35.2 Appeals by the State

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).

A. State's Right to Appeal from District Court Judgment

Statutory right to appeal. G.S. 15A-1432 addresses the State's right to appeal to superior court from dismissals or rulings entered by the district court. Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from district court to the superior court in two instances:

1. when there has been a decision or judgment dismissing criminal charges as to one or more counts; or
2. when a motion for a new trial has been granted on the grounds of newly discovered or newly available evidence but only on questions of law.

G.S. 15A-1432(a); *see also infra* § 35.2B, State's Right to Appeal from a District Court's "Preliminary Determination" in Implied-Consent Cases.

When double jeopardy attaches. The State is precluded from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *See supra* § 30.4, Effect of Dismissal; *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"). Thus, the State cannot appeal from district to superior court when the defendant's motion to dismiss for insufficient evidence is granted in a misdemeanor case. *See State v. Harrell*, 279 N.C. 464 (1971); *State v. Fowler*, 197 N.C. App. 1 (2009).

Since criminal trials in district court are non-jury trials, jeopardy attaches when the trial judge begins to hear evidence or testimony. *See State v. Brunson*, 327 N.C. 244 (1990); *see also Fowler*, 197 N.C. App. 1, 17 ("'until 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 added by *Fowler* court) (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).

If a dismissal is granted based on a pretrial motion of the defendant and evidence has not

been accepted by the district court for an adjudication of the defendant's guilt, the State is free to appeal to superior court. *See, e.g., id.* (jeopardy had not attached and State properly appealed to superior court where district court dismissed charges before trial based on prosecutorial misconduct).

Procedural requirements. When appealing pursuant to G.S. 15A-1432(a), the State must file a written motion specifying the basis of the appeal. G.S. 15A-1432(b); *see also State v. Hinchman*, 192 N.C. App. 657, 661–62 (2008) (State properly asserted the legal basis of appeal in its motion for appeal, which asserted that "no competent evidence was presented to support the [defendant's] motion and order to dismiss" and the "[d]ismissal of the charges was contrary to law"). The motion must be filed with the clerk and served on the defendant within ten days after entry of the district court judgment. G.S. 15A-1432(b).

Minor inadequacies in the State's "motion of appeal" will not be fatal to the superior court's jurisdiction unless the defendant can show prejudice. *See Hinchman*, 192 N.C. App. 657 (defendant showed no prejudice resulting from the State's mistake in captioning its motion to appeal as having been filed in the district court division instead of superior court); *Ward*, 127 N.C. App. 115 (State's appeal designated as "Notice of Appeal" and setting forth the legal bases on which it sought review was sufficient to vest the superior court with jurisdiction even though the document was not labeled a "motion" as required by G.S. 15A-1432(b)).

The State and the defendant are entitled to file briefs addressing the motion and to adequate time for their preparation, "consonant with the expeditious handling of the appeal." G.S. 15A-1432(c).

Scope of review. The superior court must conduct a de novo review of the district court's decision. Since district courts are not courts of record, there would be no way for the superior court to exercise appellate-like jurisdiction to determine whether the district court's findings of fact and conclusions of law were sufficient. In many instances, the only way for a superior court judge to determine whether the district court's order should be affirmed or reversed will be to hold a full evidentiary hearing. *See Ward*, 127 N.C. App. 115; *State v. Gurganus*, 71 N.C. App. 95 (1984).

De novo review in this context does not mean that the State has the opportunity for a new trial on the merits, as when a defendant appeals for a trial de novo in superior court. The hearing in superior court on the State's appeal is limited to a de novo review of the district court's order dismissing criminal charges against a defendant or granting a motion for a new trial based on newly discovered evidence. *Gurganus*, 71 N.C. App. 95 (State was only entitled to a hearing de novo on the issue of whether the second prosecution of the charges by the State was barred by double jeopardy).

Disposition by superior court. If the superior court finds that the district court's decision was erroneous, it must reinstate the charges and remand the case to district court for further proceedings. The defendant may appeal from this order to the appellate division "as in the case of other orders of the superior court." This is true even though the appeal is

interlocutory if the defendant, or his or her attorney, certifies to the superior court judge "that the appeal is not taken for the purpose of delay" and "the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter." G.S. 15A-1432(d).

If the superior court finds that the district court's decision was correct, it must enter an order affirming the district court judgment. The State may appeal from this order to the appellate division if the district attorney certifies to the ruling judge that the appeal is not taken for the purpose of delay. G.S. 15A-1432(e).

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 SCH. OF GOV'T (Feb. 1, 2010), www.sog.unc.edu/sites/www.sog.unc.edu/files/pleadjep.pdf, and Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, UNC SCH. OF GOV'T (Jan. 2007), www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.

