

11.2 Challenging Improper Venue

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A. Dismissal for Improper Venue

G.S. 15A-924(a)(3) requires all pleadings to state the county in which the offense occurred. The county named determines the proper venue. If the county is omitted in the pleading, counsel may either file a motion to dismiss the indictment or seek a bill of particulars identifying the county of the alleged offense. If a county is alleged in the pleading but it is not a proper venue because the offense took place elsewhere, counsel may file a motion to dismiss the indictment on the ground of improper venue and present evidence at a hearing on the issue. *See* G.S. 15A-952(b)(5); G.S. 15A-952(e). There are strict deadlines regarding the timing of a motion to dismiss for improper venue, discussed in D., Waiver, below.

In either instance double jeopardy principles do not bar the State from retrying a defendant whose case has been dismissed for improper venue before trial. Thus, the State generally will be permitted to refile charges in the proper venue following dismissal. However, a successful challenge to venue may facilitate a favorable plea bargain or other disposition of a case.

B. Facially Deficient Pleading

Sometimes an indictment or other pleading will contain allegations about venue that are invalid on their face. For instance, in *State v. Carter*, 96 N.C. App. 611 (1989), a Wake County indictment for drug trafficking alleged that the defendant had sold cocaine in Franklin County. Recognizing that the proper venue for prosecuting drug transactions that occurred in Franklin County was Franklin County, *Carter* held that Wake County was an improper venue for the trafficking charge; however, the court affirmed the conviction because the defendant failed to timely move to dismiss for improper venue.

A related error occurred in *State v. Bolt*, 81 N.C. App. 133 (1986). In *Bolt*, the venue allegations in the indictment were invalid as a matter of law. The defendant in that case resided in Wilson County and allegedly sent illegal campaign contributions to a candidate in Wake County. Wake County prosecuted the case, returning an indictment alleging a violation of the election laws in Wake County. The Court of Appeals upheld the Wake County trial court's dismissal of the case on the ground that the statute that was violated, G.S. 163-278.27, provided for exclusive venue for excessive campaign contributions in

the county where the offender resided. *Bolt* demonstrates the importance of checking the substantive statute creating a particular offense for venue provisions.

The proper procedure for objecting to a facially invalid pleading is to file a motion to dismiss the indictment on the ground of improper venue at or before arraignment. *See* G.S. 15A-952(b)(5), (c), (e). If counsel does not request arraignment, such a motion must be filed within 21 days of the return of an indictment. G.S. 15A-952(c).

C. Factually Inaccurate Allegations

Generally. A more common problem with venue is where the pleading is facially valid but factually inaccurate—that is, it alleges that the criminal conduct occurred in the county where the prosecution is initiated, but the criminal conduct actually occurred elsewhere. For instance, your client may be indicted in Durham County for a Durham County breaking-and-entering, but through your investigation you discover that the property is located across the Orange County line. Here again, if the defendant fails to file a pretrial motion to dismiss the indictment for improper venue, he or she may be deemed to have waived the objection. *See* G.S. 15A-952(b)(5), (e).

Burden of proof. Once the defendant has raised the issue of venue, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county alleged in the indictment. *See State v. Bullard*, 312 N.C. 129 (1984) (if defendant moves to dismiss for improper venue, State has burden to prove that offense occurred in county alleged in indictment); *State v. Louchheim*, 296 N.C. 314 (1979) (State must prove location of charged offense, not that crime actually occurred). The trial court rules on this issue rather than the jury. *See State v. Louchheim*, 36 N.C. App. 271, 280 (1978) (questions of venue must be resolved before jury empanelment), *aff'd*, 296 N.C. 314 (1979). In this respect, challenges to venue differ from challenges to territorial jurisdiction, where the factual question of whether the crime occurred in North Carolina is a jury question. *See supra* § 10.2, Territorial Jurisdiction.

