
23.6 Appeal from Guilty Pleas

A. Appeal from District Court

Misdemeanor pleas. Except to the extent it is permissible for a defendant to waive his or her right to appeal as part of a plea agreement (*see supra* § 23.3C, Plea Bargaining), a defendant who enters a plea of guilty to a misdemeanor in district court has the right to appeal for trial de novo in superior court. G.S. 15A-1431; *State v. Fox*, 34 N.C. App. 576 (1977). A trial de novo returns a defendant to his or her position before the plea in district court. *State v. Sparrow*, 276 N.C. 499 (1970) (in trial de novo, judgment below is annulled); *Fox*, 34 N.C. App. 576. Any charges dismissed as part of the plea bargain in district court may be reinstated, and the superior court has jurisdiction over those charges. G.S. 15A-1431. Also, the trial judge in superior court may sentence the defendant to a longer sentence than that imposed in the district court as long as the sentence is statutorily permissible. *Sparrow*, 276 N.C. 499; *State v. Meadows*, 234 N.C. 657 (1951). The State may not reinstate charges in superior court that were dismissed independently of the plea bargain, which unconstitutionally penalizes the defendant for filing an appeal. For a discussion of this limit, see 1 NORTH CAROLINA DEFENDER MANUAL § 13.4D (Motion to Dismiss for Vindictive or Selective Prosecution) (2d ed. 2013).

For further discussion of the defendant's right to appeal from a district court judgment in misdemeanor cases, see *infra* § 35.1B, Defendant's Right to Appeal from District Court Judgment.

Felony pleas in district court. Where a defendant pleads guilty or no contest to a Class H or I felony in district court pursuant to G.S. 15A-1029.1(a) and G.S. 7A-272(c), the defendant's appeal is to the court of appeals. G.S. 7A-272(d); G.S. 15A-1029.1(b); *see also State v. Goforth*, 130 N.C. App. 603 (1998) (attorney erroneously advised defendant that she could appeal sentence to superior court after felony guilty plea in district court).

B. Appeal from Superior Court

Generally. A criminal defendant who enters a plea of guilty or no contest in superior court has a limited right of appeal. A defendant can appeal as a matter of right the following issues:

1. Whether the prior record level was properly calculated. G.S. 15A-1444(a2)(1).
2. Whether the sentence disposition was a type that was authorized for the defendant's

class of offense and prior record level—e.g., the defendant received an active or intermediate sentence when only an intermediate or community sentence was authorized. G.S. 15A-1444(a2)(2).

3. Whether the lengths of the minimum and maximum sentences are outside those set by statute for the defendant's class of offense and prior record level. G.S. 15A-1444(a2)(3).
4. If the defendant was sentenced outside of the presumptive range, whether there were improper findings of aggravating circumstances or improper failures to find mitigating circumstances. *See* G.S. 15A-1444(a1); *see also State v. Davis*, 206 N.C. App. 545 (2010); *State v. Rogers*, 157 N.C. App. 127 (2003). The N.C. Court of Appeals has interpreted the governing statutory provision to mean that a defendant is entitled to an appeal when his or her sentence falls within the aggravated range *or* within the mitigated range. *See State v. Mabry*, 217 N.C. App. 465, 470 (2011) (holding that "a defendant receiving a mitigated sentence must, under the plain language of the statute, have a right to appeal the sufficiency of the evidence supporting his or her sentence").
5. Whether a motion to withdraw the plea of guilty or no contest was improperly denied. G.S. 15A-1444(e); *see also State v. Handy*, 326 N.C. 532 (1990) (defendant entitled to an appeal as of right after the trial judge denied his motion to withdraw his plea of guilty; death sentence vacated because denial of the presentence motion was improper).
6. Whether there were evidentiary and procedural issues in a sentencing hearing before a jury on the existence of aggravating circumstances or sentence enhancements. *See, e.g.*, *State v. Hurt*, 361 N.C. 325 (2007) (granting new sentencing hearing where trial judge's *Blakely* error in failing to submit an aggravating factor to the jury was not harmless beyond a reasonable doubt).
7. Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. G.S. 15A-979(b); G.S. 15A-1444(e); *see also State v. Smith*, 193 N.C. App. 739 (2008).

