession of firearm by felon is a separate substantive offense from the defendant's prior felony drug conviction on which his status as a felon was based.

(1) Trial Court Erred in Sentencing Habitual Felon to Less Than Required Minimum and Maximum Terms of Imprisonment for Class C Felon, Prior Record Level IV

(2) Trial Court Erred in Requiring Habitual Felon Sentence to Run Concurrently with Federal Prison Sentence That Defendant Was Then Serving

State v. Watkins, 189 N.C. App. 784, 659 S.E.2d 58 (15 April 2008).

The defendant pled guilty to financial card theft and habitual felon status. The trial judge sentenced him as a Class C felon with Prior Record Level IV to a minimum term of 64 months and a maximum term of 86 months. The judge also entered findings of extraordinary mitigation and ordered

the sentence to run concurrently with the federal sentence the defendant was then serving. (1) The court ruled that the state had a right of appeal from the trial court's sentencing the defendant below the statutory minimum and maximum sentences. The court then ruled that the trial court erred in sentencing the defendant below the required minimum and maximum sentences, which for a Class C felony in Prior Record Level IV was 80 months for the minimum and 107 months for the maximum. (2) The court ruled that the state did not have a right of appeal from the trial judge's imposing a concurrent sentence for habitual felon. However, the court suspended the appellate rules and elected to treat the state's appeal as a petition for a writ of mandamus, for the reasons set out in *State v. Ellis*, 361 N.C. 200 (2007). The court ruled that defendant's concurrent sentence was contrary to G.S. 14-7.6, and the court directed the trial judge on remand to enter a judgment that comports with that statute.

During Sentencing Hearing Before Jury on Existence of Aggravating Factor in Non-Capital Case, Prosecutor's Jury Argument Reviewing Sentencing Grid Was Improper Because It Was Irrelevant to Finding of Aggravating Factor

State v. Lopez, 188 N.C. App. 553, 655 S.E.2d 895 (5 February 2008).

(Note: The North Carolina Supreme Court has granted the state's petition to review this ruling.) The defendant was convicted of several offenses arising from a vehicle crash that resulted in the death of one person and injuries to another. During the sentencing hearing before the jury on the existence of an aggravating factor, the prosecutor in jury argument reviewed the sentencing grid and explained the effect of a finding of an aggravating factor on the defendant's sentence and also explained the doctrine of merger of the convictions of involuntary manslaughter and felony death by vehicle. The court ruled that the jury argument was improper because it was irrelevant to the finding of the aggravating factor.

(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.

Conviction After Original Sentencing Was Properly Used to Calculate Defendant's Prior Record Level at Resentencing Hearing

State v. Pritchard, ___ N.C. App. ___, 649 S.E.2d 917 (18 September 2007).

The defendant was convicted of two offenses and sentenced under Prior Record Level I. He appealed to the North Carolina Court of Appeals, which ordered a new sentencing hearing. The defendant was convicted of another offense after the original sentencing hearing and before the resentencing hearing. The trial judge at the resentencing hearing determined based on the new conviction that the defendant must be sentenced under Prior Record Level II. The court ruled that the trial judge did not err in using the new conviction to calculate the defendant's prior record level at the resentencing hearing. (Author's note: The length of the defendant's sentence imposed at the resentencing hearing did not exceed the original sentence.)

Stipulation to Existence of One Point for Prior Record Level Based on All Elements in Current Offense Are Included in Prior Offense Was Ineffective Because Stipulation to Legal Issue Is Not Permitted

State v. Prush, ___ N.C. App. ___, 648 S.E.2d 556 (21 August 2007).

The court ruled, relying on *State v. Hanton*, 175 N.C. App. 250 (2006), that a stipulation to the existence of one point for a prior record level based on all the elements in the current offense are included in a prior offense was ineffective because a stipulation to a legal issue is not permitted.

(1) G.S. 15A-1024 (Judge Imposing Sentence Other Than Provided in Plea Agreement Must Allow Defendant to Withdraw Plea) Did Not Apply When Judge Found Defendant Failed to Comply with Plea Agreement and Thus No Plea Agreement Existed at Time of Sentencing

(2) Trial Judge Did Not Err in Not Allowing Defendant to Withdraw Guilty Plea

State v. Hatley, ___ N.C. App. ___, 648 S.E.2d 222 (7 August 2007).

The defendant pled guilty pursuant to a plea agreement in which he would provide truthful statements to a SBI agent and the state would recommend a specific sentence. If the defendant failed to provide truthful statements, the agreement specifically provided that the state was not bound to recommend the specific sentence. The prosecutor later determined that the defendant did not provide truthful statements and thus the defendant was not entitled to the sentencing recommendation in the plea agreement. The trial judge denied the defendant's motion to withdraw his guilty plea and sentenced him to a more severe sentence than provided in the plea agreement. (1) The court ruled that G.S. 15A-1024 (judge imposing sentence other than provided in plea agreement must allow defendant to withdraw plea) did not apply when the judge found that the defendant failed to comply with the plea agreement and thus no plea agreement existed at the time of sentencing. (2) The court ruled that the trial judge did not err in not allowing the defendant to withdraw his guilty plea. The defendant did not meet his burden of proving a "fair and just" reason to support his motion to withdraw.

Aggravating Factor G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person) Was Properly Found for Second-Degree Murder and Felonious Assault Convictions Involving Vehicle Crash

State v. Borges, 183 N.C. App. 240, 644 S.E.2d 250 (15 May 2007).

The defendant was convicted of second-degree murder and four counts of assault with a deadly weapon inflicting serious injury involving a vehicle crash in which the defendant was impaired. The jury found the aggravating factor G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person) for these convictions. The court ruled that the finding of the aggravating factor did not violate G.S. 15A-1340.16(d) (evidence necessary to prove element of offense may not be used to prove aggravating factor). The state was required to prove additional facts by additional evidence to prove the aggravating factor.

(1) Rules of Evidence Do Not Apply to Sentencing Hearings

(2) Ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), Does Not Apply to Non-Capital Sentencing Hearing

State v. Sings, 182 N.C. App. 162, 641 S.E.2d 370 (6 March 2007).

(1) The court ruled, Citing Rule 1101(b)(3) and G.S. 15A-1334(b), that the rules of evidence do not apply at a sentencing hearing. (2) The court ruled, relying on the rationale of *State v. Phillips*, 325 N.C. 222, 381 S.E.2d 325 (1989), and distinguishing *State v. Bell*, 359 N.C. 1, 603 S.E.2d 2004), that the ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), does not apply to a non-capital sentencing hearing.

“Law of the Case” Doctrine Did Not Bar State at Resentencing Hearing From Presenting New Evidence and Arguing for Higher Prior Record Level

State v. Dorton, 182 N.C. App. 34, 641 S.E.2d 357 (6 March 2007).

The defendant was convicted of second-degree sexual offense and was sentenced to an aggravated sentence in Prior Record Level I. The defendant appealed and the North Carolina Court of Appeals ordered a new sentencing hearing based on *Blakely v. Washington*, 542 U.S. 296 (2004). The state did not appeal any issue relating to the defendant’s sentence. The trial judge on remand sentenced the defendant to a presumptive sentence in Prior Record Level I. Two days later during the same superior court term, the state presented evidence of a prior conviction that it had just discovered. The trial judge accepted the state’s evidence and modified the sentence to a presumptive sentence in Prior Record Level II. The court ruled that the “law of the case” doctrine did not bar state at resentencing from presenting new evidence and arguing for a higher prior record level even though it had not previously raised the issue of an incorrect prior record level by appeal to the court of appeals from the original sentence. The court stated that the doctrine is limited to issues actually presented and necessary for the determination of the case.

When Calculating Points for Prior Convictions to Establish Prior Record Level, Convictions Obtained During a Single Trial Cannot Be Used in Establishing Prior Record Level for One of the Convictions

State v. West, 180 N.C. App. 664, 638 S.E.2d 508 (19 December 2006).

The defendant at a single trial was convicted of second-degree murder, two counts of felony larceny, and one count of breaking and entering a vehicle. Before recessing for lunch, the trial judge sentenced the defendant for the convictions of the two larcenies and breaking and entering a vehicle. After lunch, the judge sentenced the defendant for second-degree murder and calculated the defendant’s prior record level for the second-degree murder by assigning two points for one of the felony larceny convictions. The court ruled that the judge erred in doing so in

contravention of legislative intent in calculating a prior record level for convictions obtained at a single trial.

(1) Doctrine of Invited Error Applies When Trial Judge in Capital Sentencing Hearing Erroneously Submits Mitigating Factor G.S. 15A-2000(f)(1) (No Significant Prior Criminal History) at Defendant's Request

(2) Trial Judge's Failure to Submit Aggravating Factor in Capital Sentencing Hearing Is Not Structural Error

State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (15 December 2006).

The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant's request, and thus the defendant cannot be prejudiced by an error resulting from his own conduct. [Author's note: The court noted, on the other hand, its recent ruling in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant's request.] (2) The court ruled that a trial judge's failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis.

Kidnapping and Burglary -- Sentencing -- Aggravating Factors -- Use of Deadly Weapon to Support Two Factors

State v. Kyle, 333 N.C. 687 (1993) 430 S.E.2d 412 Page 690

The trial court erred when sentencing defendant for kidnapping and burglary by finding as aggravating factors that defendant was armed with a deadly weapon and that he used a deadly weapon to commit the offenses.

Sentencing--Calculation of prior record level--Joined charges

State v West, 180 N.C. APP. 664 (2006)

Nothing in the Structured Sentencing Act specifically addresses the effect of joined charges when calculating previous convictions to arrive at prior

record levels, and the assessment of a prior record level when sentencing defendant for second-degree murder by using convictions for offenses which had been joined for trial with the murder charge would be unjust and in contravention of the intent of the General Assembly, as well as the rule of lenity. The sentence here was remanded.

Sentencing--Variance from plea bargain--Right to withdraw agreement

State v Carriker, 180 N.C. APP. 470 (2006)

A guilty plea was vacated and remanded where the judge failed to inform a defendant of her right to withdraw her plea after deciding to impose a sentence other than as indicated in the plea agreement. Defendant's request came the day after sentencing and involved a fair and just reason (the differing sentence). N.C.G.S. § 15A-1024.

1) Sentencing--Invalid stipulation to out-of-state conviction--Question of law

State v Palmateer, 179 N.C. APP. 579 (2006)

The trial court erred in an embezzlement sentencing proceeding based on an invalid stipulation in the worksheet regarding defendant's out-of-state convictions, and the case is remanded for resentencing, because: 1) the question of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court; and 2) stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate.

2) Sentencing--Prior record level--Multiple convictions in same week in different courts

State v Fuller, 179 N.C. APP. 61

The trial court did not err in a double count of indecent liberties with a child and triple count of first-degree rape of a child case by including in its calculation of defendant's prior record level two separate convictions received on the same day in the same county (one in district court and the other in superior court), because: 1) the plain language of N.C.G.S. § 15A-1340.14(d) states that only one conviction obtained during the same calendar week in the same court may be used to calculate prior record level; and 2) the statute does not prohibit the use of multiple convictions obtained in different courts in the same week.

3) Sentencing--Improper factors--Punishing defendant for exercising right to jury trial

State v Fuller, 179 N.C. APP. 61

Defendant is entitled to a new sentencing hearing in a double count of indecent liberties with a child and triple count of first-degree rape of a child case because the trial judge based defendant's sentence on improper factors and effectively punished defendant for exercising his constitutional right to a jury trial.

4) Sentencing--Prior record worksheet--Used to minimize record-Stipulated

State v. Cromartie, 177 N.C. APP. 73 (2006).

A defendant cannot use the prior record worksheet to seek a lesser sentence during his sentencing hearing and then disavow this conduct on appeal. The evidence here supported the trial court's findings of prior record points during sentencing where the only evidence of prior convictions was a prior record level worksheet which defense counsel acknowledged by specific reference and then used to minimize defendant's record.

5) Sentencing--Aggravating factors--Taking property of great monetary value

State v. Pender, 176 N.C. APP. 688 (2006).

The trial court erred in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case by finding the aggravating factor that the offense involved the actual taking of property of great monetary value, and defendant is entitled to a new sentencing hearing, because: 1) both defendant and the State agreed that according to earlier decisions of the Court of Appeals, \$2,500 is the least amount previously held to be of great monetary value, while other decisions of our Supreme Court and the Court of Appeals consistently have held that great monetary value included amounts of approximately \$3,000; and 2) although there is no bar or case law that prevents the Court of Appeals from holding that a great monetary amount may include an amount less than \$2,500, the amounts of \$1,300 and \$700 in this case do not constitute great or extraordinary amounts.

Sentencing Prior record level--Prior Driving While Impaired convictions

State v. Bauberger, 176 N.C. APP. 465 (2006).

The trial court did not err in a second-degree murder and assault with a deadly weapon inflicting serious injury case by using defendant's prior driving while impaired convictions in determining his prior record level and sentencing him as a Level II offender, because: 1) although defendant

contends his sentence as a Level II offender violates the prohibition against double jeopardy, he failed to cite any supporting case authority; 2) defendant's prior convictions were not aggravating factors, but instead the trial court added points to defendant's prior record level under N.C.G.S. § 15A-1340.14; and 3) the parties do not cite any provisions of the Structured Sentencing Act, nor did the Court of Appeals find any, that prohibited a trial court from using the same prior convictions introduced by the State as evidence of malice during trial to increase defendant's prior record level at sentencing.

Sentencing--Within presumptive range--No statutory right to appeal--No findings of mitigating factors

State v. Brown, 176 N.C. APP. 72 (2006)

A defendant sentenced within the presumptive range has no statutory right to appeal the sentence and this defendant did not file a petition for certiorari. Moreover, the principle that the court must find mitigating factors if a preponderance of the evidence supports them applies only when the trial court imposes a sentence outside the presumptive range.

1) Larceny--Sentence for felonious larceny--No findings of breaking or entering or value of stolen goods

State v Matthews, 175 N.C. APP. 550 (2006)

The trial court erred by entering judgment and sentencing defendant on felonious larceny when the jury did not find either that defendant was guilty of felonious breaking or entering or that the value of the goods taken was more than \$1,000.

2) Sentencing--Aggravating factors--Found by judge--Not alleged in indictment

State v Matthews, 175 N.C. APP. 550 (2006)

The trial court erred when sentencing defendant by imposing aggravated sentences based upon factors found by the judge rather than the jury. However, the argument that aggravating factors should have been alleged in the indictment has been rejected.

1) Sentencing--prior record level--Preponderance of evidence--Similarity of out-of-state convictions--Presumption of regularity for prior convictions

State v Hadden, 175 N.C. APP. 492 (2006)

The trial court did not err in a multiple taking indecent liberties with a child sentencing proceeding by determining without a jury and by a preponderance of the evidence that defendant had ten prior record level points, because: 1) defendant's prior North Carolina convictions for assault inflicting serious injury and larceny merited one point each since that determination is a fact of a prior conviction; 2) four of defendant's out-of-state convictions were substantially similar to offenses under North Carolina law and these determinations did not offend defendant's Sixth Amendment right to a jury trial; and 3) prior convictions are entitled to a presumption of regularity when challenged under N.C.G.S. § 15A-980 and the burden of overcoming the presumption properly rests with defendant.

2) Sentencing--Prior record level--Driving while impaired convictions

State v Hyden, 175 N.C. APP. 576 (2006)

The trial court did not err by counting all five of defendant's prior driving while impaired convictions when determining his prior record level under N.C.G.S. § 15A-1340.14 for purposes of sentencing even though defendant contends that three of the driving while impaired convictions were also elements of the two habitual impaired driving convictions, because: 1) although prior convictions of driving while impaired are elements of the offense of habitual impaired driving, the statute does not impose punishment for these previous crimes but instead imposes an enhanced punishment for the latest offense; 2) on each occasion that defendant was sentenced as a felon, it was based on the new instance of DWI being considered a more serious violation in light of defendant's recidivist record; 3) defendant was convicted of five separate instances of DWI, some deemed by the General Assembly to be misdemeanors and some deemed to be felonies; and 4) to hold otherwise renders habitual driving while impaired a status rather than an offense which is contrary to N.C.G.S. § 20-138.5 and prior decisions of the Court of Appeals.

3) Sentencing--Out-of-state convictions--Computer printouts--Equivalence to N.C. felonies

State v Cao, 175 N.C. APP. 434 (2006)

Computer printouts were sufficient to prove defendant's out-of-state prior convictions during sentencing, but the State did not satisfy its burden of proving that defendant's out-of-state convictions were felonies. N.C.G.S. § 15A-

1340.14(f)(4).

4) Sentencing—Factors--Indictment allegations not required

State v Harris, 175 N.C. APP. 360 (2006)

State v. Lucas, 353 N.C. 568, has been overruled by State v. Allen, 359 N.C. 425, to the extent that it required that sentencing factors be alleged in an indictment.

