31.10 Practical Effect of Mistrials

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When a mistrial is properly granted, "in legal contemplation there has been no trial." *State v. Tyson*, 138 N.C. 627, 629 (1905). "Stated otherwise, a 'mistrial results in nullification of a pending jury trial.'" *Burchette v. Lynch*, 139 N.C. App. 756, 760 (2000) (citation omitted). The parties are returned to their original positions and, at a retrial, can introduce new evidence and assert new defenses that were not raised at the first trial. *United States v. Mischlich*, 310 F. Supp. 669, 672 (D.N.J. 1970), *aff'd sub nom. United States v. Pappas*, 445 F.2d 1194 (3d Cir. 1971). This principle applies to trials and sentencing hearings. *State v. Sanders*, 347 N.C. 587 (1998).

A. Procedure Following Mistrial

When a trial judge orders a mistrial, he or she must then "direct that the case be retained for trial or such other proceedings as may be proper." G.S. 15A-1065. According to the Official Commentary, the drafters did not address in this statute whether a defendant awaiting retrial should be held in custody or released on bail because it "thought the matter was already covered by Article 26, Bail." For a detailed discussion of pretrial release, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 1, Pretrial Release (2d ed. 2013).

B. Rulings from Previous Trials

When a defendant is retried after a mistrial has been declared, rulings made by the trial judge in the previous trial are generally not binding on the subsequent judge. Principles of collateral estoppel usually do not bar a judge at retrial from ruling differently because when a mistrial is properly granted, in legal contemplation there has been no trial. *State v. Harris*, 198 N.C. App. 371 (2009). Likewise, since a prior ruling ordinarily no longer has any legal effect after a mistrial is declared, the rule that one superior court judge may not overrule another does not apply and the judge at retrial is free to rule anew. *See, e.g.*, *State v. Knight*, 245 N.C. App. 532 (2016), *modified and aff'd on other grounds*, 369 N.C. 640 (2017).

Our courts have specifically addressed some types of rulings and found that they are not binding at retrial after a mistrial is declared. These include:

- Evidentiary rulings. *See Harris*, 198 N.C. App. 371 (holding that previous judge's ruling excluding evidence under N.C. Rule of Evidence 404(b) did not bind judge in

later retrial); *see also State v. Lawrence*, 179 N.C. App. 654 (2006) (unpublished) (trial judge on retrial could grant State's motion in limine to exclude evidence allegedly beneficial to the defendant that judge in first trial had denied).

- Pretrial non-evidentiary rulings. *See Harris*, 198 N.C. App. 371 (holding that previous judge's ruling on defendant's motion for complete recordation did not bind judge in retrial).
- Suppression rulings made pursuant to Article 53 of Chapter 15A of the N.C. General Statutes unless they have become the "law of the case" as discussed later in this section. *See State v. Knight*, 245 N.C. App. 532 (2016) (judge presiding at defendant's retrial following a mistrial was not bound by the first judge's ruling granting defendant's motion to suppress), *modified and aff'd on other grounds*, 369 N.C. 640 (2017).
- Jury instructions. *State v. Macon*, 227 N.C. App. 152 (2013) (trial judge at defendant's retrial after first trial ended in mistrial was not bound by previous judge's ruling that there was insufficient evidence to support a jury instruction on defendant's refusal to submit to a breath test).

Application of doctrine of collateral estoppel when a verdict was reached on certain issues or charges in prior trial. As discussed above, a party is generally not precluded by the principle of collateral estoppel from relitigating during a retrial an issue that was raised during a previous trial that ended in mistrial. However, if the issue was one of ultimate fact that was actually litigated and finally decided by a general or special verdict during the previous trial, the party is precluded from relitigating the issue at the retrial. *Compare State v. Cornelius*, 219 N.C. App. 329 (2012) (where verdict of guilty of burglary had been accepted by trial judge in defendant's previous trial prior to a mistrial being granted on felony murder charge due to jury deadlock, judge at retrial properly instructed jury that because the underlying felony on which the charge of felony murder was based had already been determined beyond a reasonable doubt in a prior proceeding, the jury "should consider that this element [of felony murder . . .] has been proven to you beyond a reasonable doubt."), *and State v. Dial*, 122 N.C. App. 298 (1996) (defendant, at retrial, was precluded from relitigating jurisdiction issue where trial judge in first trial accepted jury's special verdict finding that North Carolina had jurisdiction but granted a mistrial due to the jury's deadlock on the issue of guilt or innocence), *with State v. Macon*, 227 N.C. App. 152, 157-58 (2013) (judge on retrial de novo after mistrial properly revisited previous judge's ruling that the State was not entitled to an instruction to the jury that it could find defendant's refusal to submit to a breath test to be evidence of her guilt of driving while impaired; collateral estoppel did not apply because original ruling "involved a question of law, not fact, and there was no final judgment because of the mistrial on the DWI charge.").