A defendant who pleads guilty has no right of appeal from any other issue. *See, e.g.*, *State v. Parks*, 146 N.C. App. 568 (2001) (no right to appeal denial of motion to dismiss habitual felon indictment following entry of guilty plea to charge of being habitual felon); *State v. Waters*, 122 N.C. App. 504 (1996) (no right to appeal ineffective assistance of counsel claim).

For an in-depth discussion of the defendant's limited right to appeal from a guilty plea in superior court, see *infra* § 35.1D, Defendant's Right to Appeal from Guilty Plea in Superior Court. For a discussion of possible alternative remedies following a guilty plea, see subsection C., below.

Possible waiver of right to appeal issues under G.S. 15A-1444(a2). If a defendant enters into a plea bargain that contains specific sentencing provisions, the defendant may waive, or partially waive, the right to appeal the issues set out in G.S. 15A-1444(a2). For example, in *State v. Hamby*, 129 N.C. App. 366, 369–70 (1998), the court found that the defendant had "mooted the issues of whether her prior record level was correctly

determined, whether the type of sentence disposition was authorized and whether the duration of her prison sentence was authorized" by stipulating in her plea agreement that her prior record level was II and that the judge was authorized to sentence her to a minimum of 29 months and a maximum of 44 months and by agreeing that her sentence could be intermediate or active in the trial judge's discretion.

However, after *Hamby*, the Court of Appeals clarified that when a defendant's stipulation involves a question of law, the stipulation does not preclude appellate review of the issue of whether the prior record level was properly calculated. *See State v. Gardner*, 225 N.C. App. 161, 166 (2013) (rejecting State's argument that defendant's stipulation to her prior record level had mooted the issue on appeal that the trial judge erred in adding one point to defendant's prior record level based on the judge's determination that all the elements of the present offense were included in a prior offense for which defendant had been convicted); *see also State v. Burgess*, 216 N.C. App. 54 (2011) (holding that even though defendant had stipulated to his prior record level and agreed to a specific sentence in his plea agreement, he had not mooted the issue on appeal that the trial judge erred in calculating his prior record level by including points for convictions from other jurisdictions; whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law). *But cf. State v. Edgar*, 242 N.C. App. 624 (2015) (defendant's stipulation to his prior record level, which included a felony conviction falling within the Class I default classification for out-of-state convictions, was binding because it did not include any questions of law; defendant did not attempt to show that the offense was substantially similar to a misdemeanor in North Carolina and his stipulation mooted any contentions he may have raised on appeal as to the calculation of his prior record level pursuant to G.S. 15A-1444(a2)).

Preserving right to appeal from denial of suppression motion. Where a defendant intends to enter a guilty plea but wants to preserve his or her right to appeal the denial of a suppression motion, the defendant bears the burden of creating a record that clearly states the defendant's intention to appeal. The defendant must inform the judge and the prosecutor of his or her intent to appeal before the plea is entered. *State v. McBride*, 120 N.C. App. 623 (1995), *aff'd per curiam*, 344 N.C. 623 (1996). In *State v. Brown*, 142 N.C. App. 491 (2001), the Court of Appeals held that a stipulation in the appellate record that the defendant intended to appeal the denial of a suppression motion was not sufficient to preserve the issue—the trial record itself had to demonstrate the defendant's intention.

Practice note: To ensure the right is preserved, counsel should advise the State during plea negotiations of the defendant's intent to appeal from the denial of the suppression motion and should file a written "notice of intent to appeal" before entry of the plea. Additionally, both the written transcript of plea and the record from the in-court plea colloquy should include a statement that the defendant intends to appeal the denial of a suppression motion under G.S. 15A-979. The last step is to enter an oral or written "notice of appeal" from the judgment itself (not from the denial of the motion to suppress) *after* entry of final judgment in order to confer jurisdiction on the appellate court. *See State v. Miller*, 205 N.C. App. 724 (2010) (appeal dismissed because, although

defendant properly gave notice of his intention to file an appeal before he pled guilty, his written notice of appeal entered after final judgment was "from the denial of Defendant's motion to suppress[,]" not from his judgment of conviction); N.C. R. APP. P. 4; *see also* 1 NORTH CAROLINA DEFENDER MANUAL § 14.7, Appeal of Suppression Motions (2d ed. 2013).