1) Sentencing--Prior record level--Prior convictions where courts files destroyed

State v Frady, 175 N.C. APP. 393 (2006)

The trial court did not err in a double second-degree kidnapping sentencing hearing by denying defendant's motion to suppress the use of two prior convictions for which the court files had been destroyed to calculate his prior record level even though defendant contends there was no proof of a knowing and voluntary waiver of his right to counsel, because: 1) defendant failed to carry his burden of proof to show by a preponderance of evidence that the convictions were obtained in violation of his right to counsel; and 2) neither of the cases defendant relies upon involves, as does the instant case, a collateral attack on prior convictions used for calculation of defendant's record level for purposes of resentencing him for a later offense.

2. Sentencing--Prior record level--Prior convictions--Purchase or possession of beer or wine by underage individual

State v Frady, 175 N.C. APP. 393 (2006)

The trial court did not err in a double second-degree kidnapping sentencing hearing by utilizing defendant's prior conviction in 1987 for purchase or possession of beer or wine by an eighteen-year-old underage individual even though defendant contends it is not classified as a Class A1 or Class 1 misdemeanor, because: 1) N.C.G.S. § 15A- 1340.14(c) provides that in determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed; and 2) as it is undisputed that defendant was eighteen years old in 1987 at the time of the misdemeanor offense, the classification of that offense for prior record level calculation purposes was a Class 1 misdemeanor.

1) Sentencing--Out-of-state convictions--Similarity to N.C. offenses--Question of law

State v Hanton, 175 N.C. APP. 250 (2006)

The issue of whether a conviction under an out-of-state statute is substantially similar to an offense under North Carolina statutes is a question of law to be resolved by the trial court, and the court here did not err by not requiring that the issue be proven to the jury beyond a reasonable doubt.

2) Sentencing--Out-of-state conviction—Assault--Not similar to N.C. offense

State v Hanton, 175 N.C. APP. 250 (2006)

The trial court erred by finding that the New York offense of second-degree assault was substantially similar to North Carolina's assault inflicting serious injury, as opposed to simple assault. The error was prejudicial because it raised defendant's record level, and he was sentenced at the maximum for that level.

3) Criminal Law--Sentencing--Habitual misdemeanor assault--Absence of arraignment--Stipulation of prior convictions

State v Artis, 174 N.C. APP. 668 (2005)

The trial court did not commit prejudicial error by its failure to arraign defendant on a habitual misdemeanor charge or to ask defendant whether he wanted the issue regarding his prior convictions submitted to the jury where defendant requested at trial that his prior convictions not be shared with the jury, and defense counsel, after consultation with defendant, stipulated to the prior convictions. N.C.G.S. § 15A-928.

1) Sentencing--Prior convictions--Indigency--Insufficient evidence

State v Jordan, 174 N.C. APP. 479 (2005)

A defendant being sentenced failed to meet his burden of proving that he was indigent at the time of challenged prior convictions. N.C.G.S. § 15A-980.

2) Sentencing--Prior convictions--Presumption of regularity--Right to counsel

State v Jordan, 174 N.C. APP. 479 (2005)

Prior convictions were entitled to a presumption of regularity in a sentencing proceeding where the convictions were 20 years old and the records had been routinely destroyed. The trial court did not err by placing the burden of

proof on defendant, who offered no reason that the presumption of regularity should not apply.

3) Sentencing--Prior convictions--Jury findings--Not required

State v Jordan, 174 N.C. APP. 479 (2005)

Jury findings were not required where a defendant sentenced within the presumptive range challenged his prior convictions. The State met its burden by presenting certified records, and the trial court was entitled to sentence defendant in the presumptive range without further proof.

1) Sentencing--Habitual offender--Not cruel and unusual

State v Hall, 174 N.C. APP. 353 (2005)

The trial court's use of seven prior misdemeanor convictions to enhance a sentence already enhanced under the Habitual Felon Act was consistent with N.C.G.S. § 15A-1340.14 and with legislative purpose and was not cruel and unusual punishment.

2) Sentencing--Aggravating factor--Failure to submit to jury

State v Whitehead, 174 N.C. APP. 165 (2005)

The trial court erred in imposing an aggravated sentence for robbery with a dangerous weapon based upon the court's finding an aggravating factor not admitted by defendant nor found by a jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing.

3) Sentencing--Aggravated sentence--Probationary status--Failure to submit to jury

State v Shine, 173 N.C. APP. 699 (2005)

The trial court erred in a trafficking in cocaine, possession with intent to sell or distribute cocaine, and maintaining a dwelling for keeping and selling cocaine case by adding a point to defendant's prior record level without first submitting the issue of defendant's probationary status to a jury, because his probationary status, which was used to increase his prior record level, was a fact other than a prior conviction that was required to be submitted to a jury and proved beyond a reasonable doubt.

Sentencing--Aggravating factor--Failure to present to jury--Stipulation

State v Dierdorf, 173 N.C. APP. 753 (2005)

The trial court did not err in a double indecent liberties with a child and second-degree sex offense case by entering an aggravated sentence after defendant's pleas of guilty even though the factor was not alleged in the indictment or presented and proven to a jury beyond a reasonable doubt, because defendant stipulated to the aggravating factor that defendant took advantage of a position of trust or confidence when he agreed to be sentenced in the aggravated range and did not object to the trial court's finding of the aggravating factor.

Sentencing--Presumptive sentence--Failure to submit aggravating factors to jury

State v. Norris, 360 NC 507 (2006) Rev'd Ct Appeals 172 N.C. APP. 722 (2005)

A trial court did not violate defendant's Sixth Amendment right to a jury trial in a first-degree arson case, as construed in *Blakely v. Washington*, 542 U.S. 296 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), when it found an aggravating factor but sentenced defendant within the presumptive range, because: 1) judicial fact-finding does not trigger the Sixth Amendment right to jury trial so long as trial courts sentence inside the presumptive or, a fortiori, the mitigated range; and 2) although the Structured Sentencing Act directed the trial court to find aggravating and mitigating factors only if sentencing outside the presumptive range, the court's actions did not jeopardize the values underlying the Sixth Amendment since the trial court in finding aggravating and mitigating factors merely exercised the discretion our legal system has always demanded of individuals charged with passing judgment on their fellow citizens.

Sentencing--Presumptive and mitigated ranges--No error

State v Tuck, 173 N.C. APP. 61 (2005)

There was no error in the sentencing of defendant for multiple convictions of armed robbery where defendant received two sentences in the presumptive range and four in the mitigated range. He was not entitled to a sentence in the mitigated range for each conviction solely because his sentences in other convictions were in the mitigated range.

Juveniles--Committed youthful offender--Consecutive sentences--Total exceeding twenty years

State v Ware, 173 N.C. APP. 434 (2005)

N.C.G.S. § 148-49.14 (now repealed) does not prohibit the imposition of separate consecutive sentences for a committed youthful offender which

do not exceed twenty years respectively. The trial court here correctly denied a motion for appropriate relief that challenged consecutive sentences for multiple offenses as exceeding twenty years in total.

Sentencing--Aggravating factors--Allegation not required

State v Caudle, 172 N.C. APP. 261 (2005)

Aggravating factors need not be alleged in the indictment.

Sentencing--Stipulation to aggravating factor--Unaware of right to jury determination--Not a knowing and intelligent waiver

State v Everette, 172 N.C. APP. 237 (2005)

Defendant's stipulation to an aggravating factor was not knowing and intelligent and did not result in a waiver of his right to have the jury determine aggravating factors, because the cases establishing that right had not yet been decided.

1) Sentencing--Nonstatutory aggravating factor--Joint criminal action with one other person

State v. Hurt, 359 NC 840 (2005) Rev'd Ct. Appeals

The Court of Appeals erred in a second-degree murder case by vacating defendant's sentence based on its determination that a defendant's joint criminal action with one other person is insufficient to support the finding of a nonstatutory aggravating factor under N.C.G.S. § 15A-1340.16(d)(20), because: 1) factors that may diminish or increase the offender's culpability are reasonably related to the purposes of sentencing and will support a finding of a nonstatutory aggravating factor under N.C.G.S. § 15A-1340.16(d)(20); and 2) accomplishment of a robbery and murder by uniting with one other individual is a factor that may increase the offender's culpability and is thus reasonably related to the purposes of sentencing.

2) Sentencing--Aggravating factors--Unilateral finding by trial court--Structural error

State v. Blackwell, 359 NC 814 (2005)

The trial court committed structural error in a second-degree murder, habitual impaired driving, and felonious assault with a deadly weapon inflicting serious injury case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(12) that defendant committed the offense while on pretrial release on another charge even though aggravating

factors need not be alleged in an indictment, and the case is remanded for resentencing, because: 1) the trial court violated *Blakely*, 542 U.S. 296 (2004), by imposing an aggravated sentence that exceeded the statutory maximum after making a unilateral finding that defendant was on pretrial release for another charge; and 2) although the State contends the sentence should be upheld under a harmless error analysis, *Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and therefore reversible per se.

1) Sentencing--Calculation of prior record level--Method

State v. Alexander, 359 NC 824 (2005) Rev'd Ct. Appeals *State v. Alexander*, 167 N.C. APP. 79 (2004)

Defendant's prior record level was properly calculated during sentencing for assault where the court relied on defense counsel's statements regarding defendant's prior record level, defense counsel's invitation to the court to consult defendant's prior record level worksheet, and the trial judge's knowledge of the plea agreement between defendant and the State. While a worksheet standing alone is not sufficient to establish a defendant's prior record level, a defendant need not make an affirmative statement to stipulate to his or her prior record level or to the State's summation of the facts, particularly if defense counsel had an opportunity to object to the stipulation in question but failed to do so. The trial judge here used a reliable method to calculate defendant's prior record level. N.C.G.S. § 15A-1340.14(f)(4).

2) Sentencing--Prior record level--State's failure to meet burden of proof

State v. McIlwaine, 169 N.C. APP. 397 (2005)

The trial court erred by sentencing defendant as an habitual felon where the State failed to meet its burden of proving defendant's prior record level and defendant is entitled to a new sentencing hearing, because: 1) N.C.G.S. § 15A-1340.14(f) requires the State to prove a felony offender's prior convictions by a preponderance of the evidence and a worksheet prepared and submitted by the State purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden of establishing proof of prior convictions; 2) even though defendant did not disagree with statements made by the prosecutor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions and the State provided no other proof of prior convictions; and 3) although the trial court misstated defendant's prior record level as "VI" both in open court and in his written judgment, the sentence imposed was actually a record level IV and within the presumptive range, and this clerical error should be corrected on remand.

3) Sentencing--Consecutive probationary sentences--Sexual exploitation of minor

State v. Howell, 169 N.C. APP. 58 (2005)

The trial court did not err in a multiple third-degree sexual exploitation of a minor case by allegedly imposing consecutive probationary sentences in violation of N.C.G.S. § 15A-1346, because: 1) defendant did not receive consecutive probationary sentences; 2) the judgment indicated that defendant was subject to six consecutive suspended sentences and a total of five years of probation, that defendant would serve six consecutive sentences if defendant's probation is revoked, and the trial court in its discretion may sentence a defendant this way; and 3) the trial court imposed 60 months of supervised probation only after making a finding that a longer period was necessary than that prescribed in N.C.G.S. § 15A-1343.2(d).

4) Sentencing--Prior record level--New York conviction

State v. Ayscue, 169 N.C. APP. 548 (2005)

The trial court erred in determining defendant's prior record level when sentencing him for armed robbery. The State failed to produce sufficient evidence that defendant's prior New York conviction for possession of stolen property in the fifth degree was substantially similar to a Class 1 misdemeanor in North Carolina.

5) Sentencing--Prior record level--Failure to prove prior convictions

State v. Quick, 170 N.C. APP. 166 (2005)

The trial court erred in a possession of cocaine case by sentencing defendant as a prior record level III offender based on prior convictions which were not proven at trial, and the judgment is vacated and remanded to the superior court for resentencing.

Criminal Law--Prayer for judgment--No presumption of judicial or prosecutorial vindictiveness

State v. Trusell, 170 N.C. APP. 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--Prior record level—Agreement--Structured Sentencing requirements

State v. Alexander, 167 N.C. APP. 79 (2004) Rev'd by State v. Alexander, 359 NC 824 (2005)

The trial court erred when sentencing defendant for assault by relying on a record level worksheet submitted by the State showing a prior misdemeanor assault (with no other documentary evidence) along with defendant's stipulation to a sentence range and defense counsel's statement that defendant had no prior felonies. A worksheet is not sufficient without more to meet the State's burden, defense counsel did not agree with the item listed on the worksheet, and the stipulation to a minimum and maximum term of imprisonment is not a stipulation that the requirements established by the Legislature for sentencing have been met. The defendant and the prosecution may not, under these circumstances, stipulate to a specific term of imprisonment irrespective of what might be permitted by the Structured Sentencing Act.

Sentencing--Overlapping presumptive and aggravated range--Aggravating factor not found

State v. Allah, 168 N.C. APP. 190 (2005)

Imposing a sentence within the aggravated range without findings in aggravation was not error where defendant was sentenced to a term within an overlap between the presumptive and aggravated ranges.

Sentencing--Prior record level--Worksheet and oral recitation--Not sufficient--Trial testimony--Not sufficient in this case Stayed to be ruled on by the Sup. Ct.

State v. Silas, 168 N.C. APP. 627 (2005)

Defendant was entitled to a new sentencing hearing for discharging a firearm into occupied property and misdemeanor breaking and entering where the State relied upon a sentencing worksheet and an oral recitation by the State of defendant's criminal history instead of utilizing a method authorized by N.C. Gen. Stat. § 15A- 1340.14 (2003). Defendant's trial

testimony was not sufficient to support the prior record level determination.

Sentencing--Structured Sentencing Act--Aggravating factors--Same item of evidence

State v. Beck, 359 NC 611 (2005)

The trial court erred in a second-degree murder case by concluding that the phrase stating that the “same item of evidence” cannot be used to prove more than one aggravating factor under The North Carolina Structured Sentencing Act of N.C.G.S. § 15A-1340.16(d) refers to a single source document and defendant is entitled to be resentenced, because the phrase restricts the use of the same facts, and not the same source, as the basis of more than one aggravating factor.

1) Sentencing--Trial court’s authority over DOC--Motion for appropriate relief

State v. Ellis, 167 N.C. APP. 276 (2004)

The court’s authority to order the Department of Correction to change its records to reflect the trial court’s entry of a sentence is not affected by the defendant’s use of a motion for appropriate relief rather than a civil suit naming DOC as a party. While DOC is not a formal party to criminal proceedings, the statutory scheme established by the Legislature relies upon DOC to carry out the punishment imposed by the court.

2) Sentencing--Erroneous sentence--Correction by DOC--Separation of powers

State v. Ellis, 167 N.C. APP. 276 (2004)

An erroneous criminal sentence is voidable, not void, and the Department of Correction usurped the power of the judiciary and violated separation of powers by ignoring the court’s directive to show this defendant’s armed robbery sentence as concurrent rather than consecutive.

3) Sentencing--Motion to withdraw guilty plea--Second sentence different from plea arrangement

State v. Wall, 167 N.C. APP. 312 (2004)

The trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon while being an habitual felon case by denying defendant’s motion to withdraw his guilty plea during a second sentencing hearing where the trial court

stated the error in the first sentencing hearing was the result of a clerical error, miscommunication, or something else, because; 1) the error in the first sentencing hearing was not merely clerical or administrative, and thus, defendant's second sentencing invalidated his previous sentence and does in fact constitute a "sentencing" under N.C.G.S. § 15A-1024; and 2) N.C.G.S. § 15A-1024 applies whenever the judge at the time of sentencing determines that a sentence different from that provided for in the plea arrangement must be imposed even if defendant receives a lighter sentence.

4) Sentencing--Prior record level--Worksheet alone insufficient--Plea agreement not an implied stipulation

State v. Jeffery, 167 N.C. APP. 575 (2004)

Defendant's sentence for indecent liberties was remanded where the state submitted only the prior record level worksheet without supporting documents or other statutorily authorized means of proof. Defendant's plea agreement did not provide an implied stipulation to a prior record level because there was no reference to the record level or the worksheet in defense counsel's discussion with the judge. Furthermore, defendant's plea agreement was not sufficiently specific to rise to the level of a stipulation.

5) Sentencing--Mitigating factor--Acknowledged wrongdoing prior to arrest

State v. Shelton, 167 N.C. APP. 225 (2004)

The trial court did not abuse its discretion in a multiple felony incest, double first-degree rape, and triple second-degree rape case by failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing prior to arrest and at an early stage of the criminal process, because: 1) defense counsel's statement to the court that defendant "admitted some of this" did not constitute a request for the court to find the statutory mitigating factor at issue; and 2) assuming arguendo that defense counsel's statement at sentencing was such a request, defendant never acknowledged the pain and suffering he caused the victims, the closest defendant came to admitting any wrongdoing was a grudging acknowledgment that having sex with his daughters had been a mistake, and defendant's statements did not prove by a preponderance of evidence that he acknowledged wrongdoing in connection with the offense.

