30.4 Effect of Dismissal
A. Application of Double Jeopardy
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A. Application of Double Jeopardy

If the trial judge grants a motion to dismiss based on the insufficiency of the evidence, double jeopardy precludes the State from trying the defendant again on the charge. *See Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986) ("a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause"); *State v. Ausley*, 78 N.C. App. 791 (1986); *State v. Murrell*, 54 N.C. App. 342 (1981); *see also* G.S. 15-173 (dismissal for insufficiency of evidence has force and effect of not guilty verdict). Retrial on the charge is barred because "the case was dismissed on the merits and did involve a determination of guilt or innocence." *See Murrell*, 54 N.C. App. 342, 345. Likewise, double jeopardy bars a retrial if the defendant's conviction is reversed by an appellate court because of insufficiency of the evidence. *Burks v. United States*, 437 U.S. 1 (1978); *State v. Mason*, 174 N.C. App. 206 (2005).

Principles of double jeopardy bar further prosecution even if the trial judge erroneously grants the motion to dismiss for insufficient evidence based solely on his or her mistake of law. *See Evans v. Michigan*, 568 U.S. 313, 315–16 (2013) (holding retrial not permitted where "a directed verdict of acquittal" was entered by the trial judge based on the judge's erroneous view that the State had not provided sufficient evidence of a particular element of the offense when it "turns out that the unproven 'element' was not actually a required element at all").

If the trial judge's dismissal was not based on grounds of factual guilt or innocence, the subsequent prosecution of a previously-dismissed charge does not violate double jeopardy (although it may be barred for other reasons). *State v. Priddy*, 115 N.C. App. 547 (1994); *see also United States v. Scott*, 437 U.S. 82 (1978) (prosecution's appeal from judgment dismissing defendant's charges was permitted since further prosecution did not violate double jeopardy because the dismissal was based on pre-indictment delay and did not amount to an acquittal on the merits).

B. State's Right to Appeal from Dismissals Based on Insufficient Evidence

Generally. There is no common law right providing for appeal by the State—the right is purely statutory. *State v. Harrell*, 279 N.C. 464 (1971). The State may not appeal a judgment in favor of a criminal defendant in the absence of a statute that clearly confers

that right. *State v. Dobson*, 51 N.C. App. 445 (1981). Statutes granting the State a right to appeal in criminal cases are to be strictly construed. *State v. Elkerson*, 304 N.C. 658 (1982).

Applicable statutes. G.S. 15A-1432 addresses the State's right to appeal to superior court from dismissals in district court, and G.S. 15A-1445 addresses the State's right to appeal to the appellate courts from dismissals in superior court. As discussed in detail below, the State is precluded by each of these statutes from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *Cf. United States v. Scott*, 437 U.S. 82, 91 (1978) (in accordance with double jeopardy principles, "[a] judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal"). This is true even if the judge's ruling was clearly erroneous. *See State v. Morgan*, 189 N.C. App. 716 (2008); *see also Smith v. Massachusetts*, 543 U.S. 462, 473 (2005) (acknowledging "the well-established rule" that the double jeopardy bar will attach to a pre-verdict acquittal even if it is "patently wrong in law").

No appeal from district to superior court of a dismissal based on insufficient evidence. G.S. 15A-1432(a)(1) provides that the State may appeal from district to superior court when there has been a decision or judgment dismissing criminal charges as to one or more counts "[u]nless the rule against double jeopardy prohibits further prosecution." In non-jury trials in district court, jeopardy attaches when the trial judge begins to hear evidence or testimony. *See State v. Brunson*, 327 N.C. 244 (1990); *see also State v. Fowler*, 197 N.C. App. 1, 17 (2009) ("'[U]ntil a defendant is "put to trial *before the trier of the facts*, whether the trier be a jury or a judge," jeopardy does not attach.'" (emphasis in original) (citations omitted)). The rationale behind this rule is that the potential for conviction exists only when evidence or testimony against a defendant is presented to and accepted by the court. *See State v. Ward*, 127 N.C. App. 115, 121 (1997).

Under North Carolina law, motions to dismiss based on insufficient evidence cannot be made pretrial because only those defenses, objections, or requests that are capable of being determined without the trial of the general issue (for example, a motion to dismiss for lack of jurisdiction or for a constitutional violation) may be resolved by pretrial motion. *See also* John Rubin, *Self-Defense Provides Immunity from Criminal Liability*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 4, 2016) (discussing statutory changes raising potential for pretrial determination of immunity based on use of defensive force). "[A] court can *only* consider a motion to dismiss for insufficient evidence *after* the State has had an opportunity to present all of its evidence to the trier of fact *during* trial." *See Fowler*, 197 N.C. App. 1, 28 (emphasis in original); *see also State v. Seward*, 362 N.C. 210, 216 (2008) (once the grand jury has determined the sufficiency of evidence to support a charge, a trial judge "may not pass on the sufficiency of that evidence again until after the State has had an opportunity to present its case-in-chief"). Accordingly, motions to dismiss on the grounds of insufficient evidence are made after the judge "begins to hear evidence or testimony," and jeopardy has attached by the time any ruling is made granting the motion to dismiss. Since a dismissal by a district court judge based

on the insufficiency of the evidence has the effect of a not guilty verdict and constitutes an acquittal for double jeopardy purposes, the State may not appeal to the superior court from such a dismissal. *See State v. Morgan*, 189 N.C. App. 716 (2008).

No appeal from superior court to the appellate division of a pre-verdict dismissal based on insufficient evidence. G.S. 15A-1445(a)(1) provides that the State may appeal from superior court to the appellate division from a decision or judgment dismissing criminal charges as to one or more counts "[u]nless the rule against double jeopardy prohibits further prosecution." Jeopardy attaches in superior court "when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." *See State v. Cutshall*, 278 N.C. 334, 344 (1971). Thus, the critical time for jeopardy purposes in a jury trial is the empanelment and swearing of the jury, not the taking of testimony of the first witness.

Double jeopardy will prohibit further prosecution in cases where the trial judge grants a defendant's motion to dismiss based on insufficient evidence *before the verdict* because "a reversal at the appellate level would result in a new trial—requiring defendant to once again defend himself, with all the emotional and monetary burdens associated therewith." *See State v. Scott*, 146 N.C. App. 283, 286 (2001), *rev'd on other grounds*, 356 N.C. 591 (2002). Thus, as long as the motion to dismiss is granted after attachment of jeopardy and before a verdict is entered, the State is barred from appealing the decision.

Appeal permitted from superior court to the appellate division of a post-verdict dismissal based on insufficient evidence. If the trial judge grants a dismissal *after the verdict* is returned, the State is free to appeal and the conviction may be reinstated if the appellate court finds that the trial judge erroneously granted the motion. *See State v. Hernandez*, 188 N.C. App. 193 (2008). Double jeopardy does not prohibit an appeal in that instance because the jury has already rendered its verdict and, if the State is successful on appeal, the verdict could be reinstated without subjecting a defendant to retrial. *Id.*; *see also United States v. Jenkins*, 420 U.S. 358 (1975).

Additional resources. For further information on double jeopardy and the State's right to appeal, see Robert L. Farb, *Criminal Pleadings, State's Appeal from District Court, and Double Jeopardy Issues* (UNC School of Government, Feb. 1, 2010), and Robert L. Farb, *Double Jeopardy and Related Issues*, N.C. SUPERIOR COURT JUDGES' BENCHBOOK (Oct. 2013).