7.4 Prosecutor's Calendaring Authority

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7.4 Prosecutor's Calendaring Authority

A. Generally

North Carolina vests the prosecutor with considerable authority over the calendaring of criminal cases for trial. *See* G.S. 7A-49.4; G.S. 7A-61. The authority to calendar cases is a powerful tool, which may be subject to abuse. Prosecutors have misused their calendaring authority in at least three identifiable ways:

- by failing to call particular cases and thus subjecting defendants to excessive pre-trial detention or multiple futile trips to court;
- by calendaring far more cases than can possibly be heard in a session, leaving defense lawyers unable to predict the trial schedule or adequately prepare for trial; and
- altering the calendar with inadequate notice to defendants and their attorneys.

Calendaring abuses may violate a defendant's right to a speedy trial or due process. *See State v. Chaplin*, 122 N.C. App. 659 (1996) (basing finding of speedy trial violation in part on calendaring abuses). However, even in situations where a speedy trial, due process, or other constitutional violation cannot be shown, a defendant who has been prejudiced by the State's strategic use of its calendaring authority may be able to obtain relief by arguing that the State has failed to comply with its statutory calendaring duties. This section discusses the scope and limits of the prosecutor's calendaring authority and suggests ways in which a defendant may challenge abuses of this power. *See generally* Paul M. Green & Shannon Tucker, *Abuses of Calendaring Authority* (Fall Public Defender Conference, Nov. 2008).

B. *Simeon v. Hardin*

Calendaring abuses have been difficult to challenge as part of the criminal case in which they occur because many such cases are resolved through plea bargains (in some instances, the prosecutor's purpose is to force a plea).

In *Simeon v. Hardin*, 339 N.C. 358 (1994), North Carolina Prisoner Legal Services used a civil approach to challenging calendaring abuses. *Simeon* involved a civil complaint alleging that the Durham County district attorney's office regularly used its calendaring authority to the tactical advantage of the State. In particular, the plaintiffs alleged that the

calendaring power was used to select judges, to pressure jailed defendants to accept plea offers, and to inconvenience disfavored defense attorneys. The plaintiffs, who were criminal defendants in Durham County, sought a declaration that the calendaring statutes were unconstitutional and requested a remedial order placing control of the calendar under the supervision of the court.

The superior court in Durham County dismissed the plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim. On appeal, the N.C. Supreme Court reversed the summary dismissal. The supreme court held that the challenged statutes, which vested calendaring authority in the prosecutor, were not unconstitutional on their face. The Court held further, however, that the plaintiffs' complaint raised genuine issues of material fact as to whether the statutes in question were being applied in an unconstitutional manner and therefore summary dismissal of the complaint was improper. *Id.* at 372. The decision recognized that the plaintiffs' allegations stated a claim that their right to due process had been violated by, among other things, imposition of punishment before an adjudication of guilt. In addition, the plaintiffs had raised claims that they had been denied their right to a speedy trial and that their right to trial by jury and to effective assistance of counsel had been impaired. *Id.* at 377–78. The case was remanded to the Durham County superior court, where it was eventually settled through the development of a criminal docket plan.

C. Calendaring Statute

After *Simeon*, the North Carolina General Assembly rewrote the statute governing superior court criminal case docketing. G.S. 7A-49.3 was repealed and replaced with G.S. 7A-49.4, effective January 1, 2000. The statute requires the district attorney in each superior court district to create a criminal case docketing plan, in consultation with the resident superior court judges and the defense bar. *See* G.S. 7A-49.4(a). It also imposes specific limitations on calendaring, discussed below, with which the local plan must comply. *See generally* John Rubin, *1999 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 99/05, at 9–11 (UNC School of Government, Oct. 1999) (summarizing calendaring provisions).