6) Sentencing--Prior record level--Unilateral determination

State v. Spellman, 167 N.C. APP. 374 (2004)

The trial court erred in a robbery with a dangerous weapon, second-degree kidnapping, assault with a deadly weapon on a government official, and assault with a deadly weapon case by sentencing defendant as a prior record level IV offender and the case is remanded for resentencing, because: 1) the trial court unilaterally determined that defendant had twelve prior record points; and 2) the record is devoid of any evidence of defendant's previous convictions or a stipulation by defendant regarding his prior record level.

7) Sentencing--Aggravating factors--Victim suffered serious injury that is permanent or debilitating--Armed with deadly weapon during commission of assault

State v. Spellman, 167 N.C. APP. 374 (2004)

The trial court erred by applying the aggravating factor to defendant's sentence that the second-degree kidnapping victim suffered serious injury that is permanent or debilitating, but it did not err by finding that defendant was armed with a deadly weapon during the commission of the assault, because: 1) the record is devoid of any evidence that the victim of the second-degree kidnapping suffered any injury during the commission of the offense; and 2) the assault with a deadly weapon charge is a misdemeanor offense that was not subject to modification upon a finding of aggravating or mitigating factors, and the trial court did not enhance defendant's sentence for the assault by relying on facts used to satisfy an element of the assault.

6) Sentencing--Mitigating factor--Good character

State v. Walker, 167 N.C. APP. 110 (2004)

The trial court did not err in a robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury case by failing to find the mitigating factor of good character for defendant Browning, because: 1) character evidence may still fail to establish by a preponderance of the evidence any given factor in aggravation or mitigation even if it is uncontradicted, quantitatively substantial, and credible; 2) the statements in the letters from various persons stating that defendant had displayed a high level of respect and honesty toward his family, friends, and community, that he was a caring young man who was generous and thoughtful, and that he was a dependable individual with a superior work ethic, were general statements as to defendant's character rather than specific; 3) the trial court did not have an opportunity to examine the individuals writing the letters to determine the extent of their relationship with defendant, assess their credibility, or determine what they knew about defendant's activities; 4) one letter did not describe

recent knowledge of defendant's character and in fact inferred bad character; and 5) defendant's character evidence, although not contradicted, was not the type of evidence which demonstrated defendant's good character by a preponderance of the evidence.

7) Sentencing--Aggravating factors--Not found by jury--Remanded

State v. Speight, 166 N.C. APP. 106 (2004)

A defendant's motion for appropriate relief was granted where a jury did not decide the aggravating factors considered by the court in imposing aggravated sentences. Although the State argued harmless error, a case must be remanded for new sentencing when the trial judge errs in a finding in aggravation and imposes a sentence beyond the presumptive. Appealed

Sentencing--Punishment enhancement--Habitual misdemeanor assault

State v. McDonald, 165 N.C. APP. 237 (2004)

The trial court did not err by using the charge of habitual misdemeanor assault (HMA) to enhance defendant's punishment even though defendant contends he never entered a guilty plea to nor was convicted of this charge, because: 1) habitual misdemeanor assault can be considered as either a substantive offense or a sentence enhancement offense; 2) defendant admitted the prior convictions element of the HMA offense, the jury found defendant guilty of assault on a female which was the last element of the HMA charge, and thus the trial court correctly used this conviction as one of the underlying felonies to enhance defendant's sentence under the Habitual Felon Act; and 3) defendant was not prejudiced by the trial court's failure to formally arraign him under N.C.G.S. § 15A-928(c), since defense counsel and defendant's statements to the trial court show that defendant understood the charges against him and knowingly waived his right for the jury to determine those issues.

Constitutional Law--Double jeopardy--Failure to register as sex offender--Prior record--Inclusion of underlying rape

State v. Harrison, 165 N.C. APP. 332 (2004)

Defendant was not subjected to double jeopardy by the inclusion of the underlying second-degree rape conviction in his prior record level during his sentencing for failing to register as a sex offender.

Sentencing--aggravating factors--found by judge

State v. Allen, 166 N.C. APP. 139 (2004)

A motion for appropriate relief was granted by the Court of Appeals and the case was remanded for resentencing where the trial court unilaterally found the existence of an aggravating factor and thereupon sentenced defendant in the aggravated range. N.C.G.S. § 15A-1340.16. Appealed

1) Sentencing--Habitual felon--Prior record level--Prior conviction--Prayer for judgment continued

State v. Canellas, 164 N.C. APP. 775 (2004)

The trial court did not err in a felony breaking and entering and habitual felon case by calculating defendant's prior record level by adding one point for the prayer for judgment continued on the assault on a female charge, because: 1) the North Carolina Structured Sentencing Statute under N.C.G.S. § 15A-1340.11(7) provides that a person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime; and 2) N.C.G.S. § 15A-1331(b) provides that for the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest, and the Court of Appeals has determined that formal entry of judgment is not required in order to have a conviction.

2) Sentencing--Nonstatutory aggravating factor--Could have been charged with shooting into occupied property

State v. Byrd, 164 N.C. APP. 522 (2004)

The trial court did not err in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant could have been but was not charged with shooting into occupied property, because the additional risk defendant created by firing into a moving vehicle makes her more culpable than if she had shot the victim outside his vehicle.

3) Sentencing--Mitigating factors--Evidence not allowed

State v. Knott, 164 N.C. APP. 212 (2004)

Plain error analysis was applicable where a defendant was not allowed to present evidence of mitigating factors before she was sentenced within the presumptive range. The case was remanded because it could not be concluded that defendant's sentence was unaffected.

4) Sentencing--Prior convictions in other states--Similarity to N.C. offenses

State v. Morgan, 164 N.C. APP. 298 (2004)

A defendant's sentencing stipulation to the existence of prior convictions did not extend to whether those convictions were similar to North Carolina offenses, and the State failed to show that defendant's prior convictions were substantially similar to North Carolina offenses.

5) Sentencing--Resentencing--Opportunity to withdraw guilty plea

State v. Rhodes, 163 N.C. App. 191 (2004)

The trial court erred in a case involving defendant's failure to register as a sex offender by failing to follow the procedural safeguards established by N.C.G.S. §§ 15A-1022 and 15A-1024 upon resentencing him, because the trial court should have: 1) informed defendant of the court's decision to impose a sentence other than that provided in the plea agreement; 2) informed defendant that he could withdraw his plea; and 3) granted a continuance until the next session of court if defendant chose to withdraw his plea.

6) Sentencing--Aggravating factors--Joined with more than one other person in committing offense and not charged with conspiracy

State v. Little, 163 N.C. APP. 235 (2004)

The trial court did not err in a first-degree burglary, assault with a deadly weapon inflicting serious injury, and assault inflicting serious injury case by using the N.C.G.S. § 15A-1340.16(d)(2) aggravating factor that defendant joined with more than one other person in committing the offenses and was not charged with committing a conspiracy, because the trial court could have found by the preponderance of the evidence that defendant joined with his father and either defendant's friend or his friend's drug dealer, or both, in the commission of these crimes.

1) Sentencing--Aggravating factor--Joined with one other person in committing robbery

State v. Hurt, 163 N.C. APP. 429 (2004) Rev'd by State v. Hurt, 359 NC 840 (2005)

The trial court erred in a second-degree murder case by finding as an aggravating factor that defendant, who was not charged with conspiracy, joined with one other person in committing the offense of robbery because the trial court did not find that defendant had joined with more than one other person in committing an offense which is required to find an aggravating factor under N.C.G.S. § 15A-1340.16(d)(2).

2) Sentencing--Possession of less than 1.5 ounces of marijuana--Class 3 misdemeanor

State v. Yates, 162 N.C. APP. 118 (2004)

Although the judgment finding defendant guilty of possession of less than 1.5 ounces of marijuana correctly referenced N.C.G.S. § 90-95(d)(4), the case is remanded for resentencing because the judgment incorrectly states the offense is a Class 1 misdemeanor as opposed to the Class 3 misdemeanor for which defendant should have been sentenced.

3) Sentencing--Aggravating factors--Acquittals of related offenses--Facts proven

State v. Boyd, 162 N.C. APP. 159 (2004)

The trial court properly considered the aggravating factor of involving a person under 16 when sentencing defendant for conspiracy to sell a controlled substance even though defendant was acquitted of contributing to the delinquency of a minor and of using a minor to commit a controlled substance offense. The court may consider any aggravating factors reasonably related to the purposes of sentencing which it finds proven by a preponderance of the evidence. The minor's age in this case was stipulated and it cannot be inferred from the acquittals that the jury found insufficient evidence to conclude that the co-conspirator was a minor.

4) Sentencing--Aggravating factors—Larceny--Age of victim

State v. Skinner, 162 N.C. APP. 434 (2004)

The trial court erred by using the victim's age (76) as an aggravating factor for larceny under the then existing Fair Sentencing Act. The victim did not know that anything had been taken until told by a deputy, and her age was not related to the larceny.

5) Sentencing--Aggravating factors--Taking advantage of position of trust and confidence

State v. Wiggins, 161 N.C. APP. 583 (2003)

The trial court did not err in a multiple statutory rape and statutory sexual offense case by finding the aggravating factor that defendant violated a position of trust and confidence even though defendant could have been also been charged with incest between near relatives under N.C.G.S. § 14-178.

6) Sentencing--Restitution--Undercover marijuana purchase

State v. Reynolds, 161 N.C. APP. 144 (2003)

There was no error in requiring a marijuana defendant to pay thirty dollars in restitution for the money used for an earlier marijuana purchase for which he was not charged. The first purchase was part of an ongoing investigation leading to defendant's conviction for the second offense.

7) Sentencing--Aggravating factor--Use of element of offense

State v. Robertson, 161 N.C. APP. 288 (2003)

The trial court did not violate N.C.G.S. § 15A-1340.16(d) when sentencing an inmate for malicious conduct for spitting at guards by finding in aggravation that defendant intended to hinder the lawful exercise of a governmental function. The fact that defendant knowingly spit at a guard does not implicitly presume that he intended to hinder the guard in his duties, so that additional evidence would be required to prove the intent necessary for a finding of this aggravating factor.

8) Sentencing--Aggravating circumstances--Pecuniary gain--Amendment to instruction

State v. Maske, 358 NC 40 (2003)

The trial court erred in a capital sentencing proceeding by its instruction pertaining to the pecuniary gain aggravating circumstance under N.C.G.S. § 15A-2000(e)(6) and the case is remanded for a new sentencing proceeding, because: 1) the instruction omitted the requirement that defendant have the intent to obtain something of value at the time of the killing; 2) the instruction allowed the jury to apply the aggravating circumstance even if the taking had no causal relationship to the killing; and 3) there is a reasonable probability that, had the error not been committed, the jury might have reached a different result. See Farb p. 6

1) Sentencing--Consecutive sentence--Rejection of plea agreement

State v. Poag, 159 N.C. APP. 312 (2003)

The trial court did not err in a second-degree murder, attempted first-degree murder, and robbery with a dangerous weapon case by imposing a consecutive sentence for defendant's robbery conviction instead of a concurrent sentence even though defendant contends it was punishment based on his exercise of his right to a jury trial, because: 1) there was

nothing in the record that indicated that the trial court imposed a consecutive sentence on defendant as punishment for his rejection of a plea agreement that would have imposed a concurrent sentence; and 2) the trial court was not limited by the initial terms of the plea bargain and was free to impose a fair and appropriate sentence after the jury returned a guilty verdict.

2) Sentencing--Aggravating circumstances--Position of trust or confidence--Former employee

State v. Ingram, 160 N.C. APP. 224 (2003)

There was insufficient evidence to find the aggravating circumstance that a robbery defendant abused a position of trust or confidence where the defendant was a former employee who had not worked for the victim for six months.

3) Sentencing--Trafficking in methamphetamine by possession and by transportation--Same punishment not required for different defendants

State v. Shelman, 159 N.C. APP. 300 (2003)

The trial court did not err in a trafficking in methamphetamine by possession and by transportation case by its sentencing of defendant, because: 1) defendant received the minimum sentence permitted by N.C.G.S. § 90-95(h); and 2) even though defendant received a greater sentence than his codefendant received pursuant to a plea bargain, there is no requirement of law that defendants charged with similar offenses be given the same punishment.

4) Sentencing--Prior record level—Proof--Worksheet not sufficient

State v. Riley, 159 N.C. APP. 546 (2003)

The trial court erred by setting defendant's prior record level based only upon a worksheet prepared and submitted by the prosecutor. There were no records of conviction, no records from agencies, and no evidence of a stipulation.

Sentencing--Aggravating factor--Abused position of trust or confidence--Consolidation of convictions for multiple offenses

State v. Tucker, 357 NC 633 (2003) Revd. Ct. Appeals, 156 N.C. APP. 53 (2003)

The trial court did not err by aggravating defendant's sentence in two judgments that consolidated convictions for multiple offenses of statutory sexual offense of a person 13, 14, or 15, indecent liberties, and sexual offense by a person in a parental role based on defendant's abuse of his position of trust or confidence, because: 1) the trial judge is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment, and aggravating factors applied to the sentence for a consolidated judgment will apply only to the most serious offense in that judgment; 2) statutory sexual offense of a person aged 13, 14 or 15 is the most serious offense in each of the judgments; and 3) the aggravating factor of abusing a position of trust or confidence thus did not apply to the crime of sexual offense by a person in a parental role but applied only to the most serious crime of sexual offense of a person aged 13, 14, or 15. N.C.G.S. § 15A-1340.15(b).

Sentencing--Aggravating circumstances--Felony involving use or threat of violence to person--Right to rebut evidence

State v. Valentine, 357 NC 512 (2003)

The trial court erred during the sentencing phase of a first-degree murder and discharging a firearm into occupied property case by limiting defendant's right to cross-examine the witness whose testimony supported submission of the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that defendant had been previously convicted of a felony involving the use or threat of violence to the person, and defendant is entitled to a new capital sentencing proceeding, because the error violated defendant's right to rebut evidence the State submitted.

Sentencing--Aggravating factor--Serious, permanent, and debilitating injury

State v. Jones, 158 N.C. APP. 498 (2003)

The trial court did not abuse its discretion in a first-degree kidnapping case by finding the aggravating factor that the victim suffered serious, permanent, and debilitating injury, because: 1) the evidence that the victim had been shot was sufficient to prove the serious injury element of first-degree kidnapping, and the evidence that the victim was paralyzed as a result of the shooting was the additional evidence that supported the finding of the aggravating factor; and 2) the same item of evidence was not used to prove both an element of the offense and an aggravating factor in this case.

Sentencing--Offense committed during probation--Evidence

State v. Maddox, 159 N.C. APP. 127 (2003)

The trial court did not err in sentencing defendant for assault with a deadly weapon with intent to kill by finding that the offense was committed while he was on probation and adding a point to his prior record level. Although the State did not move to admit the record check, it was handed up to the trial court and was sufficient to support the finding.

Sentencing--Restitution--Pain and suffering

State v. Wilson, 158 N.C. APP. 235 (2003)

The appellate court exercised its discretionary power under N.C. R. App. P. 2 and determined that the trial court erred in a common law robbery case by ordering defendant to make restitution under N.C.G.S. § 15A-1340.34(b) in the amount of \$500.00 when the property loss incurred by the victim was limited to \$20.00, because: 1) the trial court's basis for awarding restitution is limited to quantifiable costs, income, and values of the kind set out in N.C.G.S. § 15A-1340.35; and 2) pain and suffering is an impermissible basis for restitution.

Sentencing--Prior record level--Robbery with a dangerous weapon

State v. Bartley, 156 N.C. APP. 490 (2003)

The trial court erred in a robbery with a dangerous weapon case by sentencing defendant as a prior record level IV based on the State's uncontested and unsupported statement that defendant had eleven points placing him in that record level, because: 1) N.C.G.S. § 15A-1340.14 requires that each of a felony offender's prior convictions be proven to determine the offender's prior record level and that the State bears the burden of proving any prior convictions by a preponderance of the evidence; and 2) the State failed to present evidence in the form of a stipulation of the parties, a copy of the court record of defendant's prior convictions, or a copy of any record maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts.

Sentencing--Habitual felon--Ineffective assistance of counsel--Cruel and unusual punishment

State v. Hensley, 156 N.C. APP. 634 (2003)

The trial court did not err in an obtaining property by false pretenses case by sentencing defendant as an habitual felon, because: 1) defendant's attack on the use of his 1982 conviction is ineffective as a collateral attack on the prior conviction when his argument does not equate to a failure to appoint counsel, but rather that counsel procured by defendant provided ineffective assistance by failing to appear; 2) reliance on a nineteen-year-old conviction as a predicate for habitual felon status was not unconstitutional infliction of cruel and unusual punishment when the General Assembly enacted provisions limiting the use of older convictions only in certain classes of habitual offense statutes not including N.C.G.S. § 14-7.4; and 3) the sentence imposed in this case under the habitual felon laws was not so grossly disproportionate so as to result in constitutional infirmity.