C. Alternative Remedies

Writs of certiorari. G.S. 15A-1444(e) provides that a defendant who has entered a plea of guilty or no contest and has no statutory right to appeal may file a petition for writ of certiorari to the appellate division and request discretionary review. Rule 21 of the N.C. Rules of Appellate Procedure purports to limit certiorari review to only three instances:

1. where the party lost the right to appeal by failing to take timely action;
2. where the order appealed from is interlocutory and there is no right of appeal; or
3. to review a trial judge's ruling on a motion for appropriate relief.

See N.C. R. APP. P. 21(a)(1).

Based on these conflicting statutory provisions and the conflicting cases that ensued, the N.C. Court of Appeals reached the conclusion that if a defendant, after pleading guilty or no contest, could not assert one of the three procedural bases set out in Appellate Rule 21, the court could not grant certiorari and allow review unless the defendant showed exceptional circumstances pursuant to Appellate Rule 2 warranting the suspension of the appellate rules. *See, e.g.*, *State v. Ledbetter*, ___ N.C. App. ___, 794 S.E.2d 551 (2016) (court, in its discretion, declined certiorari review of the denial of defendant's motion to dismiss based on *State v. Knoll*, 322 N.C. 535 (1988)); defendant's petition for writ of certiorari seeking review after her guilty plea failed to fall under any of the three grounds set out in Appellate Rule 21 and failed to meet the threshold requirements of Appellate Rule 2 which would justify the suspension of the procedural requirements of Appellate Rule 21), *rev'd and remanded*, ___ N.C. ___, 814 S.E. 2d 39 (2018); *see generally* N.C. R. APP. P. 2 (allowing suspension or variance of the provisions or requirements of the appellate rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest . . . .").

Upon review, the N.C. Supreme Court rejected the above analysis adopted by the Court of Appeals pertaining to its ability to grant certiorari review of guilty pleas, and held that Appellate Rule 21 cannot limit the jurisdiction to issue the writ of certiorari granted to the Court of Appeals by the General Assembly in G.S. 7A-32(c) in accordance with the N.C. Constitution. *See State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018) (holding that certiorari review of defendant's petition for writ of certiorari was permitted by G.S. 15A-1444(e) and no other statute revoked or limited the jurisdiction or the discretionary authority of the Court of Appeals in that specific context). The Supreme Court then reversed and remanded the case to the Court of Appeals so that it could exercise its discretion to determine whether it should grant or deny the defendant's petition for writ of certiorari.

For further discussion of petitions for writ of certiorari, see *infra* § 35.7D, Certiorari of Trial Court Orders and Judgments (discussing writs of certiorari generally).

Practice note: As in cases where the defendant has an appeal as a matter of right, N.C. Commission on Indigent Defense Services Rule 3.2(b) (May 29, 2015) authorizes the appointment of the Office of the Appellate Defender in cases where an indigent person seeks to file a petition for writ of certiorari in the appellate division. Counsel should fully inform clients who plead guilty and then wish to seek certiorari review that the Office of the Appellate Defender can only file a petition for writ of certiorari if it determines that the petition "will present a potentially meritorious issue for review." *See* N.C. Commission on Indigent Defense Services Rule 3.2(b) (May 29, 2015). Counsel should also fully inform the client that because the writ of certiorari is a discretionary one, the appellate court does not have to accept review. If you have questions about the process, contact the Office of the Appellate Defender.