Setting of trial dates. The calendaring statute requires that an administrative setting be held for each felony case within sixty days of indictment. One of the purposes of the administrative setting is to set a trial date. Unless the State and defendant agree, the trial date may not be sooner than 30 days after the final administrative setting. *See* G.S. 7A-49.4(b). The statute also gives a defendant whose case has not been scheduled for trial within 120 days of indictment the right to ask the senior resident superior court judge, or that judge's designee, to set a trial date. *See* G.S. 7A-49.4(c). Thus, defendants whose cases are delayed should not only demand a speedy trial, but should also seek the additional statutory remedy of asking a judge to set a trial date.

Trial calendars. The calendaring statute provides that a trial calendar must be published at least ten working days before trial and that "the trial calendar shall schedule the cases in the order in which the district attorney anticipates they will be called for trial and should

not contain cases that the district attorney does not reasonably expect to be called for trial." G.S. 7A-49.4(e). At each session of court, the prosecutor must announce the order in which he or she intends to call the cases on the calendar. Deviations from the announced order require approval of the presiding judge if the defendant objects. *See* G.S. 7A-49.4(f).

Cases that have been placed on the trial calendar may be continued only with the consent of the prosecutor and defendant or by order of the judge. If all of the cases on the calendar are not reached before the end of the session of court, the prosecutor must schedule a new trial date in consultation with the defendant. *See* G.S. 7A-49.4(f).

Remedies for violations. Although the calendaring statute still gives prosecutors considerable authority over trial calendaring, it creates some concrete limitations that were not in the former statute. The calendaring statute does not specify a remedy for violations; however, given that the amendments to the criminal case docketing statute were intended to curtail abuse, a defendant who can show that his or her case was scheduled in violation of G.S. 7A-49.4, and that he or she was prejudiced by the violation, may be entitled to relief, including possibly dismissal. *See generally State v. Messer*, 145 N.C. App. 43 (2001) (scheduling of case for trial in violation of former calendaring statute required reversal of defendant's conviction for failure to appear), *aff'd per curiam*, 354 N.C. 567 (2001). Claims of prejudice might include: (i) oppressive pretrial incarceration; (ii) unfair surprise or lack of adequate time to prepare for trial; (iii) loss of witnesses or evidence as a result of either delay or short notice; (iv) judge shopping (on this last point, a defendant may be on stronger ground if he or she can show a pattern of the State using its calendaring power to avoid a judge); or (v) undue pressure to accept a plea offer.

D. Other Limits

The calendaring statute does not affect the court's authority to modify the calendar. *See* G.S. 7A-49.4(h) ("Nothing in this section shall be construed to affect the authority of the court in the call of cases calendared for trial"). This authority gives the defendant the ability to challenge the prosecutor's calendaring decisions but also potentially allows modifications of the calendar by the court to the defendant's disadvantage. *See State v. Monk*, 132 N.C. App. 248 (1999) (under prior calendaring statute, judge had authority to call case that prosecutor had inadvertently left off calendar; case was related to other cases on calendar against defendant); *State v. Thompson*, 129 N.C. App. 13 (1998) (under prior calendaring statute, no error where trial court on its own motion consolidated joinable charge that had not been calendared with calendared charge and defendant failed to show prejudice).

The court's calendaring authority remains subject to the time limits on trial after arraignment. *See* G.S. 15A-943 (in counties in which there are twenty or more weeks of superior court criminal sessions a year, defendant may not be tried in same week of arraignment without his or her consent); *State v. Cates*, 140 N.C. App. 548 (2000)

(violation of statutory requirement of one-week period between defendant's arraignment and trial constitutes automatic reversible error).

E. District Court Proceedings

The calendaring statute for superior court does not apply to misdemeanors tried in district court. Nevertheless, the district court has authority to manage cases once they are on the court's docket. In *Simeon v. Hardin*, 339 N.C. 358 (1994), which addressed calendaring in superior court, the court recognized the trial court's authority over its docket. In finding that the previous calendaring statute was not unconstitutional on its face, the court stated:

> [W]e do not believe that the statutes which authorize district attorney calendaring vest the district attorney with judicial powers in violation of separation of powers or intrude upon the trial court's inherent authority. In the civil context, we have recognized that the "trial court is vested with wide discretion in setting for trial and calling for trial cases pending before it." *Watters v. Parrish*, 252 N.C. 787, 791, 115 S.E.2d 1, 4 (1960). We likewise believe that the criminal superior court has wide discretion in managing criminal cases which are pending before it. However, the vesting of calendaring authority in the district attorney does not intrude upon the court's authority.

