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3.2 Right to Hearing

A. Eligible Cases

A defendant has a statutory right, before indictment, to a probable cause hearing in district court in all cases within the original jurisdiction of the superior court. *See* G.S. 15A-601(a) (first appearance required for cases within original jurisdiction of superior court); G.S. 15A-606(a) (at first appearance, probable cause hearing must be scheduled unless it is waived). In addition to felony cases, the superior court has original jurisdiction over misdemeanors that are joined with a felony. *See* G.S. 7A-271(a)(3). Therefore, a defendant appears to have a statutory right to a probable cause hearing on felonies and any joined misdemeanors.

A probable cause hearing is not required by the United States or the North Carolina Constitutions. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (due process does not require full probable cause hearing); *State v. Lester*, 294 N.C. 220 (1978) (no equal protection violation by practice of holding probable cause hearings for some defendants but not others); *State v. Foster*, 282 N.C. 189 (1972) (state constitution does not require probable cause hearing); *State v. Brunson,* 221 N.C. App. 614 (2012) (rejecting argument that denial of probable cause hearing deprived defendant of discovery and impeachment evidence in violation of his constitutional rights to due process and confrontation; defendant failed to show reasonable possibility that a different result would have been reached at trial had he been given a probable cause hearing). *But see State v. Freeland*, 667 P.2d 509 (Or. 1983) (en banc) (finding equal protection violation under Oregon state constitution), *overruled on other grounds by State v. Savastano*, 309 P.3d 1083 (Or. 2013) (en banc). If a probable cause hearing is held, however, constitutional protections apply. *See infra* § 3.2E, Right to Counsel.

B. Effect of Indictment

The North Carolina courts have held that once the State obtains an indictment, the district court loses jurisdiction of the case and can no longer hold a probable cause hearing. Therefore, the State can avoid a probable cause hearing by obtaining an indictment first. *See State v. Lester*, 294 N.C. 220 (1978) (probable cause hearing not prerequisite to indictment); *see also State v. Hudson*, 295 N.C. 427, 431 ("[I]t is well settled that there is no necessity for a preliminary hearing after a grand jury returns a bill of indictment.").

Similarly, a probable cause hearing may not be held if an information is filed on waiver of indictment. *See* G.S. 15A-611(d).

The defendant has limited potential remedies if the State obtains an indictment before a probable cause hearing occurs. Two possibilities raised in other cases are as follows:

- In an older case, the superior court gave defense counsel an opportunity to examine the State's witnesses after indictment as a remedy for the State's failure to proceed with a preliminary hearing. *See State v. Foster*, 282 N.C. 189 (1972) (defendant was present at each of five scheduled preliminary hearings; first four hearings were continued on State's motion and over defendant's objection, and at fifth hearing district court dismissed case with leave to refile); *see also Coleman v. Burnett*, 477 F.2d 1187 (D.C. Cir. 1973) (suggesting that post-indictment remedies, such as depositions of prosecution witnesses, may be ordered).
- A conviction may be vacated if the defendant shows that the failure to hold a probable cause hearing prejudiced the presentation of his or her defense. This burden is difficult to meet and requires the defendant to show a reasonable possibility of a different result at trial without the error. *See, e.g., State v. Wiggins*, 334 N.C. 18 (1993) (defendant not prejudiced by lack of hearing where defendant was in custody, defendant made two written motions for a hearing, and four months elapsed between the first appearance and indictment).

C. Scheduling Requirements

Time limits. The district court generally must schedule a probable cause hearing for between five and fifteen working days from the date of the defendant's first appearance in district court. *See* G.S. 15A-606(d) (hearing may be sooner than five working days if parties consent and later than fifteen working days if no session of district court is scheduled within that time). Unless the defendant waives the right to a probable cause hearing, the court may grant a continuance only on a showing of good cause and may grant a continuance requested within 48 hours of the hearing only on a showing of extraordinary cause. *See* G.S. 15A-606(f).

Remedies. Although the statutory time limits appear to be strict, enforcement is problematic. Possible remedies are as follows:

- Counsel may request dismissal of the charges if the State is not ready to proceed. Generally, however, the State may reinitiate the charges later. *See* G.S. 15A-612(b); *State v. Coffer*, 54 N.C. App. 78 (1981) (State's taking of voluntary dismissal at probable cause hearing did not bar later indictment). Such a result may harm an out-of-custody defendant, who may have to post an additional bond on rearrest. *See* Daniel Spiegel, *When (and If) an Order for Arrest Should Issue after Dismissal to the Grand Jury*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 26, 2024).
- Instead of moving for dismissal, counsel may move that an in-custody defendant be released or that an out-of-custody defendant be discharged from any bail requirement or other release conditions. *See* 18 U.S.C. 3060(d) (requiring this remedy in federal

court if government does not proceed to probable cause hearing or indict defendant within statutory time limits); *see also* G.S. 15A-534(e) (district court may modify pretrial release order before probable cause hearing or waiver of hearing).

- If a hearing does not occur within the statutory time limits, an in-custody defendant may challenge continued detention by petitioning the superior court for a writ of habeas corpus. The superior court may hold a hearing to determine the legality of the restraint (*see State v. Harrington*, 283 N.C. 527 (1973)) or may order the defendant released from custody unless a prompt probable cause hearing is held. *See State v. Foster*, 282 N.C. 189, 196 (1972) (suggesting this possibility before indictment); *see also* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.2(g), at 351 (4th ed. 2015) (defendant held in custody beyond time limit for bindover hearing may obtain release through writ of habeas corpus). The cited cases suggest that a defendant may file a habeas corpus petition even after the State obtains an indictment, but the potential relief is unclear in those circumstances.
- A conviction may be vacated if the defendant shows that the failure to comply with statutory time limits prejudiced the presentation of his or her defense. This is a difficult burden to meet. *See State v. Siler*, 292 N.C. 543 (1977) (defendant's statutory rights were not violated where the trial court allowed the State's two motions to continue the probable cause hearing, resulting in a two-week delay); *State v. Rotenberry*, 54 N.C. App. 504 (1981) (defendant not prejudiced by two-day delay).

D. Demand for Hearing

The statutes do not require that the defendant file a formal demand for a probable cause hearing; however, in judicial districts that typically do not hold probable cause hearings, counsel may need to do so. A demand puts the court and prosecutor on notice that counsel wants to depart from the norm. The demand does not need to meet any particular requirements as to form; a signed motion filed with the court and served on the State that cites the probable cause statutes and requests a hearing should suffice. However, a prosecutor who is determined to avoid a probable cause hearing may do so by dismissing the case and later seeking a grand jury indictment.

E. Right to Counsel

An indigent defendant has both a statutory right and constitutional right under the Sixth Amendment to counsel at a probable cause hearing. *See* G.S. 7A-451(b)(4); G.S. 15A-611(c); *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (probable cause hearing is "critical stage" of proceedings for appointment-of-counsel purposes; although hearing is not constitutionally required, defendant has constitutional right to counsel if one is held); *State v. Cradle*, 281 N.C. 198 (1972) (recognizing that failure to appoint counsel at probable cause hearing must be reviewed under harmless-beyond-reasonable-doubt standard, but finding no error); *see also Moore v. Illinois*, 434 U.S. 220 (1977) (Sixth Amendment violated by identification of defendant at preliminary hearing in absence of counsel).