Sentencing--Habitual felon indictment--Prior to substantive felony indictment

State v. Blakney, 156 N.C. APP. 671 (2003)

The issuance of an habitual felon indictment before a substantive felony indictment does not by itself void the habitual felon indictment if the notice and procedural requirements of the Habitual Felons Act have been complied with. In this case, the substantive felony indictment was returned well in advance of the judicial proceeding, so that there was a pending felony prosecution to which the habitual felon prosecution could attach, and defendant had notice of the substantive charges and that he was being prosecuted as a recidivist. N.C.G.S. § 90- 95(d)(4).

1) Sentencing--Habitual felon--Indictment--Prima facie case--Prior judgments--Discrepancy in race of defendant

State v. Wolfe, 157 N.C. APP. 22 (2003)

The State met the statutory prima facie requirement for submitting an habitual felon case to the jury where the State submitted certified records of judgments entered upon felony convictions of a person bearing defendant's name, but defendant is white while the convicted person's race in one of the indictments is noted as black. Discrepancies in details are for the jury to consider.

2) Sentencing--Habitual felon--Prior offense upgraded

State v. Wolfe, 157 N.C. APP. 22 (2003)

The trial court did not err by not dismissing an habitual felon charge where defendant contended that a 1987 voluntary manslaughter conviction was a Class F felony in 1987 rather than the Class D felony it would have

been at this trial. Voluntary manslaughter is a superseded offense which the State was specifically authorized to use by N.C.G.S. § 14-7.7.

1) Sentencing--Aggravating factors--Leadership role

State v. Rogers, 157 N.C. APP. 127 (2003)

The trial court correctly found in aggravation that defendant assumed a leadership role in a kidnapping and rape where defendant initiated the abduction, forced the victim into a truck, and initiated and completed the sexual assault.

2) Sentencing--Aggravating factors--Joining with more than one other person

State v. Rogers, 157 N.C. APP. 127 (2003)

The defendant did not join with more than one other person in committing a kidnapping and rape, and the trial court erred by finding this aggravating factor, where defendant joined with one accomplice in committing the offense.

3) Sentencing--Aggravating factors--Position of trust or confidence

State v. Rogers, 157 N.C. APP. 127 (2003)

Defendant did not take advantage of a position of trust and confidence in committing a kidnapping and rape, and the trial court erred by finding that aggravating factor, where the evidence showed that defendant and the victim were no more than acquaintances.

1) Sentencing--Incorrect verdict sheet--Inadvertent mislabeling--Arrest of judgment

State v. Tucker, 156 N.C. APP. 53 (2003) rev'd by State v. Tucker, 357 NC 633 (2003)

Although the State has conceded error as to 00 CRS 54820 and agrees that defendant's conviction for sexual activity with a person in a parental role in the home of the minor victim under this case number should be arrested based on an incorrect verdict sheet where a count of indecent liberties should have been listed, the inadvertent mislabeling of the fourteen counts against defendant for statutory sexual offense of a thirteen, fourteen, or fifteen-year-old was not a fatal defect requiring arrest of judgment.

2) Sentencing--Aggravating factor--Took advantage of position of trust or confidence

State v. Tucker, 156 N.C. APP. 53 (2003) rev'd by State v. Tucker, 357 NC 633 (2003)

Although the trial court did not err in 00 CRS 54807 by using the aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of position of trust or confidence to commit the offenses to aggravate his sentences, the trial court erred by using this aggravating factor to increase the judgments in 00 CRS 54812 and 00 CRS 54815 which included convictions of sexual activity by a person in a parental role in the home of the minor victim.

Sentencing--Aggravating factors--Sufficiency of evidence--More than assertion required

State v. Radford, 156 N.C. APP. 161 (2003)

A defendant was entitled to a new sentencing hearing for sexual activity by a substitute parent and indecent liberties where the court found the nonstatutory aggravating factor that the victim's psychological injuries were debilitating to an extent that she required counseling based on the prosecutor informing the court, after conferring with the victim's mother, that the victim was currently receiving counseling. The courts cannot find an aggravating factor based only upon an assertion by the prosecutor.

Sentencing--Attempted second-degree murder convictions vacated--Motion to pray judgment on assault convictions

State v. Lea, 156 N.C. APP. 178 (2003)

The trial court did not err by allowing the State's motion to pray judgment on multiple assault convictions five years after defendant's convictions for multiple attempted second-degree murders were vacated based on the fact that the crime of attempted second-degree murder was no longer recognized in North Carolina, because: 1) the delay is not unreasonable since for five years judgment was in effect which had been properly entered on defendant's convictions for attempted second-degree murder; 2) the record does not show that defendant objected to the continuation of the prayer for judgment or that he ever requested that the trial court enter judgment on the assault convictions which is tantamount to his consent to a continuation of judgment during that time period; and 3) there is no evidence that defendant suffered any actual prejudice due to the delay in sentencing, and defendant only argued about the length of the sentence he was about to receive.

Sentencing--Prior record level--Sufficiency of evidence

State v. Smith, 155 N.C. APP. 500 (2002)

The trial court erred by sentencing based on a prior record level worksheet submitted by the district attorney without further documentation or stipulation by defendant.

Sentencing--Guilty plea and sentence set aside--Greater sentence after trial--Statutory violation

State v. Wagner, 356 NC 599 (2002) Revd CT Appeals, 148 N.C. APP. 658

After defendant's plea of guilty of attempted possession of cocaine and his sentence of 101 to 131 months were set aside pursuant to his motion for appropriate relief, a sentence of 135 to 175 months imposed upon defendant's conviction at trial for attempted possession of cocaine was contrary to the mandate of N.C.G.S. § 15A-1335 that a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand. The fact that defendant's original conviction resulted from a negotiated plea rather than a finding of guilt by a jury is of no consequence.

Sentencing--Second-degree kidnapping--Firearm enhancement penalty--Failure to allege enhancement factors

State v. Wilson, 154 N.C. APP. 127 (2002)

The trial court erred in its resentencing of defendant for second-degree kidnapping and the firearm enhancement penalty under N.C.G.S. § 14-2.2(a) by imposing a sentence exceeding the range authorized by N.C.G.S. § 15A-1340.17, because: 1) although defendant pleaded guilty to a firearm enhancement, the statutory factors necessary for the enhancement were not alleged in the indictment; 2) the case was no longer final for purposes of the Lucas rule when the trial court voided the original judgments of conviction to enter a new single judgment; and 3) on the specific facts of this case defendant cannot be resentenced using the firearm enhancement penalty due to the State's failure to allege in the original indictment the statutory factors supporting the enhancement despite the fact that the original indictment occurred before the decision of *State v. Lucas*, 353 N.C. 568, which states that its law applies to cases that were not yet final as of 9 August 2001.

Sentencing--Aggravating factor--Defendant on pretrial release when committed offenses

State v. Mark, 154 N.C. APP. 341 (2002)

The trial court did not err in a driving while impaired and habitual impaired driving case by finding as an aggravating factor that defendant was on pretrial release when he committed the charged offenses even though defendant contends the pending charge had been dismissed with leave based on defendant's failure to appear in court, because: 1) N.C.G.S. § 15A-932 provides that dismissal with leave results in removal of the case from the docket but all other process outstanding retains its validity; 2) the statute does not contain any time limitation and contemplates that a case remains active after a failure to appear and dismissal with leave; and 3) allowing defendant to benefit from his failure to appear in court is an unnecessary result and inconsistent with the relevant statute.

Sentencing—Basis--Insistence on jury trial

State v. Peterson, 154 N.C. APP. 515 (2002)

A statutory rape and indecent liberties defendant received a new sentencing hearing where there was a reasonable inference that defendant's sentences were based in part on his insistence on a jury trial.

Sentencing--Aggravating factors--Joining with more than one other person-- Evidence insufficient

State v. Moses, 154 N.C. APP. 332 (2002)

Aggravated sentences for armed robbery, assault, and operation of a vehicle to elude arrest were remanded where the court found as an aggravating factor for each judgment that defendant joined with more than one person in committing the offense, but there was no evidence that more than one other person was involved.

Sentencing--Prior record level--Juvenile adjudication

State v. Tucker, 154 N.C. APP. 653 (2002)

A defendant being sentenced for second-degree sexual offense should not have been assigned a sentencing point because he was in training school at the time of the offense. Juveniles in North Carolina are neither convicted, sentenced, nor imprisoned; adjudication of delinquency and commitment to a youth development center shall not be considered conviction of a criminal offense.

Sentencing--Rule of lenity--Use of prior offenses--Habitual felon status-- Statute not ambiguous

State v. Cates, 154 N.C. APP. 737 (2002)

The rule of lenity was not violated by the prosecutor's choice of prior offenses with lesser sentencing points for habitual felon status, so that defendant's sentence was enhanced more than if the prosecutor had selected the higher point offenses (prior offenses used for habitual offender status may not be used to determine prior record level). The rule of lenity forbids interpretation of a statute to increase a penalty beyond the legislature's intent only when the applicable statute is ambiguous.

Sentencing--Prior record level--Method of proof

State v. Lowe, 154 N.C. APP. 607 (2002)

There was no authority for defendant's contention that the State must produce a certified copy of the record of a prior conviction if defendant objects to the evidence used to establish the record. By statute, prior convictions may be proven by any method found to be reliable; moreover, defendant had sufficient points for the record level even without this conviction.

1) Sentencing--Prior record level determination--Collateral estoppel

State v. Safrit, 154 N.C. APP. 727 (2002)

Collateral estoppel did not apply to determining a prior record level where the trial court considered two convictions which a previous jury had determined did not support violent habitual felon status. The issues litigated were not the same in that the burden of proof in determining prior record level is preponderance of the evidence while the burden in a violent habitual felon proceeding is beyond a reasonable doubt.

2) Sentencing--Evidence of prior convictions--Court records and DCI printout

State v. Safrit, 154 N.C. APP. 727 (2002)

The trial court did not err by basing its sentencing findings on the State's evidence where the prosecutor introduced a Division of Criminal Information printout and court documents. Although defendant points out minor clerical errors, these errors alone do not render the evidence incompetent.

3) Sentencing--Aggravating factors--Abuse of trust--Used to prove element of sexual offense

State v. Corbett, 154 N.C. APP. 713 (2002)

The trial court erred in a second-degree sexual offense prosecution by finding as an aggravating factor that defendant took advantage of a position of trust after the State used the same evidence (circumstances surrounding the parental relationship) to prove the element of force.

1) Sentencing--Aggravating factors--Knowingly creating great risk of death to more than one person

State v. Sellers, 155 N.C. APP. 51 (2002)

The trial court did not err in an assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(8) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, because: 1) additional evidence was required from the State to prove the existence of N.C.G.S. § 15A-1340.16(d)(8) beyond that required for the offenses themselves; and 2) where, as here, the jury has found defendant's evidence regarding insanity lacking, there is sufficient evidence for a reasonable judge to find that, despite the expert testimony to the contrary, defendant acted knowingly.

2) Sentencing--Aggravating factors--Defendant on pretrial release when committed crimes

State v. Sellers, 155 N.C. APP. 51 (2002)

The trial court erred in an assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious bodily injury, and discharging a firearm into occupied property case by finding the aggravating factor under N.C.G.S. § 15A-1340.16(d)(12) that defendant was on pretrial release when he committed these crimes, because proof of arrest and absence of proof that a trial occurred is not sufficient evidence to conclude defendant was on pretrial release.

Sentencing--First-degree murder--Replacement of death sentences with consecutive life sentences

State v. Oliver, 155 N.C. APP. 209 (2002)

The trial court did not violate N.C.G.S. § 15A-1335 in a first-degree murder case by imposing consecutive life sentences as a replacement for

one defendant's concurrent death sentences and the other defendant's death sentence with a second life sentence to run consecutively to the life sentence originally entered, because: 1) N.C.G.S. § 15A-1335 does not prohibit the trial court's replacement of concurrent sentences with consecutive sentences provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing; and 2) any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence since the penalty of death is qualitatively different from a sentence of imprisonment, however long.

Sentencing--Aggravating circumstances--Robbery with a dangerous weapon

State v. Haselden, 357 NC 1 (2003)

The trial court did not err in a first-degree murder sentencing proceeding by submitting robbery with a dangerous weapon as an aggravating circumstance under N.C.G.S. § 15A-2000(e)(5), because the evidence supported the trial court's submission of the (e)(5) aggravating circumstance.

1) Sentencing - Life sentence - Minimum service requirement - Credits No good or gain time for Class B Felon under Fair Sentencing

Price v. Beck, 153 N.C. App. 763 (2002)

The Parole Commission did not err by failing to reduce the minimum service requirement of plaintiff's life sentence with gain time, meritorious time, and good conduct credits, because: 1) N.C.G.S. § 148-13(b) gives the Secretary of the Department of Correction discretion to issue regulations regarding deductions of time from the terms of prisoners for good behavior, meritorious conduct, and the like for Class A, B, and C felons; 2) the Secretary has not issued regulations regarding deductions of time for Class A, B, and C felons; and 3) plaintiff does not argue that the Secretary has abused his discretion or failed to exercise his discretion by not promulgating regulations.

2) Constitutional Law - Prohibition against ex post facto laws - Court's construction of statute different from state agency's prior interpretation

Price v. Beck, 153 N.C. App. 763 (2002)

The retroactive application of case law to plaintiff's parole eligibility resulting in a delay of two years and three months does not violate the constitutional prohibition against ex post facto laws, because: 1) the fact that the Fair Sentencing Act has not undergone substantive change

subsequent to the commission of plaintiff's crimes means it is still applicable in plaintiff's case, and the pertinent case law simply construed an existing statute; and 2) a court's construction of a statute that is different from a state agency's prior interpretation is not an ex post facto legislative action.

3) Constitutional Law - Due process - Retroactive application of case law

Price v. Beck, 153 N.C. App. 763 (2002)

The retroactive application of case law to recalculate plaintiff inmate's parole eligibility did not violate his due process rights even though plaintiff contends the pertinent case was unforeseeable and thus denied him the chance to accept a plea bargain for a term of years because even assuming the case was unexpected as it changed long-standing policy and practice of the Parole Commission, it was not indefensible by reference to prior law since the decision rested on the express and unambiguous language of N.C.G.S. § 15A-1354(b)(2).

1) Sentencing--Aggravating factor--Murder committed with premeditation and deliberation

State v. Pimental 153 N.C. APP. 69 (2002)

The trial court did not err by imposing an aggravated sentence for second-degree murder based on the nonstatutory aggravating factor that the murder was committed with premeditation and deliberation even though the case is remanded for correction of a clerical error containing the term malice on the sentencing form, because: 1) there was no actual acquittal of defendant on the charge of first-degree murder and no binding jury determination as to whether the murder was committed with premeditation and deliberation when defendant was indicted and tried for first-degree murder but subsequently pled guilty to second-degree murder; 2) a sentencing judge is not precluded from finding premeditation and deliberation as an aggravating factor even though the State has accepted a defendant's plea of guilty to second-degree murder; and 3) the trial court's reference to the murder being committed with malice was a lapsus linguae which did not prejudice defendant since the State has not argued that the murder was committed with malice and defense counsel in his response did not use the term malice.

2) Sentencing--Prayer for judgment--Superceding habitual felony indictment to change date

State v. Gant, 153 N.C. APP. 136 (2002)

The trial court did not abuse its discretion in a forgery and uttering case by entering a prayer for judgment to allow the State time to obtain a superceding habitual felony indictment for purposes of changing the date of the occurrence of defendant's first felony offense from 16 April 2000 to 16 April 1990, because: 1) N.C.G.S. § 15A- 1334(a) provides that either defendant or the State may obtain a continuance of the sentencing hearing upon a showing that the judge determines to be good faith; and 2) the defect was only technical in nature and in no way deprived defendant of sufficient notice that he was being prosecuted as an habitual felon at the time of his plea to the underlying substantive felony charges.

3) Sentencing--Record level--Prior misdemeanor convictions obtained without counsel

State v. Rogers, 153 N.C. APP. 203 (2002)

The trial court did not err in an attempted first-degree rape, felony breaking or entering, second-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's motion to suppress the use of two prior misdemeanor convictions used by the State to elevate defendant's prior record level for sentencing purposes from Level IV to Level V even though defendant contends the two prior convictions were obtained in violation of his right to counsel under N.C.G.S. § 15A-980, because: 1) defendant failed to prove by the preponderance of the evidence that he was indigent at the time of the two prior convictions which he sought to suppress at trial; and 2) the only evidence of defendant's indigency was his mere assertion that he could not afford an attorney at the time of the prior convictions.