Id. at 375–76. Under the reasoning of *Simeon*, once a case is on the district court docket, the trial judge has "wide discretion" over the case, including determining when the case will be heard and compelling compliance with its orders. Thus, a trial judge may refuse to grant a request for a continuance by the State, compelling the State to proceed or take a voluntary dismissal. *See* G.S. 15A-952(g) (factors in determining whether to allow continuance).

In *State v. Friend*, 219 N.C. App. 338 (2012), the court of appeals addressed the district court's authority when, after the court refuses to allow a continuance, the State takes a voluntary dismissal and subsequently refiles the case. In *Friend*, the State voluntarily dismissed an impaired driving charge after the district court denied the State's motion for a continuance; and when the State refiled a new impaired driving charge nine days later based on the same incident, the district court dismissed the charge in light of its earlier refusal to grant the State a continuance. The court of appeals found that dismissal was not a proper remedy. The court found that the State's taking of a voluntary dismissal and reinstitution of the charges after the district court's denial of a continuance did not interfere with the district court's authority over the calendar and therefore did not constitute a separation of powers violation. The court also found in the circumstances of the case that proceeding with prosecution of the case did not violate the defendant's speedy trial and due process rights.

In *State v. Sheppard*, 225 N.C. App. 655 (2013) (unpublished), the court of appeals further considered the problem of delay in district court, upholding the dismissal of the

charges on speedy trial grounds. In *Sheppard,* as in *Friend*, the defendant was charged with impaired driving. Also as in *Friend,* when the district court denied the State's continuance motion (in *Sheppard* after an 11-month delay from the date of arrest), the State took a voluntary dismissal and later the same day refiled the charges and rearrested the defendant. The district court denied the defendant's motion to dismiss for a speedy trial violation, and the defendant was tried and convicted in district court, but on appeal for a trial de novo the superior court granted the motion to dismiss for a speedy trial violation. The court of appeals affirmed the superior court's ruling, holding that the fourteen-month delay from the defendant's arrest to trial in district court supported the motion.

In *State v. Loftis*, ___ N.C. App. ___, 792 S.E.2d 886 (2016), the court of appeals addressed the authority of the court to dismiss for failure to prosecute. The district court entered a preliminary indication in an impaired driving case, granting the defendant's motion to suppress the stop of the defendant's vehicle. That ruling was affirmed on appeal by the superior court. Following the affirmance and remand to district court, the trial judge allowed the State an additional "last" continuance for the State to prepare a petition for writ of certiorari to the appellate division on the suppression issue. When the State failed to file the petition before the next court date, the trial judge refused to continue the case again and directed the State to call the matter for trial or dismiss the case. The State refused to take either action, and the court dismissed the matter for failure to prosecute, which was again affirmed by the superior court. Citing *Simeon*, the court of appeals affirmed the dismissal, noting that the trial court retains the inherent authority to manage its own calendar. (Relying on 2009 Formal Ethics Opinion 15 (Jan. 15, 2010), which addressed dismissal of charges by prosecutors, the court also recognized that prosecutors have an ethical obligation not to call cases for trial for which they have no admissible evidence.)