Variance between pleading and proof at trial. Sometimes the discrepancy between the venue allegations in the indictment and the actual location of the crime will not become apparent until during trial. Although usually a criminal defendant must object to improper venue before trial or suffer waiver, several federal cases have held that the waiver rule does not apply where the problem with venue does not become apparent until during presentation of the evidence. *See United States v. Melia*, 741 F.2d 70 (4th Cir. 1984) (court declines to apply waiver rule where improper venue not apparent until evidence adduced at trial); *United States v. Black Cloud*, 590 F.2d 270 (8th Cir. 1979) (indictment specifically alleged that defendant received firearm in North Dakota; thus, when proof at trial was otherwise, his motion at close of evidence to dismiss for improper venue was timely); *United States v. Gross*, 276 F.2d 816 (2d Cir. 1960) (where lack of venue not apparent on face of the indictment, issue was not waived where the defendant objected to improper venue at the close of all evidence).

In dicta, the North Carolina Court of Appeals has declined to follow this line of authority. *See State v. Brown*, 85 N.C. App. 583 (1987) (venue waived if not raised pretrial even if issue arises from variance between pleading and proof). However, *Brown* suggests that a motion to dismiss on the ground of variance between the pleadings and the State's proof may be granted if the allegations about the place of the crime were material or they affected the defendant's ability to defend against the charge. *See also State v. Spencer*, 187 N.C. App. 605 (2007) (to same effect).

In light of these decisions, if you believe the allegation of venue is factually inaccurate and do not want the case heard in the venue alleged, move to dismiss before trial in accordance with the timelines in G.S. 15A-952(c), discussed below in subsection D. If the problem with venue is not apparent until the presentation of evidence at trial, move to dismiss at the close of the State's evidence and again at the close of all the evidence, and advance any arguments about why the variance between pleading and proof is material and requires dismissal. *See Brown*, 85 N.C. App. at 588 (indicating when dismissal may be appropriate for variance).

D. Waiver

Explicit waiver of right to proper venue. The defendant may waive the right to venue in the statutorily mandated locale by filing a motion to change venue under G.S. 15A-957 or by entering into a written stipulation with the prosecutor to change venue pursuant to G.S. 15A-133.

Implicit waiver of right to proper venue. Challenges to venue are subject to the time limits of G.S. 15A-952(c). If the defendant requests arraignment (which must be in writing), a motion challenging venue must be made at or before the time of arraignment. If counsel does not request arraignment, such a motion must be filed within 21 days of the return of an indictment.

If the defendant fails to move to dismiss for improper venue the issue is considered waived. *See G.S. 15A-135* ("Allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue under G.S. 15A-952."); *State v. Haywood*, 297 N.C. 686 (1979) (motion to dismiss for improper venue must be timely). Moreover, the court's authority to excuse a late motion to dismiss for improper venue is restricted by G.S. 15A-952(e), which states that the trial court may grant relief from any waiver for an untimely motion "except failure to move to dismiss for improper venue." Untimely motions for a change of venue or for a special venire, by contrast, may be excused in the discretion of the trial court. *See infra* § 11.3A, Methods for Changing Venue; § 11.4A, Special Venire.

No waiver for trial de novo. G.S. 15A-135 permits a defendant to "move to dismiss for improper venue upon trial de novo in superior court, provided he did not in the district court with benefit of counsel stipulate venue or expressly waive his right to contest venue."

Waiver by certain guilty pleas. Under G.S. 15A-1011(c), a defendant may enter a plea of guilty to offenses charged in several judicial districts at once if certain procedural rules are followed. A plea in one county to an offense charged in another constitutes a waiver of venue. A superior court judge may accept a plea under this statute even though the case is within the exclusive original jurisdiction of the district court. A district court judge may accept pleas under this statute in cases within the original jurisdiction of the district court or in cases within the concurrent jurisdiction of the district and superior courts under G.S. 7A-272(c) (authorizing district courts to accept guilty pleas to Class H and I felonies).