Sentencing—Restitution--Ownership of stolen items

State v. Craycraft, 152 N.C. APP. 211 (2002)

The trial court erred in part by ordering restitution from a defendant who broke into a trailer from which his father had been ejected and took a table and chairs. The table and chairs did not belong to the landlord and he was not the aggrieved party to be compensated for the loss. However, the amount attributable to damage to the mobile home was proper.

Sentencing--Aggravating factor--Victim very young

State v. Starner, 152 N.C. APP. 150 (2002)

The trial court did not err in a first-degree statutory sexual offense and taking indecent liberties case by imposing an aggravated range sentence

based on the aggravating factor that the victim, defendant's stepdaughter, was very young, because the combined factor of the child victim's young age and defendant's position of authority rendered the child more vulnerable to these crimes.

1) Sentencing--Aggravating factor--Took advantage of position or trust or confidence--False pretenses

State v. Murphy, 152 N.C. APP. 335 (2002)

The trial court did not err in obtaining property by false pretenses cases (98CRS 72458-72461) arising out of defendant's loan brokering scheme by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offenses, because: 1) the evidence of defendant's loan brokering scheme demonstrates the existence of a relationship between defendant and the victims generally conducive to reliance of one upon the other; and 2) defendant held himself out as a legitimate businessman with the ability to obtain financing for loans for the victims, and the victims placed great trust and confidence in defendant that he would follow through on his representation and not defraud them of their money.

2) Sentencing--Aggravating factor--Took advantage of position or trust or confidence--False pretenses--Embezzlement

State v. Murphy, 152 N.C. APP. 335 (2002)

The trial court erred in an obtaining property by false pretenses case (98CRS 30353) involving the Swim Association by finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence to commit the offense, and the case is remanded for resentencing, because: 1) the relationship between defendant and the Swim Association presents a classic case of embezzlement which is the wrongful conversion of property which was initially acquired lawfully pursuant to a trust relationship, whereas false pretenses is the unlawful acquisition of property pursuant to a false representation; 2) N.C.G.S. § 14-100 provides that a defendant may be convicted of embezzlement upon an indictment charging him with false pretenses, and defendant's guilty plea in this case is treated as a guilty plea to the crime of embezzlement; and 3) evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and to be guilty of embezzlement defendant must have initially received the property in question lawfully pursuant to a trust relationship.

Sentencing - Aggravating factor - Took advantage of position of trust or confidence (Wife)

State v. Marecek, 152 N.C. App. 479 (2002)

The trial court erred in a second-degree murder case by sentencing defendant in excess of the presumptive range based on the finding of the aggravating factor under N.C.G.S. § 15A-1340.4(a)(1)(n) that defendant took advantage of a position of trust or confidence, because there was no evidence showing that defendant exploited his wife's trust in order to kill her.

Sentencing--Felony murder--Two underlying convictions--Merger

State v. Dudley, 151 N.C. APP. 711 (2002)

A conviction for first-degree felony murder, burglary, and attempted robbery was remanded for resentencing where defendant was sentenced for murder and both underlying charges, but there was no indication of which felony was unanimously determined to be the underlying felony. The merger rule requires the trial court to arrest judgment on at least one of the underlying convictions.

Sentencing--Aggravating factor--Abuse of trust

State v. McGriff, 151 N.C. APP. 631 (2002)

The trial court did not abuse its discretion when sentencing defendant for statutory rape and indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the fourteen-year-old victim knew defendant because defendant was living with a friend's sister; the friend and the victim visited everyday to babysit, often with no adult but defendant present; and the victim had known defendant for about two months when he began calling her, touching her, and writing to her.

1) Sentencing--Weighing aggravating and mitigating factors--Each aggravating factor outweighing all mitigating factors

State v. Norman, 151 N.C. APP. 100 (2002)

The trial court did not err when sentencing defendant for the conspiracy to commit burglary, first-degree burglary, and attempted second-degree rape by finding that each aggravating factor was sufficient in and of itself to outweigh all mitigating factors. As the court's discretion includes the power to find that one aggravating factor outweighs several mitigating factors, the court may also properly determine that each of several aggravating factors is by itself sufficient to outweigh all mitigating factors.

Furthermore, the court eliminated the need for remand if there was error in finding an aggravating factor.

2) Sentencing--Aggravating factors--Sleep--Victim more vulnerable

State v. Murphy, 152 N.C. APP. 335 (2002)

The trial court properly aggravated sentences for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary on the grounds that the victims were asleep and thus more vulnerable. Sleep will constitute a proper basis for an aggravating factor if it impaired the victim's ability to flee, fend off an attack, or otherwise avoid being victimized.

3) Sentencing--Determination of prior record level--State's worksheet--Construed stipulation by defendant

State v. Eubanks, 151 N.C. APP. 499 (2002)

There was no error in a second-degree murder sentencing proceeding where the court determined defendant's prior record level from a worksheet prepared by the State. Although a worksheet prepared by the State is insufficient to satisfy the State's burden, statements by defendant's attorney here may be construed as a stipulation that defendant had been convicted of the charges listed on the worksheet.

4) Sentencing--Habitual offender--No contest plea

State v. Jones, 151 N.C. APP. 317 (2002)

The trial court did not err by accepting defendant's no contest plea to being an habitual felon. A conviction within the context of N.C.G.S. § 14-7.6 includes a judgment entered upon a no contest plea, as long as the statutory procedures in N.C.G.S. § 15A-1022 are followed.

Sentencing--Firearms enhancement--Indictment

State v. Guice, 151 N.C. APP. 293 (2002)

On remand, a 60 month firearm enhancement penalty was vacated and remanded where the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony and this factor was not submitted to the jury. The prior opinion in this matter, *State v. Guice, 141 N.C. App. 177 (2000)*, is modified.

1) Sentencing--Record points--Prayer for judgment continued

State v. Graham, 149 N.C. APP. 215 (2002)

The trial court did not err when sentencing defendant for cocaine possession by assessing prior record points for a district court prayer for judgment continued. A formal entry of judgment is not required in order to have a conviction. N.C.G.S. § 15A-1331(b).

**2) Sentencing--Insurance fraud and fraudulently burning building--
Aggravating factor--Amount of monetary damages**

State v. Payne, 149 N.C. APP. 421 (2002)

The trial court did not err in a prosecution for insurance fraud and fraudulently burning a dwelling by finding as an aggravating factor for both charges that the acts involved an attempted and actual taking of property of great monetary value. The amount of monetary damages is not an element of either offense.

**3) Sentencing--Kidnapping and attempted rape--Aggravating factor--
Masturbation**

State v. Robertson, 149 N.C. APP. 563 (2002)

The trial court erred when sentencing defendant for kidnapping and attempted rape by aggravating the sentence for “performing the loathsome act of masturbation.” Observing this act may have been unpleasant for the victim, but there was no showing that it increased her risk of harm.

**4) Sentencing--Social services documents--Not provided to defendant--No
abuse of discretion**

State v. Patterson, 150 N.C. APP. 393 (2002)

The trial court did not abuse its discretion when sentencing defendant for first-degree statutory rape, incest, and other crimes by considering DSS records which were not provided to the defense where defendant had filed a motion for production of confidential records that required that the court review confidential DSS documents in camera, the court disclosed any arguably exculpatory evidence to both parties, and defendant requested at sentencing a mitigating factor which was rebutted by the records. Defendant was given ample opportunity to present his evidence, including any that showed error in the records; his failure to do so was not due to any restriction imposed by the trial court.

5) Sentencing--Habitual felon--Defendant's stipulation

State v. Edwards, 150 N.C. APP. 544 (2002)

The trial court erred by sentencing defendant as an habitual felon based on defendant's stipulation to being an habitual felon, because the trial court did not establish a record that defendant's stipulation was a guilty plea.

6) Sentencing--Mitigating factor--Supporting family--Insufficient evidence

State v. Boyd, 148 N.C. APP. 304 (2002)

The trial court did not err when sentencing defendant for kidnapping and rape by refusing to find as a mitigating factor that defendant supports his family where the only evidence submitted was that defendant had directed \$2,000 from the settlement of a lawsuit to his former wife for the benefit of his child.

7) Sentencing--Aggravating factor--Knowingly creating a great risk of death to more than one person

State v. Demos, 148 N.C. APP. 343 (2002)

The trial court did not err by aggravating defendant's sentences for second-degree murder and voluntary manslaughter based upon its finding under N.C.G.S. § 15A-1340.16(d)(8) that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, because: 1) the type of bullet fired and the semi-automatic handgun used would normally be hazardous to the lives of more than one person; 2) defendant's actions towards each victim created a risk of death to the other victim, to people in the adjoining trailers, or those who may have been standing nearby in the dark; 3) defendant fired more shots than were necessary to kill the victims; 4) defendant, an expert marksman, shot the victims from close range; and 5) the jury's finding of malice was not dependent upon an inference arising from his use of the weapon.

Sentencing - Legal effect - Contravention of statutory law

Hamilton v. Freeman, 147 N.C. App. 195 (2001)

The trial court did not err by ordering the North Carolina Department of Correction (DOC) to give legal effect to judgments by the trial courts that contravene statutory law, because: 1) the sentencing courts had authority over the dispute and control over the parties, thus requiring the resulting judgments to be honored as received by DOC; (2) DOC usurped

the power of the judiciary and violated separation of powers by independently amending judgments to reflect compliance with DOC's interpretation of statutory authority; and 3) the trial court's order merely requires DOC to record the sentence in its official agency records as the sentence appears on the face of the judgment instead of granting specific performance to illegal plea bargains.

Sentencing--Firearm enhancement statute--First-degree burglary--Failure of indictment to allege statutory factors

State v. Wimbish, 147 NC App 287 (2001)

The trial court erred in a first-degree burglary case by using the firearm enhancement statute under N.C.G.S. § 15A-1340.16A to lengthen defendant's sentence by 60 months, because: 1) the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony; and 2) defendant's plea of guilty has no bearing on the requirement that statutory factors supporting an enhancement must be included in the indictment.

1) Sentencing--Impact program not completed--No credit for time served

State v. Hearst, 147 NC App 298 (2001)

The trial court did not err when activating a suspended sentence by denying defendant credit for time spent during probation in the Intensive Motivational Program of Alternative Correctional Treatment (IMPACT). N.C.G.S. § 15-196.1 manifests the General Assembly's intent that a defendant be credited with time in custody and not at liberty and the phrase "in custody" is shorthand for time spent committed to or in confinement in any State or local correctional, mental or other institution. The 1998 amendment converting IMPACT to a residential program acknowledged that participation in IMPACT is a lesser sanction than commitment to or confinement in a state institution.

2) Sentencing--Aggravating factor--Firearm of mass destruction--Robbery with a dangerous weapon

State v. McMillian, 147 NC App 707 (2001)

The trial court did not err in a robbery with a dangerous weapon case by finding as an aggravating factor the use of a firearm of mass destruction, because: 1) N.C.G.S. § 14-288.8(c)(3) defines a weapon of mass destruction as any shotgun with a barrel or barrels of less than eighteen inches in length or an overall length of less than twenty-six inches; 2) a witness testified that the barrel of the shotgun found in

defendant's possession had been sawed off and the barrel was less than eighteen inches in length; and 3) this element was not required to prove the offense of robbery with a dangerous weapon.

3) Sentencing--Assault--Aggravating range--Serious injury

State v. Wampler, 145 N.C. APP. 127 (2001)

The trial court did not err in an assault case by sentencing defendant under the aggravating range of sentences, because: 1) the victim's injuries went beyond the "serious injury" necessary to convict defendant of the offense; and 2) the trial court properly found that defendant was a Level II offender based on his prior record and that the aggravating factor of the victim suffering from a serious injury that is permanent and debilitating outweighed the mitigating factor of defendant's positive employment history.

4) Sentencing--Violent habitual felon--Prior violent habitual felon prosecution--Same felonies Collateral estoppel

State v. Safrit, 145 N.C. APP. 541 (2001)

The trial court erred by denying defendant's motion to dismiss a violent habitual felon indictment where another jury in a previous prosecution had found defendant not guilty of being a violent habitual felon based on the same two alleged prior violent felony convictions. The issue to be determined in this case was raised and litigated in the prior action, it was material and relevant to the disposition of the prior action, it was necessary and essential to the jury's not guilty verdict in that action, and the State was collaterally estopped.

5) Sentencing--Firearms enhancement--Second-degree kidnapping--Fatally defective indictment

State v. McNair, 146 N.C. APP. 674 (2001)

The trial court committed plain error by enhancing each of defendant's sentences for his convictions of second-degree kidnapping by sixty months for possession of a firearm during the offense based on a fatally defective indictment because the indictment failed to allege the facts to support the firearms enhancement found in N.C.G.S. § 15A-1340.16A.

6) Sentencing - Aggravating factor - Defendant took advantage of a position of trust or confidence

State v. McNair, 146 N.C. APP. 674 (2001)

The trial court erred by aggravating defendant's sentence for the convictions of robbery with a firearm and financial transaction card theft based on the trial court's finding as an aggravating factor under N.C.G.S. § 15A-1340.16(d)(15) that defendant took advantage of a position of trust or confidence, because: 1) the evidence at most showed that defendant and his victim coworker enjoyed an amiable work relationship and perhaps even a friendship; and 2) the evidence does not demonstrate the existence of a relationship between defendant and victim that was generally conducive to reliance of one upon the other.

1) Sentencing – Burglary – Aggravating factor – Presence of young victim

State v. Hilbert, 145 NC App 440 2001

The trial court erred by aggravating a first –degree burglary sentenced based on the alleged presence of a very young victim where there was no evidence that defendant targeted the victims' home because of the presence of young children, that he knew the age of the occupants before breaking into the residence, that he entered the children's rooms, or that they were aware that he was in the house. NCGS 15A-1340.16(d)(11).

2) Sentencing--Capital--Mitigating circumstances--No significant history of prior criminal activity

State v. Bone, 354 N.C. 1, 2001

The trial court did not commit prejudicial error during a capital sentencing proceeding by submitting to the jury the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance that defendant has no significant history of prior criminal activity even though defendant neither requested nor objected to the submission of this circumstance and defendant had four prior convictions for violent felonies, because: 1) there are no extraordinary facts that make any error by the trial court in giving this instruction prejudicial to defendant; 2) it is not error to submit the (f)(1) mitigating circumstance where a defendant's prior convictions are also used to support the submission of the N.C.G.S. § 15A-2000 (e)(3) aggravating circumstance that defendant has been previously convicted of a felony involving the use or threat of violence to the person; and 3) it is inconceivable that the jury would have returned a different verdict if the (f)(1) mitigating circumstance had not been submitted to the jury.

3) Sentencing--Firearms enhancement--Determination of maximum sentence

State v. Lucas, 353 N.C. 568, 2001

A first-degree burglary and kidnapping defendant's motion for appropriate

relief in the Supreme Court was granted, his sentences were vacated, and the matter was remanded where the trial court's application of the firearms enhancement provision of N.C.G.S. § 15A-1340.16A added sixty months to the longest minimum sentence, resulting in the addition of at least sixty months to the corresponding statutory maximum sentence and an enhanced maximum exceeding that set out in the sentencing charts for a defendant in the highest criminal history category convicted of an aggravated offense. In every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in the indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. Although this defendant's prior record level and actual sentencing range was toward the low end of the sentencing tables, the statutory maximum is determined by assuming that the offense was aggravated and that defendant had a criminal history level of VI. It was noted that the General Assembly intended that the trial court add 60 months to the minimum sentence and then refer to the sentencing charts to determine the corresponding maximum sentence.

4) Sentencing--Capital--Prosecutor-s argument--Life in prison

State v. May, 354 NC 172, 2001

The trial court did not err by not intervening ex mero motu during the State's closing arguments in a capital sentencing proceeding where the prosecutor commented on the life defendant would have in prison.

5) Sentencing--Prior record level--Subsequent reversal of conviction on appeal

State v. Bidgood, 144 N.C. App. 267 2001

Defendant is entitled to be resentenced for his conviction of first-degree rape when the prior record level found by the trial court was based in part upon his conviction for uttering a forged instrument and being an habitual felon that was subsequently overturned on appeal.

Sentencing--Firearms enhancement statute--Second-degree kidnapping--Minimum and maximum terms of imprisonment

State v. Van Trusell, 144 N.C. App. 445 2001

The trial court properly applied the firearms enhancement statute in its calculation of defendant's minimum and maximum terms of imprisonment

for second-degree kidnapping, because: 1) N.C.G.S. § 14-2.2(a) allows defendant's minimum term of twenty-nine months to properly be enhanced, by an additional sixty months, to eighty-nine months based on defendant's possession of a firearm during the commission of the crime; and 2) N.C.G.S. § 15A-1340.17(e) calls for a maximum sentence of 116 months if a minimum sentence of eighty-nine months is imposed.

