Case Summaries - NC Court of Appeals

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For many years, our colleague Jessie Smith prepared summaries of appellate cases and sent them out via the School of Government's criminal law listserv. Because she is transitioning her work to focus on criminal justice policy, she will not be summarizing cases anymore, but several of us will collaboratively carry on the service. We will continue to send the summaries out using the listserv, and we are also going to post them here on the blog. Summaries of North Carolina Court of Appeals opinions from June 18, 2019 are provided below.

A defendant is not entitled to a jury instruction on self-defense using deadly force where the evidence is not sufficient to support a finding that the defendant reasonably apprehended death or great bodily harm

State v. Pender, ___ N.C. App. ___, ___ S.E.2d ___ (June 18, 2019)

In this assault with a deadly weapon inflicting serious injury case, the trial court properly instructed the jury regarding self-defense. The defendant was in a physical altercation with another woman, during which she cut the other woman a number of times with a knife. "Recognizing that a defendant may only use deadly force to protect herself from great bodily injury or death," the North Carolina Pattern Jury Instructions provide two different sets of jury instructions for self-defense: NCPI-Criminal 308.40 describes when the use of non-deadly force is justified; NCPI-Criminal 308.45 describes when the use of deadly force is justified. The trial court instructed the jury pursuant to NCPI-Criminal 308.40 and the defendant argued that this was error because the jury could have determined that the knife was a deadly weapon, entitling her to an instruction pursuant to NCPI-Criminal 308.45. The Court of Appeals disagreed. Viewing the evidence in the light most favorable to the defendant, the court concluded that the evidence was not sufficient to support a finding that the defendant "reasonably apprehended death or great bodily harm when she struck the defendant with the knife," and, thus, the trial court did not err by failing to instruct the jury pursuant to NCPI-Criminal 308.45.

The State laid a proper foundation for the admission of tracking dog evidence despite the fact that there was no testimony as to the breed of the dog

State v. Barrett, ___ N.C. App. ___, ___ S.E.2d ___ (June 18, 2019)

In this common law robbery case, the State laid a proper foundation for the admission of evidence located by a tracking dog, "Carlo." Citing precedent, the court stated the four-factor test used to establish reliability of a tracking dog as follows:

[T]he action of bloodhounds may be received in evidence when it is properly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience [to be] reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

With regard to the first factor, the court rejected the defendant's argument that the State failed to lay a proper

foundation for the tracking dog evidence because "[t]here was never any testimony as to what kind of dog Carlo was" and the State never proffered any evidence that Carlo was "of pure blood." Noting that the four-factor test "has been modified over time," the court explained that "courts have recently placed less emphasis on the breed of the dog and placed more emphasis on the dog's ability and training." The Court found that by Officer McNeal's testimony as to Carlo's ability, training, and behavior during the search, "[t]he State laid a proper foundation for admission into evidence the actions and results by Carlo, the tracking dog."

Sight of a known person drinking beer on the porch, coupled with seeing her purchase more beer at the store and drive away approximately two hours later, did not provide reasonable suspicion for stop

State v. Cabbagestalk, ___ N.C. App. ___, ___ S.E.2d ___ (June 18, 2019). In this driving while impaired case, the officer observed the defendant sitting on a porch and drinking a tall beer at approximately 9:00pm. The defendant was known to the officer as someone he had previously stopped for driving while license revoked and an open container offense. Around 11:00pm, the officer encountered the defendant at a gas station, where she paid for another beer and returned to her car. The officer did not observe any signs of impairment while observing her at the store and did not speak to her. When the defendant drove away from the store, the officer followed her and saw her driving "normally"—she did not speed or drive too slow, she did not weave or swerve, she did not drink the beer, and otherwise conformed to all rules of the road. After two or three blocks, the officer stopped the car. He testified the stop was based on having seen her drinking beer earlier in the evening, then purchase more beer at the store later and drive away. The trial court denied the motion to suppress and the defendant was convicted at trial. The court of appeals unanimously reversed. The court noted that a traffic violation is not always necessary for reasonable suspicion to stop (collecting sample cases), but observed that "when the basis for an officer's suspicion connects only tenuously with the criminal behavior suspected, if at all, courts have not found the requisite reasonable suspicion." Here, the officer had no information that the defendant was impaired and did not observe any traffic violations. The court also rejected the State's argument that the defendant's past criminal history for driving while license revoked and open container supplemented the officer's suspicions: "Prior charges alone, however, do not provide the requisite reasonable suspicion and these particular priors are too attenuated from the facts of the current controversy to aid the State's argument." Despite the lack of objection at trial, the court found the trial court's finding of reasonable suspicion to be an error which had a probable impact on the jury's verdict, reversing the denial of the motion and vacating the conviction under plain error review.

Officers exceeded authority for knock and talk by walking around defendant's yard and peering through a fan into the crawlspace of the home

State v. Ellis, ___ N.C. App. ___, ___ S.E.2d ___ (June 18, 2019). After discovering stolen property at a home across the street, officers approached the front door of the defendant's residence after being informed by a witness that the person who stole the property was at the residence. No one answered the knock, and officers observed a large spiderweb in the door frame. After knocking several minutes, an officer observed a window curtain inside the home move. An officer went to the back of the home. No one answered the officer at the back door either, despite the officer again knocking for several minutes. That officer then left the back door and approached the left front corner of the home. There, the officer smelled marijuana. Another officer confirmed the smell, and they observed a fan loudly blowing from the crawl space area of the home. The odor of marijuana was emanating from the fan and an officer looked between the fan slats, where he observed marijuana plants. A search warrant was obtained on this basis, and the defendant was charged with trafficking marijuana and other drug offenses. The trial court denied the motion to suppress, finding that the smell and sight of the marijuana plants were in plain view. The court of appeals unanimously reversed. *Florida v. Jardines*, 569 U.S. 1 (2013), recognizes the importance of the home in the Fourth Amendment context and limits the authority of officers conducting a knock and talk. *Jardines* found a search had occurred when officers conducting a knock and talk used a drug sniffing dog on the suspect's front porch, and that such action exceeded the permissible boundaries of a knock and talk. Even though no police dog was present here, "[t]he detectives were not permitted to roam the property searching for something or someone after attempting a failed 'knock and talk'. Without a warrant, they could only 'approach the home by the front path, knock promptly, and then

(absent invitation to linger longer) leave." (citing *Jardines*). North Carolina applies the home protections to the curtilage of the property, and officers here exceeded their authority by moving about the curtilage of the property without a warrant. Once the knocks at the front door went unanswered, the officers should have left. The court discounted the State's argument that the lack of a "no trespassing" sign on the defendant's property meant that the officers could be present in and around the yard of the home. In the words of the court:

While the evidence of a posted no trespassing sign may be evidence of a lack of consent, nothing . . . supports the State's attempted expansion of the argument that the lack of such a sign is tantamount to an invitation for someone to enter and linger in the curtilage of the residence.

Because the officers here only smelled the marijuana after leaving the front porch and lingering in the curtilage, officers were not in a position they could lawfully be, and the plain view exception to the Fourth Amendment did not apply. Even if officers were lawfully present in the yard, the defendant had a reasonable expectation of privacy in his crawl space area, and officers violated that by looking through the fan slats. The denial of the motion to suppress was therefore reversed.