Application of "law of the case" doctrine. A party may also be barred from relitigating an evidentiary ruling at a retrial after a mistrial has been granted if the "law of the case" doctrine applies. Under this doctrine, if a party appeals from a ruling and an appellate court has ruled on the issue, the "decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *State v. Knight*, 245 N.C. App. 532, 537 (2016) (citations omitted), *modified and aff'd on other*

grounds, 369 N.C. 640 (2017). Another version of the doctrine provides that when a party with a right to appeal from a trial judge's decision fails to do so, "the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case." *Id.* (citation omitted) (holding that the law of the case doctrine did not apply to bar the State from relitigating suppression ruling at retrial because the ruling was entered *during* the first trial and State had no right to appeal pursuant to G.S. 15A-979(c), which provides for appeals from *pretrial* orders granting motions to suppress).

Even if an appellate court has ruled on an issue, it appears that a party at retrial can nevertheless seek to have the issue relitigated as long as he or she can point to new or additional evidence that supports his or her motion. *See, e.g., State v. Zuniga*, 320 N.C. 233, 243 (1987) (holding that trial judge properly found that the law of the case doctrine applied and that he was bound by N.C. Supreme Court's previous decision that the search of defendant was lawful; court noted that "unless there was additional evidence brought forward in the defendant's subsequent trial, or a new theory of exclusion brought to our attention, this issue has already been decided."); *State v. Jackson*, 317 N.C. 1, 6 (1986), *vacated on other grounds*, 479 U.S. 1077 (1987) (holding that because the evidence produced at defendant's trial was "virtually identical" to the evidence that was previously before the court in the prior appeal from the ruling on defendant's motion to suppress, the law of the case doctrine applied to make conclusive the court's prior ruling that the confession was admissible).

Practice note: Always renew *all* of your motions at the retrial after a mistrial has been granted regardless of whether the motions were previously granted or denied. If your motions were originally denied, this is an opportunity to reargue them and obtain a different ruling. Although G.S. 15A-975(c) requires a showing of previously undiscovered facts before a defendant may renew a motion to suppress evidence, this statute does not apply at a retrial. *See State v. Knight*, 245 N.C. App. 532, 538 (2016) (holding that judge at retrial after a mistrial was not bound by prior ruling granting defendant's motion to suppress since "once a mistrial has been declared, 'in legal contemplation there has been no trial'") (citation omitted), *modified and aff'd on other grounds*, 369 N.C. 640 (2017); *State v. Gillis*, 234 N.C. App. 117 (2014) (unpublished) (stating that defendant at her retrial after a mistrial was entitled to file anew her pretrial motions, including a motion to suppress, even though the motions had been ruled on at her first trial). As a practical matter, you should be prepared to persuade a second trial judge that the earlier ruling should be revisited and that additional information or a new theory will be presented that will warrant a different ruling. *See State v. Melvin*, 99 N.C. App. 16 (1990)

You should also renew a motion to suppress even if it was originally granted at the first trial. However, you can assert to the judge at retrial that he or she is not required to rehear the motion but can instead adopt the previous ruling without hearing testimony or arguments. *Cf. State v. Grogan*, 40 N.C. App. 371, 374 (1979) (after the first trial ended in a mistrial, defendant moved for a rehearing of his motion to suppress that had been previously denied but second trial judge refused to hear it; court of appeals noted that "nothing alleged by the defendant in his motion for rehearing and supporting affidavits

required [the judge at retrial] to rehear the motion which had previously been finally denied"); *see also State v. Thompson*, 52 N.C. App. 629, 631 (1981) (at retrial after a mistrial had been previously declared, second judge held voir dire before adopting first judge's denial of defendant's motion to suppress and noted no additional information had been presented that demanded a reconsideration of the prior order; court of appeals held that second judge's order was "entirely correct"). Be prepared to argue that no new or additional information exists that would warrant a reconsideration of the prior order granting the suppression motion.

C. Transcripts of Previous Trials

Determination of defendant's entitlement. The State must, as a matter of equal protection, provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also* G.S. 7A-450(b) (State must provide indigent defendant "with counsel and the other necessary expenses of representation"). However, under *Britt*, a free transcript need not always be provided. Upon a defendant's motion for transcript, the trial judge must determine:

- whether a transcript is necessary for preparing an effective defense; and
- whether there are alternative devices available to the defendant that are substantially equivalent to a transcript.

State v. Rankin, 306 N.C. 712, 716–17 (1982) (finding constitutional violation where the trial judge denied defendant's motion for transcript as untimely because the retrial had not yet been scheduled and the judge's offer to make the court reporter available to the defendant during retrial was clearly an insufficient alternative to the verbatim transcript); *State v. Tyson*, 220 N.C. App. 517 (2012) (granting defendant a new trial where findings made by trial judge did not support denial of defendant's request for a transcript after mistrial). It is difficult to imagine a situation in which a defendant would not be entitled to the transcript of the prior trial under this standard.

Reimbursement may be required. A trial judge may order the defendant to reimburse the State for the cost of the transcript in the event that the defendant is convicted. *See State v. Harris*, 198 N.C. App. 371 (2009) (upholding trial judge's order requiring defendant, as a condition of post-release supervision, to reimburse the State for the cost of the transcript of defendant's previous trial); *see also* G.S. 7A-304(a), (c) (describing convicted defendant's obligation to repay costs); G.S. 7A-455(b) (same).