Constitutional Law--Habitual offender--Prior felony conviction--Invalid waiver of counsel

State v. Fulp, 144 NC App 428 (2001)

An habitual felon defendant carried his burden of showing by a preponderance of the evidence that he had not waived his right to counsel for a prior felony conviction used to support the habitual felony indictment where he had said he “didn't need no lawyer” when asked by a judge in a prior felony proceeding if he wanted a lawyer, but the trial judge did not make findings showing consideration of defendant's age at the time he signed the waiver, his ninth-grade education, or his time in jail prior to the waiver.

1) Homicide--Second-degree murder--Fair Sentencing Act--Aggravating factor--Serious and debilitating injuries

State v. Holt, 144 NC App 112, 2001

The trial court did not err by finding as an aggravating factor that the infant victim suffered serious injuries that were permanent and debilitating when resentencing defendant for second-degree murder under the Fair Sentencing Act. The State's evidence was sufficient to establish that the victim suffered serious and debilitating injuries in excess of that normally present in second-degree murder.

2) Sentencing--Resentencing--Greater sentence

State v. Holt, 144 NC App 112, 2001

The trial court erred by giving a greater sentence on resentencing where defendant was convicted of second-degree murder and sentenced under the Structured Sentencing Act to 196 to 245 months; the case was remanded for sentencing under the Fair Sentencing Act; and the trial court then sentenced defendant to life in prison. The sole exception to N.C.G.S. § 15A-1335, which prohibits greater sentences, is when the General Assembly's intent is clear as to the statutorily mandated sentence on resentencing. Life imprisonment is not a statutorily mandated sentence in this case.

3) Sentencing--Prior record level--Subsequent reversal of conviction on appeal

State v. Bidgood, 144 N.C. App. 267, 2001

Defendant is entitled to be resentenced for his conviction of first-degree rape when the prior record level found by the trial court was based in part upon his conviction for uttering a forged instrument and being an habitual felon that was subsequently overturned on appeal.

Sentencing--Firearms enhancement statute--Second-degree kidnapping--Minimum and maximum terms of imprisonment

State v. Van Trusell, 144 N.C. App. 445, 2001

The trial court properly applied the firearms enhancement statute in its calculation of defendant's minimum and maximum terms of imprisonment for second-degree kidnapping, because: 1) N.C.G.S. § 14-2.2(a) allows defendant's minimum term of twenty-nine months to properly be enhanced, by an additional sixty months, to eighty-nine months based on defendant's possession of a firearm during the commission of the crime; and 2) N.C.G.S. § 15A-1340.17(e) calls for a maximum sentence of 116 months if a minimum sentence of eighty-nine months is imposed.

1) Sentencing--Second-degree murder--Aggravating factors

State v. Miller, 142 N.C. App. 435 2001

The trial court did not err in a sentencing hearing for second-degree murder arising from impaired driving by finding in aggravation that defendant had knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person and that he had refused to participate in the proceedings by fleeing the courthouse after his conviction.

2) Sentencing--Flight by defendant--No good cause for continuance

State v. Miller, 142 N.C. App. 435 2001

The trial court did not err by conducting a sentencing hearing for second-degree murder after defendant fled the courthouse where the court suspended proceedings for several minutes while a sheriff searched for defendant, the bailiff informed the court that defendant's car was missing from the parking lot, and defense counsel responded affirmatively when

asked if he was ready for the jury to return with the verdict. The record does not reflect a request by defense counsel to continue defendant's sentencing and, in any event, defendant's flight and refusal to participate does not constitute good cause.

Sentencing--Structured--Extraordinary mitigation--No deviation from the range specified for the class of offense and prior record level

State v. Messer, 142 N.C. App. 515, 2001

The trial court did not err at a sentencing hearing where defendant pleaded guilty as an habitual felon to the charge of felony possession of marijuana when the trial court determined that it lacked the authority to use extraordinary mitigation to deviate from the applicable structured sentencing ranges for a defendant convicted of a Class C felony with a prior record level IV, because: 1) N.C.G.S. § 15A-1340.13(b) provides that the trial court can only deviate from the range specified for the class of offense and prior record level where there is an applicable statute that authorizes such deviation, and there is no such statute for this case; 2) N.C.G.S. § 15A-1340.13(e) provides that deviations for aggravated or mitigated punishment are allowed only in the ranges or minimum and maximum sentences of imprisonment; 3) defendant is precluded from benefitting from extraordinary mitigation under N.C.G.S. § 15A-1340.13(h)(3) when the statute prohibits its use by a defendant who has five or more prior record level points, and defendant in this case stipulated to eleven prior record level points; and 4) N.C.G.S. § 15A-1340.13(g) does not allow a trial court to impose a shorter minimum term of imprisonment than that which is required for the class of offense and prior record level at issue based on a finding of extraordinary mitigation.

Sentencing--Structured--Criminal contempt not a prior conviction

State v. Reaves, 142 N.C. App. 629, 2001

The trial court erred in a case arising out of operating a motor vehicle without a valid operator's license and injury to personal property by its computation of defendant's sentence as Level III instead of Level II under N.C.G.S. § 15A-1340.21 of the North Carolina's Structured Sentencing Act based upon defendant's prior conviction for criminal contempt, because: 1) criminal contempt does not constitute a prior conviction under the Act when it is assumed that the 1994 adjudication was punishable by a thirty-day maximum term under N.C.G.S. § 5A-12(a); and 2) the North Carolina Constitution mandates that there be no conviction of a "crime" except upon a jury verdict or upon a plea of guilty or no contest in lieu of the right to a jury trial, N.C. Const., art. I, § 24; and 3) the General Assembly did not include criminal contempt adjudications as a crime when it amended the statute on 1 December 1997.

1) Sentencing--Aggravating factor--Victim's race

State v. Choppy, 141 N.C. App. 32 2000

The trial court did not err by finding that defendant committed the crimes of conspiring to murder, attempting to murder, and feloniously assaulting one victim under the aggravating factor that defendant committed these crimes based on the victim's race in violation of N.C.G.S. § 15A-1340.16(d)(17), because: 1) defendant's motivation, if any, for his attacks on the other four victims is irrelevant in determining whether the attack on this victim was racially motivated; and 2) the State introduced evidence of the accomplice's statement that this victim was singled out since he was black.

2) Sentencing--Aggravating factor--Especially heinous, atrocious, or cruel

State v. Choppy, 141 N.C. App. 32 2000

The trial court did not err in aggravating defendant's sentences for felonious assault and attempted murder on the basis that the offenses were especially heinous, atrocious, or cruel, because: 1) defendant assaulted five unsuspecting strangers in the dead of night and all of the victims were hit by more than one bullet; 2) two victims underwent surgery to remove bullets lodged in their bodies and they both suffered lasting nerve damage; 3) one victim has been treated for post-traumatic stress disorder, which made him retire from the Navy; 4) one victim needed surgery to remove one bullet from his body while the other bullet is still lodged in his leg and causes him constant pain; 5) one victim needed surgery to repair the artery severed by a bullet; and 6) the evidence reveals that defendant took pleasure in the assaults, including bragging to his girlfriend that he made the front page, entertaining friends with stories about the assaults, ridiculing the victim he attacked for racial reasons, and visiting the scene of the first assault while commenting upon how the area had good memories.

Sentencing--Firearm enhancement--Statute violates due process

State v. Guice, 141 N.C. App. 177, 2000

A kidnapping defendant's motion for appropriate relief in the Court of Appeals was granted insofar as it requested a determination that the firearm sentencing enhancement is facially unconstitutional. The statute removed from the jury the assessment of facts that increase the prescribed range of penalties to which the criminal defendant is exposed and is facially unconstitutional as violative of due process. N.C.G.S. § 15A-

Sentencing--Habitual felon--Evidence--Faxed copy of prior conviction

State v. Wall, 141 N.C. App. 529, 2000

The trial court in an habitual felon prosecution properly admitted a faxed certified copy of a prior conviction. Defendant challenged the exhibit only under N.C.G.S. § 14-7.4, not under the Rules of Evidence; although N.C.G.S. § 14-7.4 contemplates the most appropriate means to prove prior convictions, it does not exclude other methods of proof. The trial court in this case carefully examined the facsimile, noting that it was stamped with a seal showing it to be a true copy of the original signed by a clerk of superior court, found that the seal was a reasonable copy, and concluded that the exhibit sufficed to be introduced into evidence. The Court of Appeals concluded that the faxed, certified copy was a reliable source of the prior conviction based on the trial court's observations and its own examination of the exhibit. Finally, defendant admitted under oath that he was convicted of the crimes listed therein.

1) Sentencing--Motion to correct judgment--Improper credit for time served under house arrest--Clerical error

State v. Jarman, 140 NC App 198 (2000)

The trial court did not improperly consider the State's motion to correct judgment after the trial court mistakenly granted defendant credit against an active sentence for time served under house arrest after the term of court had expired, because: 1) the trial judge did not exercise any judicial discretion or undertake any judicial reasoning when signing the original order providing credit against service of sentence; 2) the State's motion in the case at bar merely alerted the trial court to its error in awarding defendant excess credit for time served; and 3) the trial court's correction of the clerical error resulting from inaccurate information inadvertently provided by the deputy clerk was proper.

2) Sentencing--Pretrial home detention--Credit against active sentence not required

State v. Jarman, 140 NC App 198 (2000)

N.C.G.S. § 15-196.1 does not require that defendant receive credit against an active sentence for time spent in pretrial home detention prior to her convictions for embezzlement, because house arrest and/or electric monitoring in a defendant's own home while awaiting trial does not constitute confinement in a state or local institution under the statute

3) Sentencing--Second-degree murder--Aggravating factor--Failing to render aid to victim--Essence of the crime

State v. Baldwin, 139 N.C. App. 65, 2000

The trial court erred in a second-degree murder case by finding as a nonstatutory aggravating factor that defendant failed to render aid to the victim, and the case must be remanded for a new sentencing hearing, because: 1) an aggravating factor cannot be based on circumstances which are part of the very essence of a crime; and 2) not helping to save a victim is withing the essence of malice, and therefore, is inherent in the malice crime of second- degree murder.

1) Sentencing--Habitual felon--Habitual misdemeanor assault--Substantive offense

State v. Smith, 139 N.C. App. 209 2000

The trial court did not err by sentencing defendant as an habitual felon under N.C.G.S. § 14-7.1 in cases 98 CRS 3061 and 3062 in which defendant was convicted of two counts of habitual misdemeanor assault under N.C.G.S. § 14-33.2, because habitual misdemeanor assault is a substantive offense rather than merely a status for purposes of sentence enhancement, and therefore, can be used as one of the three felonies required to support an habitual felon conviction.

2) Sentencing--prior record level

State v. Smith, 139 N.C. App. 209 2000

The trial court did not err during a sentencing proceeding by determining that defendant's prior record level is level IV under N.C.G.S. § 15-1340.14(c)(4), because: 1) defendant was convicted of two separate offenses of assault on a female on 16 May 1994, and one of these convictions was used to establish defendant's guilt of habitual misdemeanor assault under N.C.G.S. § 14-33.2 while the other was applied as a point on his prior record level; and 2) even though there was insufficient evidence to show that defendant was on probation while he committed the current offenses and a prior record point was erroneously assessed, the error was harmless based on the fact that defendant already had nine prior record points.

3) Sentencing--Aggravating factor--Great monetary loss--Insufficient evidence

State v. Godley, 140 N.C. App. 15 2000

The trial court erred when sentencing defendant for assault by finding as an aggravating factor that the offense involved damage causing great monetary loss where there was no evidence that the assault resulted in damage to the victim's property causing a monetary loss. N.C.G.S. § 15A-1340.16(d)(14). Applies only to Prop Damage and not to Personal Injury.

4) Sentencing--Second-degree murder--Aggravating factor-- Knowingly created a great risk of death

State v. Fuller, 138 NC App 481 (2000)

The trial court did not err in a second-degree murder case by finding as an aggravating sentencing factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person under N.C.G.S. § 15A- 1340.16(d)(8), because: 1) defendant's operation of a motor vehicle in this case did not constitute one of the elements of second-degree murder; 2) the use of the challenged aggravating factor within the context of motor vehicle collisions caused by legally intoxicated drivers is proper; and 3) a reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile's path.

1) Evidence--Sentencing--Victim impact statement--Unsworn

State v. Hendricks, 138 N.C. App. 668, 2000

There was no error in a sentencing hearing for felonious larceny and other offenses where the trial court permitted an unsworn victim impact statement. The rules of evidence do not apply for purposes of sentencing hearings and defendant never objected to the testimony at the hearing.

2) Sentencing--Aggravating factor--Property taken of great monetary value

State v. Hendricks, 138 N.C. App. 668, 2000

There was sufficient evidence in a sentencing hearing for felonious larceny to find the aggravating factor that the larceny involved taking property of great monetary value. Defendant's indictment listed the value of the property taken as \$ 17,000 and his guilty plea served as an

admission of guilt to all facts listed in the indictment. Moreover, during the plea hearing, the prosecutor's summary of the facts included the statement that "at least \$ 17,000 was gone" and defendant did nothing to rebut the evidence.

1) Sentencing--Allocution--Request prior to sentencing

State v. Miller, 137 N.C. App. 450 2000

The trial court erred by refusing to allow defendant his right of allocution, the opportunity to address the court prior to sentencing, and a new sentencing hearing must be conducted because N.C.G.S. § 15A-1334(b) expressly gives a non-capital defendant the right to make a statement in his own behalf at his sentencing hearing if defendant requests to do so prior to the pronouncement of sentence.

2) Sentencing--Consecutive terms--Not cruel and unusual

State v. Parker, 137 N.C. App. 590 2000

The trial court did not err by imposing consecutive sentences in a trafficking in cocaine by transportation and conspiracy to traffick in cocaine case because: 1) although defendant cites the Eighth Amendment prohibition against cruel and unusual punishment in her appellate brief, it was not a basis of defendant's assignment of error challenging the sentence imposed, N.C. R. App. P. 10(a); 2) defendant has cited no authority or court decision requiring a trial court to apportion strict degrees of culpability among codefendants when imposing a sentence, N.C. R. App. P. 28(b)(5); 3) the Eighth Amendment does not require strict proportionality between the crime and the sentence; 4) the sentences imposed upon defendant were within the presumptive statutory range authorized for her drug trafficking offenses under the Structured Sentencing Act, N.C.G.S. § 90-95(h)(3)(b); 5) the Eighth Amendment is not offended by variance in sentence terms among codefendants where some have pleaded guilty and others were convicted by a jury; and 6) the statements of one trial judge, indicating it would be a perversion of justice for this defendant to get a larger sentence than her more culpable codefendants, were made prior to the plea arrangements of her codefendants.

Indecent Liberties - Sentencing - Aggravating factors - Victim's age

State v. Rudisill, 137 N.C. App. 379 (2000)

An indecent liberties defendant received a new sentencing hearing where the sentencing judge found the statutory aggravating factor that the victim

was very young, but the record showed only that the victim was seven years old. There was no finding that this child was more vulnerable simply because of his age; merely checking the AOC form is not sufficient to establish this aggravating factor except in cases where the child is of such tender age that the vulnerability is established by the nature of the crime.

Sentencing - Structured - Prior record level points - PJC

State v. Hatcher, 136 N.C. App. 524 (2000)

The trial court did not err in its assessment of prior record points when sentencing defendant for armed robbery by assessing prior record level points for an offense to which he pled no contest and for which prayer for judgment was continued. Defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered.

Sentencing - Structured sentencing - Improper sentence - Resentencing to longer term

State v. Roberts, 351 N.C. 325 (2000)

The trial court had the authority to set aside defendant's original sentence and to resentence defendant to a longer term within the correct sentencing range of the Structured Sentencing Act where the original sentence did not fall within the sentencing range for the offense and thus violated the Act.

Criminal Law 1039 (NCI4th) - Prayer for judgment - Conditions - Final judgment

State v. Brown, 110 N.C. App. 658 (1993) 430 S.E.2d 433

Criminal Law 1185 (NCI4th) - Prior sentence used as aggravating factor - Guilty pleas in prior cases – Waiver of rights

State v. Hester, 111 N.C. App. 110 (1993) 432 S.E.2d 171

The State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before it may be used to aggravate a defendant's sentence.

False Pretenses 45 (NCI4th) - Obtaining money by false pretenses - Restitution as condition of probation - Requiring defendant to sign confession of judgment - error

STATE v. CLEMMONS, 111 N.C. App. 569 (1993) 433 S.E.2d 748

Criminal Law 1054 (NCI4th) - Sentencing hearing - Continuance to obtain new habitual felon indictment – No error

State v. Oakes, 113 N.C. App. 332 (1994) 438 S.E.2d 477

The trial court did not err in continuing defendant's sentencing hearing after his conviction of sale and delivery of a counterfeit controlled substance in order to allow the State to obtain a new indictment alleging that he was an habitual felon.