B. State's Right to Appeal from a District Court's "Preliminary Determination" in Implied-Consent Cases

The Motor Vehicle Driver Protection Act of 2006 set forth specific procedures that must be followed for implied-consent offenses committed on or after December 1, 2006. When a district court judge determines that a defendant's pretrial motion to suppress or dismiss made pursuant to G.S. 20-38.6(a) should be granted, he or she must issue a written "preliminary determination" setting forth findings of fact and conclusions of law. G.S. 20-38.6(f). The State may appeal from that "preliminary determination" to superior court. If there is a dispute about the findings of fact, the superior court is not bound by the district court's findings and must determine the matter de novo. G.S. 20-38.7(a). The superior court will determine the merits of the defendant's motion and remand to district court for the entry of final judgment.

If the judge affirms the district court's "preliminary determination" granting the defendant's motion to suppress or dismiss and remands for the entry of final judgment, the State has no statutory right to appeal but may petition the N.C. Court of Appeals for a writ of certiorari. *See State v. Fowler*, 197 N.C. App. 1 (2009); *State v. Palmer*, 197 N.C. App. 201 (2009).

The defendant may not appeal from a district court judge's determination that his or her pretrial motion to suppress or dismiss made pursuant to G.S. 20-38.6(a) should be denied. He or she must wait and appeal for a trial de novo if convicted of the offense. *See* G.S. 20-38.7(b).

Additional resources. For a detailed discussion of the procedures applicable to and issues surrounding appeals from a district court's "preliminary determination," see Shea Riggsbee Denning, *Motions Procedures in Implied Consent Cases after* State v. Fowler *and* State v. Palmer, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/06 (UNC School of Government, Dec. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0906.pdf, and

John K. Fanney, *Pretrial Motions and Hot Topics in DWI Cases* (North Carolina Public Defender Attorney and Investigator Conference, Spring 2008), *available at* www.ncids.org/Defender%20Training/2008%20Spring%20Conference/HotTopicsinDWIMS.pdf.

C. State's Right to Appeal from Superior Court Judgment

Statutory right to appeal. Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from superior court to the appellate courts in the following instances:

1. when there has been a decision or judgment dismissing criminal charges as to one or more counts;
2. after a motion for a new trial on the ground of newly discovered or newly available evidence is granted but only on questions of law;
3. when the State alleges that the sentence imposed
   - results from an incorrect determination of the defendant's prior record level or the defendant's prior conviction level,
   - contains a type of sentence disposition that is not authorized by statute for the defendant's class of offense and prior record or conviction level,
   - contains a term of imprisonment that is for a duration not authorized by statute for the defendant's class of offense and prior record or conviction level, or
   - imposes an intermediate punishment pursuant to G.S. 15A-1340.13(g) based on findings of extraordinary mitigating circumstances that are not supported by evidence or are insufficient as a matter of law to support the dispositional deviation.

G.S. 15A-1445(a).

Appeals from the granting of a defendant's motion to suppress. The State also may appeal from an order by the superior court granting a defendant's motion to suppress before trial pursuant to G.S. 15A-979. *See* G.S. 15A-1445(b). The prosecutor must certify to the trial judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. G.S. 15A-979(c). The appeal is directed to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If the order suppressing the evidence affects multiple charges, the State's appeal is to the court with jurisdiction over the offense carrying the highest punishment. *Id.*

When double jeopardy attaches. The State is precluded from appealing from a judgment dismissing the charges for insufficient evidence *if reversal by the reviewing court would result in further prosecution*. *See supra* § 30.4, Effect of Dismissal; *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"). Thus, the State cannot appeal from the superior court to the appellate division when the defendant's motion to dismiss for insufficient evidence is granted. *See State v. Ausley*, 78 N.C. App. 791 (1986); *State v. Murrell*, 54 N.C. App. 342 (1981).

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); *see also United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal . . . based . . . 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."). As long as the motion to dismiss is granted after the jury has been empaneled but has not yet rendered a verdict, the State is barred from appealing the decision.

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. Double jeopardy does not prohibit an appeal in that instance because the jury already has rendered its verdict and, if the State is successful on appeal, the verdict can be reinstated without subjecting a defendant to retrial. *See State v. Hernandez*, 188 N.C. App. 193 (2008).

Additional resources. For further information on double jeopardy and the State's right to appeal, see Robert L. Farb, *Double Jeopardy, Ex Post Facto, and Related Issues*, UNC SCH. OF GOV'T (Jan. 2007), www.sog.unc.edu/sites/www.sog.unc.edu/files/djoverview.pdf.