Motions for appropriate relief. Although a defendant may not be entitled to an appeal of right after pleading guilty, he or she may be able to pursue a motion for appropriate relief under G.S. 15A-1414 and G.S. 15A-1415. *See infra* § 35.3, Motions for Appropriate Relief. Generally, a defendant who enters a guilty plea waives all errors in the proceeding, including constitutional violations that occurred before entry of the plea. One exception to this rule is that the defendant may challenge the power of the State to bring him or her into court. *See Blackledge v. Perry*, 417 U.S. 21, 30 (1974); *State v. Reynolds*, 298 N.C. 380 (1979) (discussing *Blackledge*). For example, a defendant who pled guilty may use a motion for appropriate relief to challenge a conviction based on a fatally defective indictment, which constitutes a jurisdictional defect under North Carolina law.

A defendant also may challenge whether his or her guilty plea was voluntary and intelligent and whether he or she received effective assistance of counsel in entering the plea. *See State v. Waters*, 122 N.C. App. 504 (1996) (proper remedy for defendant who pled guilty and alleged ineffective assistance of counsel was MAR in trial division); *State v. Mercer*, 84 N.C. App. 623 (1987) (finding that defendant's MAR should have been granted if he had been improperly induced to plead guilty; remanded for the entry of a new order supported by proper and sufficient findings of fact and conclusions of law); *see also Blackledge v. Allison*, 431 U.S. 63 (1977) (affirming Fourth Circuit's reversal of the summary dismissal of defendant's claim for habeas corpus relief based on allegation that defendant had been improperly induced to plead guilty).

Additionally, a defendant may file a motion for appropriate relief seeking relief from a guilty plea if it was entered under the mistaken impression that he or she could preserve the right to appeal from the denial of pretrial motions (other than a motion to suppress from which there is a right to appeal). *See State v. Rinehart*, 195 N.C. App. 774, 777 (2009) (dismissing defendant's appeal for lack of appellate jurisdiction "without prejudice to defendant's right to file a motion for appropriate relief" challenging the denial of his pretrial motions to dismiss based on double jeopardy and the right to a speedy trial).

For a further discussion of possible grounds for motions for appropriate relief after a guilty plea, see Jessica Smith, *Two Issues in MAR Procedure: Hearings and Showing Required to Succeed on a MAR*, ADMINISTRATION OF JUSTICE BULLETIN No. 2001/04 (UNC School of Government, Oct. 2001).

Caution: In some instances, G.S. 15A-1335 will bar the imposition of a greater sentence after a case has been set aside after appeal or collateral attack. For offenses committed before December 1, 2013, the statute precludes a court from imposing a more severe sentence for a conviction that has been set aside, whether the sentence was part of a negotiated plea or an open plea and whether the defendant reenters a guilty plea or is found guilty after trial. However, this statute was amended by Session Law 2013-385, s. 3 to specifically exempt application of this statute to offenses committed on or after

December 2013 when a "defendant, on direct review or collateral attack, succeeds in having a guilty plea vacated."

Even before the 2013 amendment of G.S. 15A-1335, if a defendant was successful in having a guilty plea set aside on direct review or through an MAR, any charges that had been dismissed by the State as part of the negotiated plea agreement could be reinstated; the defendant may be sentenced on those reinstated charges and as a result receive a more severe sentence than he or she originally received pursuant to his or her plea bargain. For a further discussion of the risk of receiving a greater sentence after having a guilty plea set aside, see *infra* § 35.5B, Applicability of G.S. 15A-1335.

Due process also protects the defendant to some extent from the reinstatement of charges or the imposition of a more severe sentence to punish the defendant for challenging a plea bargain. *See North Carolina v. Pearce*, 395 U.S. 711 (1969) (punishing exercise of rights is vindictive and violates due process). However, unlike a successful appeal following a trial, no presumption of vindictiveness arises for due process purposes if the second sentence after a trial is more severe than a first sentence after a guilty plea; the defendant must prove actual vindictiveness. *See Alabama v. Smith*, 490 U.S. 794 (1989); *see also infra* § 35.5A, Resentencing after Successful Appellate or Post-Conviction Review: In General (discussing constitutional limits on resentencing after successful appellate or post-conviction review).