The general takeaways from *Friend, Sheppard,* and *Loftis* on calendaring in district court can be summarized as follows:

1. Per *Simeon*, the district court has ultimate authority over its calendar and may refuse to grant a request for a continuance by the State. *Friend* and *Sheppard* reinforce this principle. Likewise, district courts may adopt deadlines for bringing cases to trial and refuse to allow continuances beyond those deadlines. *See* Michael Crowell, *Control of the Calendar in Criminal District Court* (UNC School of Government, July 2010) (author concludes that district court has authority to adopt such rules—for example, a rule requiring that the State bring a case to trial within 120 days of arrest—under its authority to control the calendar; although written before issuance of *Friend* and *Sheppard*, conclusions are consistent with reasoning of *Friend*). (Note that G.S. 20-139.1(e2) contains special provisions on continuances in impaired driving cases involving testimony by a chemical analyst; the statute was not directly at issue in either case.)
2. If the district court refuses to grant a continuance, the State must proceed with the case or take a voluntary dismissal. If the State refuses to take either action, the court may dismiss for failure to prosecute per *Loftis*. The State may not ignore the court's

order denying a continuance and unilaterally reschedule the case to a different date. *See generally* Crowell at 4. If the State does not take a voluntary dismissal, the district court may order the State to call its first witness and, if the State does not proceed, may dismiss the case under *Loftis*. Other jurisdictions have also held that the court may acquit the defendant for a failure of proof. *See State v. Watts*, 35 So.3d 1, 7 (Ala. Crim. App. 2009); *People v. Mooar*, 416 N.E.2d 81, 84 (Ill. App. Ct. 1981).

3. If the State takes a voluntary dismissal and subsequently refiles the charges, the district court may not dismiss the case solely because the court previously denied the State's request for a continuance. Although refiling of the charges may seem in derogation of the court's prior scheduling orders, *Friend* found that refiling does not unconstitutionally interfere with the court's authority over the calendar.
4. A district court has the authority to dismiss a case after refiling if prosecution of the charges violates other of the defendant's rights. (Note that G.S. 20-38.6 contains special provisions on dismissal motions in impaired driving cases.) Thus:
   - If the two-year statute of limitations for misdemeanors has run (measured from the offense date to the refiling date), the defendant is entitled to dismissal. *See supra* "Effect of dismissal with leave and voluntary dismissal" in § 7.1B, Compliance with Statute of Limitations.
   - If there was delay in prosecution of the case before the State took a dismissal, the district court may consider that delay along with any delay after refiling of the case in ruling on a motion to dismiss for violation of the right to a speedy trial. *See supra* "Effect of dismissal" in § 7.3C, When Right Attaches; *see also supra* "Length of delay" (Practice note) in § 7.3B, Test for Speedy Trial Violation (discussing potential need for defendant to raise speedy trial violation in district court to obtain benefit of this rule).
   - A due process violation also may provide grounds for dismissal. In *Simeon*, 339 N.C. at 377–78, the Court found that the plaintiffs' allegations about the district attorney's calendar practices were sufficient to state a claim of a due process violation, and the case was remanded for further proceedings. The plaintiffs alleged that the practices included, among other things: manipulating the calendar to exact pretrial punishment on incarcerated defendants and pressure defendants to plead guilty; calling cases for trial without adequate notice, thereby impairing the quality of representation; and calendaring cases repeatedly and causing defendants unnecessary expense and inconvenience. *Friend* found no violation of due process; *Sheppard* did not address the issue.
5. If the State refiles the charges after taking a voluntary dismissal and issues an arrest warrant rather than a criminal summons, rearrest may lend support to a claim of a speedy trial violation per the prejudice factor in *Barker v. Wingo*, 407 U.S. 514 (1972), or a due process violation per *Simeon v. Hardin*. While the court probably cannot dictate the criminal process to be used by the State should it decide to refile, the court certainly could unsecure any bond for a defendant if rearrested.

Practice note: To protect the client's rights, counsel should keep a record of continuances. In some districts, such a record is kept in the court file or "shuck." This practice eliminates disputes over which party requested the continuance. When the defense is ready to proceed, counsel should object to any motion to continue by the State

and, if the motion is allowed, insist on a notation that the matter was continued for the State over the defendant's objection. Some judges are willing to state that this will be the "last" continuance, a fact that should also be noted in the court file.