Criminal Law 1142 (NCI4th) conspiracy to commit murder and first-degree burglary – Aggravating factors - Offenses committed to disrupt enforcement of laws and to hinder enforcement

State v. Wilson, 338 N.C. 244 (1994) ___ S.E.2d ___

There was sufficient evidence when sentencing defendant for conspiracy to commit murder and first-degree burglary to support the aggravating factors that the offenses were committed to disrupt the lawful exercise of the enforcement of the laws and to hinder the lawful exercise of the enforcement of the laws where the evidence was sufficient to lead to the inference that the victim was killed to get rid of a "snitch" and also to deter others from reporting the drug activity of the gang.

Criminal Law 1185 (NCI4th) conspiracy to murder and conspiracy to commit arson - Aggravating factors - Prior convictions - Driving while impaired

State v. Johnson, 340 N.C. 32 (1995) ___ S.E.2d ___

Homicide 612, 707 (NCI4th) instructions imperfect self-defense voluntary manslaughter reasonable belief in need to kill

State v. Richardson, 341 N.C. 658 (1995) ___ S.E.2d ___

The trial court did not err by instructing the jury that it could return a verdict of voluntary manslaughter for imperfect self-defense only if defendant reasonably believed it was necessary to kill in self-defense.

Criminal Law 1687 (NCI4th) sentence increased at resentencing hearing violation of Fair Sentencing Act

State v. Nixon, 119 N.C. App. 571 (1995) ___ S.E.2d ___

Criminal Law 1149 (NCI4th) use of weapon normally hazardous to more than one person finding of aggravating factor proper

State v. Burton, 119 N.C. App. 625 (1995) ___ S.E.2d ___

The trial court did not err in finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person where the evidence showed that the victim was killed by a bullet fired from a 9 mm semiautomatic handgun, a gun which could hold between eight and sixteen bullets and which could fire bullets as fast as the shooter could pull the trigger.

Criminal Law 1183 (NCI4th) faxed police record admissibility for sentencing purposes

State v. Jordan, 120 N.C. App. 364 (1995) ___ S.E.2d ___

The trial court did not err in admitting a faxed copy of a Connecticut police record check into evidence for sentencing purposes, since the enumerated methods of proof in N.C.G.S. 15A-1340.4(e) are permissive rather than mandatory;

1) Criminal Law 1145 (NCI4th) heinous, atrocious, and cruel offenses sufficiency of evidence of aggravating factor

State v. Evans, 120 N.C. App. 752 (1995) ___ S.E.2d ___

The evidence was sufficient to support the trial court's finding that three assaults were heinous, atrocious, or cruel where defendant broke open one victim's door and began shooting; all three victims suffered multiple gunshot wounds; the initial act of firing the weapon and injuring the three victims was sufficient to support a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in each case; and the additional shots which resulted in further injury to each victim were not necessary to the conviction. N.C.G.S. 15A-1340.4(a)(1)(f).

2) Criminal Law 1149 (NCI4th) use of weapon normally hazardous to more than one person sufficiency of evidence

State v. Evans, 120 N.C. App. 752 (1995) ___ S.E.2d ___

The trial court did not err in finding the statutory aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person in each of the assault charges where the evidence showed that defendant indiscriminately fired a semi-automatic weapon in the house which was occupied by three women and two minor children. N.C.G.S. 15A-1340.4(a)(1)(g).

3) Criminal Law 1120 (NCI4th) excessive monetary damages sufficiency of evidence of aggravating factor

State v. Evans, 120 N.C. App. 752 (1995) ___ S.E.2d ___

The trial court properly found that monetary damages of \$135,000 and \$28,325 incurred by the victims in this case exceeded the amount normally found in this type of assault and therefore properly considered this as a nonstatutory aggravating factor.

Criminal Law § 1177 (NCI4th) larceny of computer equipment by student with access code taking advantage of position of trust sufficiency of evidence to support aggravating factor

State v. Carter, 122 N.C. App. 332 (1996) 740 S.E.2d 74

Criminal Law § 1073.8 (NCI4th) Structured Sentencing habitual felon points for same elements and probation offenses used in habitual felon status

State v. Bethea, 122 N.C. App. 623 (1996) 471 S.E.2d 430

The trial court did not err when sentencing defendant under the Structured Sentencing Act as an habitual felon by assigning one point pursuant to N.C.G.S. § 15A-1340.14(b)(6) because the offense for which defendant was being sentenced contains the same elements as a prior offense that had been used in establishing his status as an habitual felon and by assigning a point pursuant to N.C.G.S. § 15A-1340.14(b)(7) because defendant committed the offense while on probation for an offense that had been used to establish defendant's status as an habitual felon. N.C.G.S. § 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which defendant is being sentenced, rather than the mere existence of a prior offense.

Criminal Law § 1262 (NCI4th) assault sentencing mitigating factors

voluntary acknowledgement of wrongdoing

State v. Brewington, 343 N.C. 448 (1996) 471 S.E.2d 398

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury and conspiracy to commit robbery with a dangerous weapon by failing to find the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to his arrest where defendant's statement before his arrest contains numerous attempts to deny his culpability. Also, a defendant who tries to minimize his culpability by relying on self-defense has not acknowledged wrongdoing and is not entitled to this mitigating factor.

Criminal Law § 1312 (NCI4th) capital murder sentencing proof of prior conviction testimony of court clerk

State v. Wooten, 344 N.C. 316 (1996) 474 S.E.2d 360

The trial court did not abuse its discretion in a capital sentencing proceeding by admitting the testimony of a court clerk with respect to information in an indictment concerning a prior conviction of defendant. The State may present any competent evidence with respect to defendant's character or record that will substantially support the imposition of capital punishment and is not precluded from methods of proof of a prior conviction other than stipulation or original certified court record; however, the court may exercise discretion to ensure that the proof of aggravating circumstances does not become a mini-trial of the previous charges.

Criminal Law § 1150 (NCI4th) second-degree murder aggravating factor use of weapon normally hazardous to more than one person nine-millimeter semiautomatic pistol not element of offense

State v. Bruton, 344 N.C. 381 (1996) 474 S.E.2d 336

The trial court did not err in a noncapital first-degree murder prosecution in which defendant Townsend was convicted of second-degree murder by finding as to defendant Townsend the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person, and the evidence essential to prove this factor was not necessary to prove an essential element of second-degree murder on the basis of acting in concert. The evidence showed that defendant Townsend fired more than one shot from a nine-millimeter, semiautomatic pistol, which in its normal use is hazardous to the lives of more than one person, in the direction of the victim and another person.

**Criminal Law § 1291 (NCI4th Rev.) sentencing mitigating factor
acknowledgement of wrongdoing motion to suppress confession
acknowledgement thereby repudiated**

State v. Davis, 124 N.C. App. 93 (1996) 476 S.E.2d 453

**Narcotics, Controlled Substances, and Paraphernalia § 216 (NCI4th)
possession of cocaine sentencing restitution of cost of drug analysis**

State v. Johnson, ___ N.C. App. ___ (11-19-1996) 478 S.E.2d 16

The trial court did not err when sentencing defendant for possession of cocaine by ordering defendant to pay restitution to the SBI for the cost of analyzing the cocaine pursuant to N.C.G.S. § 90-95.3(b).

**1) Homicide § 727 (NCI4th) first-degree murders premeditation and
deliberation and felony murder sentence for underlying felony**

State v. Burgess, 345 N.C. 372 (1997) ___ S.E.2d ___

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, the underlying felony of arson did not merge with the murders, and the trial court did not err by sentencing defendant separately for each of the murders and for the underlying felony of arson.

**2) Homicide § 727 (NCI4th) two first-degree murders premeditation and
deliberation and felony murder each murder as underlying felony sentences
for both murders**

State v. Burgess, 345 N.C. 372 (1997) ___ S.E.2d ___

Where defendant was convicted of two first-degree murders based upon theories of premeditation and deliberation and felony murder, there was no merger of either murder conviction by its use as an underlying felony for the other murder, and the trial court did not err by sentencing defendant separately for each murder.

**3) Criminal Law § 1156 (NCI4th Rev.) Arson nonstatutory aggravating
factor course of conduct endangering others contemporaneous murder
convictions not used**

State v. Burgess, 345 N.C. 372 (1997) ___ S.E.2d ___

The trial court did not improperly use defendant's contemporaneous murder convictions as a nonstatutory aggravating factor for an arson

conviction when it found that "the arson was committed during a course of conduct in which other crimes endangered the lives of others" where the "other crimes" involved assaults on one murder victim's children rather than the murders. Furthermore, this "course of conduct" clearly related to the purposes of sentencing and was properly found as a nonstatutory aggravating factor.

4) Criminal Law § 1218 (NCI4th Rev.) arson aggravating factor armed with deadly weapon not basis for joinable crimes

State v. Burgess, 345 N.C. 372 (1997) ___ S.E.2d ___

The trial court could properly find as an aggravating factor for an arson conviction that "defendant was armed with a deadly weapon at the time of the crime" where defendant was convicted of two counts of first-degree murder and one count of first-degree arson, and the act of carrying the deadly weapon could have been, but was not, the basis for other joinable criminal convictions.

1) Constitutional Law § 228 (NCI4th); Criminal Law § 1698 (NCI4th Rev.) - aggravating factor – Insufficient evidence at sentencing hearing - Finding at resentencing hearing - Not double jeopardy

State v. Mason, 125 N.C. App. 216 (1997)

The trial court's finding of the especially heinous, atrocious, or cruel aggravating factor at a resentencing of defendant for second-degree murder pursuant to the Fair Sentencing Act after the Court of Appeals had ruled that the evidence at the original sentencing hearing was insufficient to support this aggravating factor did not violate defendant's double jeopardy rights under the federal or state constitutions. U.S. Const. amends. V and XIV; N.C. Const. art. I, § 19.

Constitutional Law § 199 (NCI4th); Criminal Law § 1096 (NCI4th Rev.) - Use of firearm - Enhancement of kidnapping sentence - Consecutive sentence for armed robbery - Not double jeopardy

State v. Evans, 125 N.C. App. 301 (1997)

The trial court's enhancement of defendant's sentence for kidnapping under N.C.G.S. § 15A-1340.16A for use of a firearm and imposition of a consecutive sentence for armed robbery did not impose multiple punishments for the same conduct in violation of defendant's right against double jeopardy.

1) Criminal Law § 1214 (NCI4th Rev.) – Second-degree murder - Sentencing

- prior offense - Pardon of forgiveness - Judicial notice improper

State v. Clifton, 125 N.C. App. 471 (1997)

It was improper for the trial court to take judicial notice of defendant's prior conviction for purposes of enhancing defendant's sentence where the judicial notice was of defendant's pardon of forgiveness for her 1979 conviction of accessory after the fact to robbery with a dangerous weapon. By taking judicial notice of the pardon of forgiveness and by finding that defendant's prior conviction constituted an aggravating factor, the trial court infringed upon the prerogatives of the governor. There are two types of pardons in North Carolina: A pardon of innocence, which is a full pardon; and a pardon of forgiveness, which is a conditional pardon. A conditional pardon can be revoked only by the governor and only after the governor has performed his administrative duty of evaluating any violations of the conditions of the pardon.

2) Criminal Law § 1096 (NCI4th Rev.) - Voluntary manslaughter - Use of firearm - Enhancement of sentence improper

State v. Smith, 125 N.C. App. 562 (1997)

The trial court erred in enhancing the defendant's sentence for voluntary manslaughter, a Class E felony, because he was armed with a firearm at the time he committed the offense, even though use of the firearm was not an element of voluntary manslaughter, since defendant's use of the firearm was used to prove an element of the offense.

3) Criminal Law § 1095 (NCI4th Rev.) - Structured Sentencing Act - Aggravating factor - Permanent and debilitating injury

State v. Crisp, 126 N.C. App. 30 (1997)

The evidence supported the trial court's finding as an aggravating factor for assault with a deadly weapon inflicting serious injury that the victim suffered a serious injury that was permanent and debilitating where the evidence at trial indicated that the victim had diminished strength in his arm after he was shot in the arm by defendant, the bullet disintegrated the bone, the arm bone was removed, and reconstructive surgery transferred bone from his hip to his arm.

4) Criminal Law § 1095 (NCI4th Rev.) - Structured Sentencing Act - aggravating factor - Weapon hazardous to multiple lives - Semi-automatic gun

State v. Crisp, 126 N.C. App. 30 (1997)

There was sufficient evidence to support the trial court's finding of the existence of the aggravating factor that defendant used a weapon which normally would be hazardous to the lives of more than one person where the evidence at trial supported the inference that defendant assaulted his victims with a semi-automatic pistol.

5) Criminal Law § 1097 (NCI4th Rev.) - Structured Sentencing Act - mitigating factor - Acceptance of responsibility for crimes - Motion to suppress statement

State v. Crisp, 126 N.C. App. 30 (1997)

Defendant was not entitled to a finding of the mitigating factor that he accepted responsibility for his criminal conduct where defendant repudiated his incriminating statement to the police by moving to suppress it. N.C.G.S. § 15A-1340.16(e)(15).

1) Criminal Law § 1093 (NCI4th Rev.) - Assault conviction - Sentencing - probation - One record point

State v. Leopard, 126 N.C. App. 82 (1997)

In sentencing defendant for his assault conviction, it was not error for the trial court to assess defendant one prior record point, pursuant to N.C.G.S. § 15A-1340.14(b)(7), for committing the offense while on probation for driving while impaired even though the driving while impaired conviction could not be assessed a prior record point.

2) Criminal Law 138 - Guilty plea to second degree murder - Premeditation and deliberation as aggravating factor in sentencing

State v. Melton, 307 N.C. 370 (1983)

1) Criminal Law 138 - Aggravating factor that defendant took advantage of position of trust – Properly submitted

State v. Potts, 65 N.C. App. 101 (1983)

In a sentencing hearing upon defendant's plea of guilty to second degree murder, the trial court properly considered as an aggravating factor that defendant took advantage of a position of trust and confidence to commit the offense. The evidence tended to show that deceased was referred to as one of defendant's "best friends," that minutes prior to the shooting deceased told defendant, "I thought we were friends," and defendant responded that they were; that deceased stated, "Well, we've been just like

brothers. So why are you trying to mess over me?"; that after deceased was asked to leave, deceased indicated that he was going to stay because he knew defendant would not hurt him.

2) Criminal Law 138 - Fair Sentencing Act - Dangerousness to others - aggravating and mitigating factor - Dangerousness to self not proper aggravating factor

State v. Ahearn, 307 N.C. 584 (1983)

In imposing a sentence for felonious child abuse, the trial court did not err in finding as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems even though evidence of his social and emotional problems was also considered in mitigation.

3) Criminal Law § 1095 (NCI4th) - Automobile accident - Intoxication - second-degree murder – Aggravating factor - Risk of death by device hazardous to more than one person

State v. Ballard, 127 N.C. App. 316 (1997)

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. Although defendant contended that his use of a motor vehicle could not be used in aggravation because that use provided the inference of malice necessary for second-degree murder, it is the reckless and wanton nature of the act committed which leads to the inference of malice while the aggravating factor is supported by the use of a device normally hazardous to the lives of more than one person to create a risk of death to more than one person.

4) Criminal Law § 1097 (NCI4th Rev.) - Second-degree murder- mitigating factors - Acknowledgment of wrongdoing

State v. Ballard, 127 N.C. App. 316 (1997)

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by failing to find as a statutory mitigating factor that defendant voluntarily acknowledged wrongdoing where defendant was agitated and uncooperative with medical personnel at the accident scene; defendant repeatedly yelled that he wanted to get out of the police car at the accident scene; the first officer at the accident scene testified that he felt that defendant was going to run from him; defendant provided the necessary information to complete an accident report and

indicated that he had not meant to harm the child but only wanted to scare the child's mother; and defendant failed to submit to a test to determine his blood alcohol concentration.

5) Criminal Law § 1097 (NCI4th Rev.) - Second-degree murder - Mitigating factors - Mental or physical condition - Alcoholism alone insufficient

State v. Ballard, 127 N.C. App. 316 (1997)

The trial court did not abuse its discretion in a prosecution for second-degree murder resulting from defendant's operation of his vehicle while he was intoxicated by failing to find as a statutory mitigating factor that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. The existence of a condition such as alcoholism, without more, does not mandate consideration of this mitigating factor.

1) Criminal Law § 1095 (NCI4th Rev.) - Kidnapping and rape - Aggravating factor - Premeditation and deliberation - Random victim

State v. Ruff, 127 N.C. App. 575 (1997)

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by finding as an aggravating factor that defendant kidnapped and raped the victim after a period of premeditation and deliberation where there was enough evidence for the trial court to find that defendant committed those offenses in a cool and calculated manner. A reasonable inference could be drawn from defendant's actions and words that he had previously contemplated kidnapping and raping someone, even in the absence of prior contact or ill will between defendant and the victim.

2) Criminal Law § 1096 (NCI4th Rev.) - Kidnapping and rape - Structured Sentencing – Firearms enhancement - Element of joined offense

State v. Ruff, 127 N.C. App. 575 (1997)

The trial court erred when sentencing defendant for second-degree kidnapping by adding a 60-month firearms enhancement where defendant was convicted of first-degree rape based upon his use of a dangerous weapon, convicted of first-degree rape based upon his use of a dangerous weapon, convicted of first-degree kidnapping based upon the commission of a sexual assault, and the trial court arrested judgment on the first-degree kidnapping, sentenced defendant for second-degree kidnapping, and increased that sentence under the firearms enhancement statute. Under *State v. Westmoreland, 314 N.C. 442 (1985)*, a trial court cannot

aggravate a sentence with acts which form the gravamen of contemporaneous convictions of joined offenses. The State relied only upon evidence showing that the forcible rape occurred with the aid of a dangerous weapon to establish first-degree rape; use of a firearm, therefore, was a "gravamen" of defendant's first-degree rape conviction. N.C.G.S. § 15A-1340.16A.

3) Criminal Law § 1095 (NCI4th Rev.) - Structured sentencing - Aggravating factor - Failure to assist wounded victim

State v. Applewhite, 127 N.C. App. 677 (1997)

The trial court did not err by finding as a statutory aggravating factor for attempted armed robbery and assault with a deadly weapon inflicting serious injury that defendant failed to assist the victim to save his life after the victim was shot and near death since 1) defendant's abandonment of the victim was not an element of either offense, and 2) this factor is reasonably related to the purposes of sentencing.

4) Criminal Law § 445 (NCI4th Rev.) - State's closing argument - Defense witness - Characterized as drug dealer

State v. Williams, 127 N.C. App. 464 (1997)

The trial court did not err in not correcting on its own motion remarks made by the State in its closing argument which characterized a defense witness as a "drug dealer" where evidence elicited on cross-examination established that the witness had been convicted of possession with intent to sell and deliver cocaine and selling cocaine to an undercover officer.

Criminal Law § 1093 (NCI4th Rev.) - Structured Sentencing - Prior record points - Appeal from district to superior court withdrawn - Remanded to district court - Session at which conviction occurred

State v. Wilkins, 128 N.C. App. 315 (1998)

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury in its determination of prior record points pursuant to N.C.G.S. § 15A-1340.14(b) where defendant had appealed a district court conviction to superior court and then withdrew the appeal, so that the matter was remanded to district court, and the superior court treated the remanded conviction separately from other convictions and awarded an extra point. Although the record did not show

the date the case was taken back to district court and defendant contended that it must have been at the same session as the other convictions, so that only one may be used in determining prior record level, when a defendant withdraws his appeal to the superior court and the case is remanded to the district court, it is as though the appeal had not been taken and defendant's conviction of the offense occurred upon the date of the entry of judgment in district court.

Constitutional Law § 165 (NCI4th) - Second-degree rape-prior 1993 delinquency adjudication for rape – Use as aggravating factor - No ex facto violation

State v. Taylor, 128 N.C. App. 394 (1998)

The trial court did not violate the ex post facto clauses of the state or federal constitutions when sentencing defendant as an adult for second-degree rape by considering defendant's previous adjudication of delinquency based on another second-degree rape in 1993, even though the current statute was not in effect in 1993. The new sentencing statute does not retroactively punish conduct that was innocent when done in that the 1993 conduct was indisputably proscribed at that time, and does not aggravate the 1993 delinquency adjudication or inflict a greater punishment for that conduct than allowed at that time. The question of the level assigned to the delinquency adjudication was not raised at trial.

1) Criminal Law § 1094 (NCI4th Rev.) - Second-degree murder - Structured Sentencing - Prior record level - 1972 kidnapping conviction

State v. Rice, 129 N.C. App. 715 (1998)

The trial court did not err when sentencing defendant for second-degree murder by assigning points to a 1972 kidnapping guilty plea when calculating his prior record level. Although defendant contends that common law kidnapping is no longer a crime in North Carolina because it was replaced by a statutorily defined offense, N.C.G.S. § 15A-1340.14(c) states that the classification assigned to an offense is that denominated at the time of the offense for which the offender is being sentenced. Moreover, the Structured Sentencing Act generally provides for more severe punishment for recidivist crimes and disregarding defendant's prior kidnapping conviction would contradict legislative intent.

2) Criminal Law § 1093 (NCI4th Rev.) - Second-degree murder - Structured Sentencing - Prior kidnapping conviction - Points assigned

State v. Rice, 129 N.C. App. 715 (1998)

The trial court did not err when sentencing defendant for second-degree murder by calculating and assigning four points to defendant's 1972 prior kidnapping offense pursuant to N.C.G.S. § 15A-1340.14(b) even though defendant argued that kidnapping constituted a misdemeanor at common law (the statute providing that kidnapping was unlawful in 1972 did not define the crime and kidnapping was therefore construed according to the common law definition.) It is consistent with both the provisions and the spirit of the Structured Sentencing Act to assign a prior offense which has been superseded by a substantially similar crime the same number of prior record level points as that offense would receive under the definition in force when the current offense was committed. Moreover, in an abundance of caution, the trial court assessed the point total attributable to second-degree kidnapping based upon the absence of all requisite elements of first-degree kidnapping.

1) Criminal Law - Sentencing - Evidence of prior convictions

State v. Rich, 130 N.C. App. 113 (1998)

The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting the State's offer of a printout containing the heading "DCIRecord" showing that defendant had multiple convictions in North Carolina, New Jersey, and New York. The computerized record contains sufficient identifying information with respect to defendant to give an indicia of reliability and the use of the printout was proper under N.C.G.S. § 15A-1340.14(f)(3) and N.C.G.S. § 15A-1340.14(f)(4).

2) Criminal Law - Sentencing - Classification of convictions from other jurisdictions

State v. Rich, 130 N.C. App. 113 (1998)

The trial court did not err when sentencing defendant for first-degree burglary and common law robbery under the Structured Sentencing Act by accepting photocopies of New Jersey and New York statutes when classifying his prior convictions from those jurisdictions. N.C.G.S. § 8-3 provides that a printed copy of a statute of another state is admissible as evidence of the law of that state.

Criminal Law - Sentencing - Prior record level

State v. Vaughn, 130 N.C. App. 456 (1998)

The trial court erred when sentencing defendant for possession of a stolen car by treating a 1984 conviction of breaking and entering as a Class C

conviction where defendant was also found in 1984 to be an habitual felon and was therefore sentenced as a Class C rather than Class H felon. When N.C.G.S. § 15A-1340.14 uses the term "prior felony conviction," it refers only to a prior adjudication of the defendant's guilt or to a prior entry of a plea of guilty or no contest by the defendant; the term "prior felony conviction" does not refer to the sentence imposed for committing the prior felony. Defendant's contemporaneous conviction of being an habitual felon did not reclassify the offense of breaking and entering as a Class C felony and was not therefore a "prior felony Class C conviction" for this sentencing determination.

Criminal Law - Sentencing - Acknowledgment of wrongdoing - Inculpatory statement - Repudiated at trial

State v. Waddell, 130 N.C. App. 488 (1998)

The trial court did not err in a prosecution arising from the sexual abuse of a child by not finding as a mitigating factor during sentencing that defendant voluntarily acknowledged wrongdoing where he repudiated his inculpatory statement by moving to suppress it at trial.

Criminal Law § 1095 (NCI4th Rev.) - Second-degree murder - Automobile accident - Aggravating factor - Position of trust or confidence - Insufficient evidence

State v. Ballard, 349 N.C. 286 (1998)

The evidence was insufficient to support the trial court's finding of the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense of second-degree murder arising from the death of a twelve-year-old child in an automobile accident while defendant was intoxicated and being pursued by a deputy sheriff.

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.

Sentencing - Structured sentencing - Nonstatutory aggravating factor - Attempting to dispose of evidence

State v. Rollins, 131 N.C. App. 601 (1998)

The trial court erred when sentencing defendant under Structured Sentencing for discharging a firearm into an occupied vehicle by finding as a nonstatutory aggravating factor that defendant attempted to dispose of evidence in that he gave the handgun used in the offense to someone else immediately after the offense. No law enforcement officers were present when defendant passed the firearm to another and no investigation had focused on defendant; passing the firearm to the other person lacks the characteristic of affirmative misconduct or active misrepresentation to law enforcement officials previously held to withdraw a nonstatutory factor from the constitutional protections of the right to plead not guilty and the privilege against self-incrimination.

Sentencing - Noncapital - Substantial assistance - Term less than structured minimum - Permissible

State v. Saunders, 131 N.C. App. 551 (1998)

A cocaine trafficking case was remanded for resentencing where the court found substantial assistance but stated that it was limited by structured sentencing minimum requirements. The punishment range set out in N.C.G.S. § 15A-1340.17 does not control the minimum sentence when an applicable statute requires or authorizes another minimum sentence. N.C.G.S. § 90-95 (h)(5) specifically authorizes the sentencing judge to reduce the fine or impose a less than minimum prison term once the court has made a finding of substantial assistance.

Sentencing - Structured - Plea agreement - Aggravating range - Necessary written findings

State v. Bright, 135 N.C. App. 381 (1999)

The trial court erred in sentencing defendant, who entered a plea of guilty for assault with a deadly weapon inflicting serious injury, in the aggravating range even though the plea agreement gave the trial court discretion in sentencing because N.C.G.S. § 15A-1340.16(b) and (c) requires the trial court to make the necessary written findings before

deviating from the presumptive sentence of Structured Sentencing.

Criminal Law - Conspiracy to murder - Aggravating factor - Position of leadership or dominance – Not element of joined accessory murder conviction

State v. Brown, 350 N.C. 193 (1999)

The trial court did not erroneously use the acts that formed the gravamen of a joined accessory murder conviction when it found as an aggravating factor for conspiracy to commit murder that "defendant occupied a position of leadership or dominance of other participants in the commission of the offense." With the possible exception of the included required action that defendant "commanded" the principal to murder the victim, accessory before the fact to murder does not in any way require that the defendant occupy a position of leadership or dominance in the commission of the crime, and there was no evidence in this case that defendant "commanded" the principal.

Sentencing - Driving while impaired - Probation - longer than statutory period - No findings

State v. Cardwell, 133 N.C. App. 496 (1999)

The trial court erred when sentencing defendant for driving while impaired by sentencing her to a longer probation period than provided in N.C.G.S. § 15A-1343.2 without making the required finding.

Sentencing - Structured - Presumptive range - Evidence of mitigating factors - No evidence of aggravating factors

State v. Campbell, 133 N.C. App. 531 (1999)

The trial court did not abuse its discretion by sentencing defendant within the Structured Sentencing presumptive range where there was evidence of several mitigating factors, but no aggravating factors. A trial court is not required to justify a decision to sentence a defendant within the presumptive range by making findings of aggravation and mitigation.

1) Sentencing - Fair Sentencing Act - Structured Sentencing Act - Combined sentences not permitted

State v. Branch, 134 N.C. App. 637 (1999)

The trial court did not err in a breaking and entering and larceny case by resentencing defendant based on the theory that offenses committed prior to 1 October 1994 could not be combined with offenses committed after that date, because defendant's offenses committed on 19 September 1994 were controlled by the Fair Sentencing Act and his offenses committed on 4 October 1994 were subject to the Structured Sentencing Act.

2) Sentencing - Plea bargain - Consolidated offenses not required

State v. Branch, 134 N.C. App. 637 (1999)

The trial court did not violate defendant's plea bargain in a breaking and entering and larceny case by failing to consolidate the two offenses under Structured Sentencing even though the offenses occurred under different sentencing schemes because the guilty plea was made before the discrepancy in sentencing schemes was brought to the trial court's attention, and the State kept its end of the bargain by dismissing two other breaking and entering charges.

3) Sentencing - Resentencing hearing - Trial court as a matter of law can vacate an invalid sentence

State v. Branch, 134 N.C. App. 637 (1999)

The trial court did not unlawfully hold a resentencing hearing in a breaking and entering and larceny case since the Department of Correction's letter alerting the trial court of its erroneous sentence was not a motion for appropriate relief, and the trial court as a matter of law has authority to vacate the invalid sentence and resentence defendant accordingly even if the term of court has expired.

4) Sentencing - Child abuse - Aggravating factor - "Very young" - Not a necessary element

State v. Burgess, 134 N.C. App. 632 (1999)

The trial court did not err in a felony child abuse and second-degree murder case when it found as an aggravating factor, on the felony child abuse conviction, that the three-week old infant victim was "very young" because this finding was not a necessary element to prove felonious child abuse.

5) Sentencing - Defendant's presence - Alteration between oral rendering and

written judgment

State v. Crumbley, 135 N.C. App. 59 (1999)

A sentence was vacated where defendant was present in open court when concurrent sentences were rendered in an oral judgment, but not when a written judgment was entered which provided that the sentences would run consecutively. This substantive change could only be made in defendant's presence, where he would have an opportunity to be heard.

1) Sentencing - Habitual driving while impaired - Use of prior convictions

State v. Gentry, 135 N.C. App. 107 (1999)

Sentences for impaired driving and habitual impaired driving were remanded where the trial court enhanced the impaired driving conviction through points for prior convictions and those same prior convictions were the basis for the habitual DWI charge. Although being an habitual felon is a status and driving while impaired is a substantive offense, that is a distinction without a difference. The legislature has recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate a sentencing status to that of an habitual felon and then to increase the sentencing level and it is reasonable to conclude that the same legislature did not intend that convictions which elevate misdemeanor driving while impaired to the status of felony habitual driving while impaired would again be used to increase the sentencing level. It is basic learning that criminal laws must be strictly construed and any ambiguities resolved in favor of defendant.

2) Sentencing - Active prison sentence - Restitution can only be recommended

State v. Hughes, 136 N.C. App. 92 (1999)

Although defendant failed to object to the judgments or the amount of restitution ordered at the sentencing hearing, the Court of Appeals considered this argument to prevent manifest injustice and concluded the trial court erred in requiring defendant to make restitution in the amount of \$550,283.75 for the charge of accessing computers in Count III of the indictment when an active prison sentence was imposed on this count, and on remand, the trial court is required to indicate whether it is recommending that defendant is to make restitution as a condition of work release or post-release supervision.

3) Sentencing - Aggravating factor - Great monetary loss - Felony accessing computers - Not element of offense

State v. Hughes, 136 N.C. App. 92 (1999)

Even though defendant did not object to this alleged error at the sentencing hearing, the Court of Appeals exercised its discretion and determined the trial court did not err in finding as an aggravating factor that the offense of felony accessing computers involved damage causing great monetary loss and consequently by sentencing defendant in the aggravating range because: 1) the amount of money involved in the offense is not an element of N.C.G.S. § 14-454 and only comes into play at the time of sentencing; and 2) nearly three million dollars were diverted, with Excel being forced to initiate a civil suit to recoup some of these funds at great expense and inconvenience.

4) Sentencing - Mitigating factors - Sufficiency of evidence

State v. Hughes, 136 N.C. App. 92 (1999)

The trial court did not err in failing to find certain statutory mitigating factors because the evidence was not conclusive that: 1) defendant had made substantial restitution to the victim, since Excel was forced to bring a civil lawsuit and employ an investigator in order to obtain monies and property from defendant; 2) defendant had been a person of good character or has a good reputation in the community in which he lives; 3) defendant had a positive employment history and was gainfully employed; or 4) defendant had a support system.

5) Sentencing - Aggravating factor - Ethnic group of victim

State v. Hughes, 136 N.C. App. 92 (1999)

The trial court did not err when sentencing defendant for armed robbery by finding in aggravation that the offenses were committed against the victims because of their race, color, religion, or country of origin where defendant's accomplice testified that they selected two Hispanic men as their victims because they thought that Hispanics carried large sums of cash and were less likely to report crimes committed against them. There is no language in N.C.G.S. 15A-1340.16 (d)(17) to suggest a limiting requirement that the defendant harbor animosity toward a race or ethnic group.

6) Sentencing Habitual felon - Attempt - Substantially equivalent offense

State v. Stevenson, 136 N.C. App. 235 (1999)

The trial court did not err in defendant's convictions for robbery with a dangerous weapon and of being a violent habitual felon by ruling as a matter of law that defendant's prior conviction for assault with intent to commit oral copulation from California is a substantially equivalent offense to that of a Class A through E felony, making it a violent felony under N.C.G.S. 14-7.7(b), even though defendant was only convicted of attempting to commit a felony.

Evidence - Prior convictions - Certified AOC printout

State v. Ellis, 130 N.C. App. 596 (1998)

The trial court did not err in a prosecution for habitual impaired driving by admitting a certified computer printout from AOC to establish one of the prior DWI convictions.